

No. 22-60397

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

HEALTHY GULF; SIERRA CLUB,

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS; COLONEL STEPHEN MURPHY, in his official capacity as New Orleans District Commander, U.S. Army Corps of Engineers; MARTIN MAYER, in his official capacity as Chief, Regulatory Division, New Orleans District, U.S. Army Corps of Engineers,

Respondents.

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

**BRIEF OF *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA AND CHAMBER SOUTHWEST
LOUISIANA, INC. IN SUPPORT OF RESPONDENTS
AND DENIAL OF THE PETITION**

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CERTIFICATE OF INTERESTED PERSONS

No. 22-60397

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.

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THE CHAMBER OF COMMERCE OF
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The Chamber of Commerce of the United States of America (“Chamber”) states that it is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

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The Chamber Southwest Louisiana, Inc. (“Chamber SWLA”) is a non-profit corporation organized under the laws of Louisiana. The Chamber SWLA has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber SWLA.

January 25, 2023

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STATEMENT OF INTEREST¹

The Chamber of Commerce of the United States of America (“Chamber”) is the world’s largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation’s business community.

The Chamber Southwest Louisiana, Inc. (“Chamber SWLA”) is a non-profit business organization with over 1,200 business members in Allen, Beauregard, Calcasieu, Cameron, and Jeff Davis parishes in Louisiana. The Chamber SWLA’s mission is to create jobs and improve the local economy. One area of particular importance for the southwest Louisiana economy, with implications for U.S. and international markets more generally, is the export of domestically produced LNG. The Chamber SWLA strongly supports the Driftwood LNG Project (“Driftwood”), which will yield significant benefits to the local and national economy by employing

¹ No counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici curiae*, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

thousands of construction workers and hundreds of permanent workers when complete, as well as generating important strategic and security benefits for the United States and its allies and trading partners worldwide, by helping supply the world's energy needs in a clean, secure, and sustainable fashion.

The Chamber and Chamber SWLA have a strong interest in this case because they support maintaining a timely, predictable, and durable regulatory framework for federal permitting of energy and other infrastructure projects. In seeking to vacate the Clean Water Act permit issued for the natural gas export facilities in this case, years after that permit was issued and after private investment and construction activity proceeded in reliance on that permit, Petitioners undermine the stability and reliability of the permitting regime. Petitioners also advance arguments that were not made to the agency in the public comment process, and misread relevant regulations in a way that would improperly constrain regulators' ability to tailor permit conditions to the circumstances of a proposed project. *Amici* offer the perspective of the broader business community on the litigation timing and substantive legal issues presented—a perspective that should complement the views of the federal government and project developer.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Clean Water Act permit challenged here was issued after a careful examination of how the proposed project would serve the public interest. The

agency's favorable determination is just one example of how energy infrastructure projects generally advance the U.S. public interest, yielding substantial economic and energy-security benefits on a local, national, and international level. Because energy infrastructure projects often require numerous overlapping authorizations, legal and permitting frameworks must be predictable, timely, and durable—facilitating investments in energy infrastructure on a timeframe and scale responsive to changes in domestic and global market demand. Although this case involves a permit for one facility, the underlying legal principles may affect Clean Water Act permitting for many other important infrastructure projects nationwide, from pipelines and LNG terminals to renewable energy and electric transmission.

Given their size and complexity, lengthy permitting timelines, the need for large up-front capital investments, and the reality that revenue is typically not generated until facilities enter service, energy infrastructure projects are particularly vulnerable to the effects of permitting delays and protracted litigation. When project opponents delay bringing challenges to key permits, the doctrine of laches plays a meaningful role in discouraging improper litigation tactics and avoiding undue prejudice to project developers. Such prejudice is particularly acute for large energy infrastructure projects, where disruption to one permit or authorization can lead to cascading effects on project development and timing—and where developers must deploy hundreds of millions, or even billions, of dollars in reliance on key permits.

Laches is an important safeguard where parties self-avowedly use litigation in a tactical fashion to advance policy goals, and where litigation is timed to maximize disruption and cost to adversaries.

If the Court were to reach the merits, it should apply administrative exhaustion principles to prevent parties from raising on appeal arguments that were not presented to the agency in the public comment process, ensuring fairness to regulators and regulated parties alike. And this Court should reject Petitioners' cramped reading of the Army Corps' compensatory mitigation regulations, which would improperly cabin permit-writers' ability to tailor mitigation regimes to particular circumstances.

The Court should deny the petition for review. But if the petition were granted in any respect, the appropriate remedy under this Court's precedent would be remand without vacatur. Vacating key permits and authorizations at a late stage of project development would be highly disruptive and unwarranted.

ARGUMENT

I. Energy Infrastructure Projects Strongly Serve the Public Interest, Yielding Important Local, Domestic, and International Benefits.

In granting the Clean Water Act permit here, the U.S. Army Corps of Engineers evaluated how the proposed project would advance the public interest, balancing environmental, economic, and other considerations. *See* 33 C.F.R. § 320.4(a); *Town of Norfolk v. U.S. Army Corps of Eng'rs*, 968 F.2d 1438, 1454 (1st

Cir. 1992). The Corps found that the Project would stimulate the local economy through job creation, economic activity, and tax revenues, and would satisfy growing “domestic and international needs for LNG.” *E.g.*, AR294-298. These findings are just one example of how having a reliable and robust U.S. energy infrastructure network strongly serves the U.S. public interest.

Energy infrastructure projects generate billions of dollars in direct and indirect economic activity and support hundreds of thousands of jobs nationwide—both during and after construction.² A few statistics illustrate the point. In 2019, pipeline construction and operation in the United States accounted for an estimated 235,000 jobs and \$71 billion in direct GDP impacts.³ That same year, the oil and gas industry’s impact on overall U.S. GDP “was nearly \$1.7 trillion, accounting for 7.9 percent of the national total.”⁴ Capital expenditures between 2018 and 2035 for new oil and gas infrastructure in North America have been estimated at approximately \$791 billion—including, notably, approximately \$154 to \$190 billion for the construction of 26,000 miles of additional natural gas pipelines.⁵

² See PwC & Am. Petroleum Inst., *Impacts of the Oil and Natural Gas Industry on the U.S. Economy in 2019*, 6-10, 23 (2021), <https://tinyurl.com/PwCAPI>.

³ *Id.* at 23.

⁴ *Id.* at E-2.

⁵ See ICF & INGAA Foundation, Inc., *North America Midstream Infrastructure through 2035: Significant Development Continues*, 2, 48 (2018), <https://tinyurl.com/NAMidstream>.

Today, numerous LNG export projects are advancing to construction after progressing through federal, state, and local approval processes, securing financing, and signing long-term supply contracts with buyers abroad.⁶ These market trends align with commitments that the United States has made regarding delivery of LNG to European allies.⁷ Unduly restrictive, lengthy, and unpredictable permitting processes, and the resulting delays and chilling effects, risk derailing infrastructure development, harming local, state, and national economies, and U.S. allies abroad.

Having a permitting framework that can facilitate investments in energy infrastructure on a timeframe and scale that are responsive to short-term and long-term market demands is critical to maintaining and promoting domestic and global energy security.⁸ As energy markets have become increasingly global, domestic markets grow more vulnerable to disruptions on the international stage. This

⁶ See U.S. Energy Info. Admin., *U.S. LNG Export Capacity to Grow as Three Additional Projects Begin Construction* (Sept. 6, 2022), <https://tinyurl.com/EIAExport>; Corey Paul, *LNG Project Tracker: Contracting Surge Accelerates Next Cycle of Export Projects*, S&P Glob. Mkt. Intel. (July 14, 2022), <https://tinyurl.com/ProjTrak>.

⁷ White House, *Fact Sheet: United States and European Commission Announce Task Force to Reduce Europe's Dependence on Russian Fossil Fuels* (Mar. 25, 2022), <https://tinyurl.com/37z4xas5>.

⁸ See Int'l Energy Agency, *Energy Security: Reliable, Affordable Access to All Fuels and Energy Sources*, <https://tinyurl.com/IEAEngSec> (last visited Jan. 18, 2023) (defining “energy security” as “the uninterrupted availability of energy sources at an affordable price”); see also Glob. Energy Inst., U.S. Chamber of Com., *Index of U.S. Energy Security Risk*, 8-12 (2020), <https://tinyurl.com/GEIUSCoC> (outlining energy security metrics).

interdependence highlights the need for an integrated U.S. energy infrastructure network that can respond efficiently and effectively to such developments.⁹ Recent events in Europe are illustrative. In the first half of 2022, the United States became the world’s largest exporter of LNG.¹⁰ Much of these exports went to the United Kingdom and European Union countries to compensate for reductions in pipeline imports from Russia—a byproduct of the ongoing crisis in Ukraine—and to refill dwindling natural gas storage inventories.¹¹ An influx of U.S.-produced LNG onto the global market helped blunt some of the more devastating economic consequences of a global energy shortage attributable to Russian aggression in Eastern Europe—consequences (such as price spikes and supply chain impacts) from which the United States itself would not have been immune, if market disruptions were left unabated.¹²

⁹ See U.S. Dep’t of Energy, *Valuation of Energy Security for the United States: Report to Congress*, 2 (2017), <https://tinyurl.com/DOEValueES>.

¹⁰ See U.S. Energy Info. Admin., *The United States Became the World’s Largest LNG Exporter in the First Half of 2022* (Dec. 27, 2022), <https://tinyurl.com/USEIALNG>.

¹¹ See *id.*; see also Stanley Reed, *Why Europe’s Electricity Prices Are Soaring*, N.Y. Times (Aug. 25, 2022), <https://tinyurl.com/ReedNYT>.

¹² *Accord* U.S. Dep’t of Energy, DOE/FE Order No. 3669, at 195-96, *Sabine Pass Liquefaction, LLC*, FE Docket No. 13-30-LNG (June 26, 2015), <https://tinyurl.com/3h68nvcs> (concluding that “[a]n efficient, transparent international market for natural gas with diverse sources of supply provides both economic and strategic benefits to the United States and our allies,” and that if “U.S. exports can diversify global LNG supplies, and increase the volumes of LNG

Responding to global developments in energy markets is not simply a matter of scaling upstream energy production. Even if, for example, U.S. natural gas production increases in response to rising prices and market demand, supply can outstrip transportation capacity if sufficient pipeline and LNG infrastructure does not already exist (or cannot be timely brought online) to deliver energy commodities to the markets that need them most.¹³ For instance, notwithstanding efforts to increase exports to Europe, domestic LNG export facilities have reportedly been running close to peak capacity. So too for European import terminals and pipelines.¹⁴ Additional infrastructure investment will be needed.¹⁵ Regulatory

available globally, it will improve energy security for many U.S. allies and trading partners”).

¹³ *E.g.*, John H. Brewer et al., Nat’l Energy Tech. Lab’y, *Reliability, Resilience, and the Oncoming Wave of Retiring Baseload Units, Volume II-C: Fuel-Electricity Interaction in the Northeast and Midcontinent*, 2 (2019), <https://tinyurl.com/2pk9m5zx> (“When increased winter demand [in New England] is modeled . . . , total gas demand is constrained by the existing and currently expected infrastructure, and prices must increase further to ration supply among demands.”).

¹⁴ *See* Steven R. Miles, Gabriel Collins & Anna Mikulska, Baker Inst. for Pub. Pol’y, *US Needs LNG to Fight a Two-Front Gas War* (Aug. 18, 2022), <https://tinyurl.com/MilesEtal>.

¹⁵ *See* U.S. Energy Info. Admin., *Europe’s LNG Import Capacity Set to Expand by One-Third by End of 2024* (Nov. 28, 2022), <https://tinyurl.com/EIALNGCap>; Arvind P. Ravikumar, Morgan Bazilian & Michael E. Webber, *The US Role in Securing the European Union’s Near-Term Natural Gas Supply*, 7 *Nature Energy* 465, 466 (2022), <https://tinyurl.com/SudEtal>.

predictability and certainty is critical for private industry's ability to respond to changing market demand and timely bring critical infrastructure into operation.

Although this case involves a permit for one facility, the underlying legal principles may affect Clean Water Act permitting for a range of other important infrastructure. For instance, the ongoing and expected buildout of U.S. renewable energy facilities and electric transmission infrastructure—critical to the Biden Administration's energy transition goals—will require many Clean Water Act Section 404 permits, among other authorizations.¹⁶ Such projects will also benefit from an efficient, timely, and predictable legal framework that generates durable permitting outcomes.

II. Laches Serves as a Critical Safeguard Against Tactical Litigation Delays That Jeopardize Infrastructure Development.

Even before the Court considers the merits of Petitioners' claims, the *timing* of this lawsuit—which by Petitioners' own admission was filed only once the project developers had committed substantial time and resources to advance to the construction stage, in reliance on the challenged permit—should not escape scrutiny. This appeal was filed more than six years after Petitioners were first put on notice of the Project, more than four years after the Corps issued a public notice of

¹⁶ See Rayan Sud & Sanjay Patnaik, *How Does Permitting for Clean Energy Infrastructure Work?*, Brookings Inst. (Sept. 28, 2022), <https://tinyurl.com/SudPatnaik>.

Driftwood’s permit application, and more than three years after the Corps issued Driftwood a final permit.¹⁷

Given their size and complexity, lengthy permitting timelines, need for massive upfront capital investments, and the reality that revenue is not generated until facilities enter service, energy infrastructure projects are particularly vulnerable to the chilling effect of protracted litigation risk. *See Mountain Valley Pipeline, LLC v. 6.56 Acres of Land, Owned by Sandra Townes Powell*, 915 F.3d 197, 217-18 (4th Cir. 2019) (upholding finding that pipeline developer would sustain “significant and unrecoverable financial losses . . . if [construction] were delayed” and holding that “economic injuries flowing from a delay in pipeline construction [are] a form of irreparable injury”); *Berkshire Env’t Action Team, Inc. v. Tenn. Gas Pipeline Co., LLC*, 851 F.3d 105, 110 (1st Cir. 2017) (Energy Policy Act of 2005 intended to “reduce the potential for the use of delay to block natural gas projects”).

Petitioners are environmental advocacy organizations with a stated goal of blocking the development of new U.S. natural gas infrastructure. *See infra* § II.C. They use the regulatory process and litigation as tools to achieve that policy goal.

¹⁷ *See* Driftwood LNC, Request to Initiate Pre-Filing Review Process of Driftwood LNG LLC and Driftwood LNG Pipeline LLC, FERC Docket No. PF16-6-000 (Accession No. 20160511-5289) (May 11, 2016), <https://tinyurl.com/FERCeLibrary> (identifying Healthy Gulf’s predecessor and Sierra Club as interested stakeholders); AR4776-4782 (Corps Public Notice of Permit Application dated March 5, 2018); AR6 (permit issuance on May 3, 2019).

Petitioners and other similar organizations nationwide understand that they can slow and sometimes block project development by extending the timeframes needed to receive key permits and the time during which permits are subject to litigation risk. Such tactics can delay receipt of the many federal, state, and local authorizations needed to secure financing and break ground. They can also impede efforts to persuade customers to sign the kinds of decades-long binding agreements that have traditionally served as the basis for raising the enormous sums of capital needed to build these projects.

If project opponents can unreasonably delay filing their challenges to key permits, waiting to sue until a project has reached a particularly vulnerable moment in project development or the deployment of capital and other resources, such disruptive tactics will become a commonplace feature of environmental litigation. *See Peshlakai v. Duncan*, 476 F. Supp. 1247, 1256-57 (D.D.C. 1979) (applying laches where “international organization with a deep and well-defined interest in environmental matters and extensive resources” unreasonably delayed in asserting claims, prejudicing private defendants who “expended more than \$19 million” in reliance on challenged federal action). Laches serves as a meaningful and important constraint on litigation gamesmanship being used to block infrastructure development.

A. Artificially protracted litigation risk prejudices project development and financing.

The laches doctrine operates to “bar litigation” when “stale claims” are presented, and “[i]t is [long] settled that the equitable doctrine of laches can apply in the context of environmental litigation.” *Env’t Def. Fund, Inc. v. Alexander*, 614 F.2d 474, 478 (5th Cir. 1980); *Save Our Wetlands, Inc. (SOWL) v. U.S. Army Corps of Eng’rs*, 549 F.2d 1021, 1026 (5th Cir. 1977). A party asserting a laches defense must show “(1) a delay in asserting a right or claim; (2) that the delay was not excusable; and (3) that there was undue prejudice to the party against whom the claim is asserted.” *Alexander*, 614 F.2d at 478.

The facts here—where Petitioners delayed for more than three years before filing their permit challenge—illustrate the broader concern, and readily satisfy the first and second elements of this test.¹⁸ As to the third prong, litigation delays are highly prejudicial to project developers and many other parties with an interest in energy infrastructure projects. *See Corps. Br. 69-70*.

Pipeline construction is a useful example. Like other linear infrastructure projects, “[c]onstructing a [natural gas] pipeline is a complex project that can only

¹⁸ In similar circumstances, this Court held that environmental challenges to a construction project were inexcusably delayed when the challengers waited “over two and one-half years” to assert their claims, measured from the time they “knew or should have known” about the factual basis for those claims. *Save Our Wetlands*, 549 F.2d at 1028.

progress in phases. Certain portions of the project have to be completed before construction can begin on other portions.” *E. Tenn. Nat. Gas Co. v. Sage*, 361 F.3d 808, 828–29 (4th Cir. 2004). Litigation that delays construction on one portion “has the potential of holding up the entire project.” *Id.* at 829. And uncertainty about the legal durability of key regulatory approvals can undermine the financing needed to support construction. *E.g.*, *Wild Va. v. U.S. Forest Serv.*, 24 F.4th 915, 925 n.6 (4th Cir. 2022) (describing how vacatur of “several decisions of state and federal agencies approving” one natural gas pipeline led to “ongoing delays[,] increas[ed] cost uncertainty,” and, ultimately, project cancellation).¹⁹

Similar considerations apply to LNG terminals. LNG export facilities are large and complex industrial systems, whose design often occurs in a sequential and iterative manner, with initial plans refined and improved as the developer advances site layout, engineering, construction sequencing, and other tasks. Delay in obtaining durable authorizations, and the resulting uncertainty about siting and design, can deprive project developers of much-needed clarity for planning

¹⁹ The concerns are not limited to cost. For example, in one case, the Third Circuit allowed a pipeline developer to commence construction immediately on a replacement pipeline, given evidence of potential operational and safety concerns if replacement had to be delayed while just compensation issues were litigated. *See Columbia Gas Transmission, LLC v. 1.01 Acres, More or Less in Penn Twp., York Cnty., Pa.*, 768 F.3d 300, 316 (3d Cir. 2014).

purposes, can impede reaching commercial agreements with customers, and can delay securing, and increase the cost of, capital.²⁰

The problems associated with tactical litigation delay extend to many other contexts. For example, litigation that “[d]elay[s] construction or requir[es] [the developer] to redo the regulatory approval process [can] be quite costly” for renewable energy projects. *Pub. Emps. for Env’t Resp. v. Hopper*, 827 F.3d 1077, 1084 (D.C. Cir. 2016). The Cape Wind Energy Project at issue in *Hopper*, which was initially heralded as the “first proposed offshore wind farm” in Massachusetts, was eventually abandoned after the project “slogged through state and federal courts and agencies for more than a decade.” *Hopper*, 827 F.3d at 1084.²¹ And historically, “protracted litigation . . . which attend[s] the construction of nuclear power projects [has] resulted in extensive delays and dramatic increases in . . . ultimate cost.” *Jersey Cent. Power & Light Co. v. FERC*, 810 F.2d 1168, 1171 (D.C. Cir. 1987).

Excessive permitting and litigation delay is particularly prejudicial to complex energy infrastructure projects given the large scale of such projects, the many stages of development, the complexity of financing, and the rigorous and overlapping

²⁰ See Texas LNG Brownsville LLC, Request for Commission Action on Remand for Texas LNG Project, FERC Docket No. CP16-116-000 (Accession No. 20220812-5040), at 2-3 (Aug. 12, 2022), <https://tinyurl.com/3r4jw855>.

²¹ See also Jon Chesto, *R.I.P., Cape Wind*, BOSTON GLOBE (Dec. 1, 2017), <https://tinyurl.com/RIPCapeWind> (project opponents’ “repeated legal challenges likely played a key role in the project’s demise”).

regulatory regimes that apply. For such projects, “[p]lanning . . . must begin far in advance of transporting the first barrel of oil, refined petroleum product, . . . cubic foot of natural gas,” or metric tonne of LNG.²² Large capital investments are needed to advance a project to the point of even *applying* for permits. *See, e.g., United States v. Baytank (Houston), Inc.*, 934 F.2d 599, 617 (5th Cir. 1991).

Project developers must work with state and federal agencies to obtain “numerous regulatory permits and approvals.” *Buccaneer Energy (USA) Inc. v. Gunnison Energy Corp.*, 846 F.3d 1297, 1316 (10th Cir. 2017); *see also Del. Riverkeeper Network v. Sec’y Pa. Dep’t of Env’t Prot.*, 833 F.3d 360, 385 (3d Cir. 2016) (“complex projects” such as interstate natural gas infrastructure “require a large number of state and federal permits”). Developers must comply with a web of interlocking and overlapping federal and state regulations. And permits often must be in hand to secure financing and proceed to subsequent development stages.²³

External investors naturally look for sufficient indications that development and permitting are on track before committing the vast sums of capital necessary to

²² U.S. Dep’t of Transp., *Phases of Pipeline Construction: an Overview* (last visited Jan. 15, 2023), <https://tinyurl.com/DOTpipelineoverview>.

²³ *See id.* (“Each . . . step[]” of development is “subject to rigorous regulatory reviews and approvals.”).

progress to construction and then to place facilities into service.²⁴ Even companies that can fund projects from internal capital must weigh competing investment opportunities, and often await the achievement of key regulatory and litigation milestones, before making a “final investment decision” that commits billions of dollars to a project.²⁵

Each stage of the development timeline is contingent on others. Delays at one stage can have cascading effects. When regulatory approvals are subject to protracted litigation risk, the possibility of future modifications or cancellation “makes [the] project a less attractive investment for outside funders and partners[.]” *San Diego Gas & Elec. Co. v. FERC*, 913 F.3d 127, 136 (D.C. Cir. 2019). And developers must bear the substantial costs of helping defend regulatory approvals. *See Niskanen Ctr. v. FERC*, 20 F.4th 787, 793 (D.C. Cir. 2021) (Randolph, J., concurring) (discussing cancellation of one natural gas project in part due to a “series of legal challenges to the project’s federal and state permits [that] has caused significant project cost increases and timing delays”); *Algonquin Gas Transmission, LLC*, 174 FERC ¶ 61,126, PP 5-6 (2021) (Comm’r Christie, dissenting) (the “use of the legal weapons of unending litigation and collateral attacks against infrastructure

²⁴ Blackridge Rsch. and Consulting, *What is FID? Meaning, Definition, and Complete Guide to Final Investment Decision* (June 15, 2022), <https://tinyurl.com/blackridgefid>.

²⁵ *Id.*

projects long after they have been approved” can make such projects “less appealing to engage in” and “harder to finance”).

In short, this case is illustrative of broader challenges facing infrastructure developers in the United States today. By strategically timing lawsuits, project opponents can extend periods of litigation risk by months or even years, to maximize disruption to the development process with the aim of derailing project completion.²⁶

B. Laches is a critical safeguard against strategic litigation tactics in actions under the Energy Policy Act of 2005.

Petitioners invoke this Court’s jurisdiction under the Energy Policy Act of 2005, which allows for direct federal appellate review of certain permits and authorizations for FERC-jurisdictional natural gas projects. 15 U.S.C. § 717r(d)(1). Congress’s goal in enacting this provision was to “provide an expedited direct cause of action in the federal appellate courts” for the benefit of applicants who had been “encountering difficulty proceeding with natural gas projects that depended on obtaining state [and federal] agency permits.” *Islander E. Pipeline Co., LLC v. Conn. Dep’t of Env’t Prot.*, 482 F.3d 79, 83, 85 (2d Cir. 2006).

²⁶ See Philip Howard, *Two Years, Not Ten Years: Redesigning Infrastructure Approvals*, Common Good, 1 (2015), <https://bit.ly/3CVbXyZ> (estimating the total six-year cost of delay in the infrastructure sector of the American economy at \$3.7 trillion); Ted Morton, *Morton: Here’s the Solution for Ending Death by Delay on Pipelines*, Calgary Herald (Sept. 11, 2019), <https://tinyurl.com/deathbydelay> (describing “death by delay” strategy employed by opponents of pipeline construction).

Courts have struggled to decide what statute of limitations period should apply under this statute. Proposals have included the analogous state law limitations period; the “four-year default statute of limitations for any ‘civil action arising under an Act of Congress enacted after’ December 1, 1990”; and the “six-year statute of limitation . . . [for] challenges brought under the [Administrative Procedure Act].” *Sierra Club v. U.S. Dep’t of the Interior*, 899 F.3d 260, 267-68 (4th Cir. 2018) (discussing 28 U.S.C. §§ 1658(a) and 2401(a)) (citation omitted). Petitioners here contend that either the four- or six-year limitations period should apply. Pet’r Br. 2.

Whichever period applies, laches plays a critical role in curtailing unfairly delayed challenges. “[T]he question of laches depends primarily on the equitable considerations of each particular case and is not to be measured strictly by the analogous limitation statute.” *Goodwyn v. Dredge Ginger Ann*, 342 F.2d 197, 197 (5th Cir. 1965) (per curiam). Given the need for prompt resolution of permitting disputes for infrastructure serving time-sensitive market demand, even periods of delay significantly shorter than four years can unfairly prejudice project developers. *Save Our Wetlands*, 549 F.2d at 1028-29. And with the concentration of energy infrastructure projects in the Fifth Circuit’s jurisdiction, it is particularly important for this Court to apply the laches doctrine here, and to confirm that challenges brought under the Energy Policy Act may not be strategically delayed to maximize

the cost or disruption to developers who rely on regulatory approvals received long ago.

C. Laches should apply where a litigant deploys dilatory tactics to increase an opponent’s litigation risk and costs.

Laches does not bar a suit if a litigant’s delay is “excusable.” *Alexander*, 614 F.2d at 478. But often, as here, delay cannot fairly be so characterized. One Petitioner here, like other similar advocacy groups, is pursuing a years-long, nationwide litigation campaign to prevent the construction of any conventional energy infrastructure.²⁷ That organization has publicly explained that natural gas infrastructure projects cannot “move forward without capital from banks and investors, who evaluate project viability” as a condition of investment.²⁸ And it is apparent from the overwhelming volume of litigation that the timing of this suit should not be attributed to a lack of resources or an inability to file sooner.²⁹ In the last decade, environmental advocacy groups, including Petitioners here, have

²⁷ Sierra Club, *Blocking Dirty Oil Infrastructure* (last visited Jan. 15, 2023), <https://tinyurl.com/3kd4c377>.

²⁸ See Hailey Duncan, *Resolution for 2023: Continue Taking Power from Gas Companies*, Sierra Club (Dec. 15, 2022), <https://tinyurl.com/jtznk3jn>.

²⁹ Sierra Club, *About Our Program* (last visited Jan. 15, 2023), <https://tinyurl.com/ycys6ccn> (claiming to have “perfected the art of campaign litigation and ‘lawyer-organizing’” and to have “launched more than 200 legal actions [against] the fossil fuel industry[]” in “the past year alone”).

litigated numerous challenges to the permits on which energy infrastructure projects depend.³⁰

In circumstances like these, where parties self-avowedly use litigation as a tool for imposing delay and cost on counterparties, there is a particular need to apply laches, which finds its roots in equity. *Alexander*, 614 F.2d at 477-78. As an equitable doctrine, laches is well-adapted to controlling tactical litigation delay. Nor can there be any serious question that litigation delays are being employed as a tactical tool. One Petitioner has publicly boasted of “launch[ing] more than 200 legal actions[against] the fossil fuel industry[.]” each year,³¹ some of which were

³⁰ See, e.g., *Sierra Club v. U.S. Army Corps of Eng’rs*, 997 F.3d 395, 399 (1st Cir. 2021) (challenge to regulatory approval of an “electric transmission power corridor in Maine”); *N.Y. State Dep’t of Env’t Conservation v. FERC*, 991 F.3d 439, 442 (2d Cir. 2021) (Sierra Club challenge to regulatory approval of a “99-mile long natural [interstate] gas pipeline” in Pennsylvania and New York); *Del. Riverkeeper Network v. Sec’y Pa. Dep’t of Env’t Prot.*, 903 F.3d 65, 69 (3d Cir. 2018) (Sierra Club challenge to regulatory approval of pipeline project in Pennsylvania); *Appalachian Voices v. State Water Control Bd.*, 912 F.3d 746, 750 (4th Cir. 2019) (Sierra Club challenge to state water quality certification for pipeline project in Virginia); *Sierra Club v. U.S. Dep’t of Interior*, 990 F.3d 898, 902 (5th Cir. 2021) (challenge to liquefied natural gas project in Texas); *Sierra Club v. U.S. Forest Serv.*, 828 F.3d 402, 404 (6th Cir. 2016) (challenge to permit authorizing operation of an oil pipeline on federal land in Michigan); *Sierra Club v. Bureau of Land Mgmt.*, 786 F.3d 1219, 1222 (9th Cir. 2015) (challenge to permit granting California wind project right of way over federal land); *Sierra Club, Inc. v. Bostick*, 787 F.3d 1043, 1046 (10th Cir. 2015) (challenge to permits for construction of Gulf Coast Pipeline in Oklahoma); *Sierra Club v. FERC*, 827 F.3d 36, 40 (D.C. Cir. 2016) (challenge to regulatory approval of LNG terminal in Texas).

³¹ *Supra* note 29.

filed within days or weeks of the agency action in question, when that timing served the Petitioner’s strategic interests.³²

III. Petitioners’ Merits Arguments Would Undermine the Predictability and Administrability of Clean Water Act Permitting for a Broad Range of Needed Infrastructure Projects.

A. The exhaustion doctrine protects regulators and regulated entities alike from improper sandbagging.

As the federal respondents make clear, Petitioners’ lead argument—that the Army Corps was required to consider a potential alternative site for the LNG terminal—was not raised with the agency during the public comment process. *See* Corps Br. 26-31. But as this Court recently held in a closely analogous context, parties “must structure their participation [in the administrative process] to alert the agency to their position in order ‘to allow the agency to give the issue meaningful consideration.’” *Shrimpers & Fishermen of the RGV v. U.S. Army Corps of Eng’rs*, No. 21-60889, __ F.4th __, 2023 WL 108558, at *3 (5th Cir. Jan. 5, 2023) (quoting *Dep’t of Transp. v. Public Citizen*, 541 U.S. 752, 764-65 (2004)). “Generally, this means raising the alternative in the comments addressed to the agency.” *Id.* Petitioners did not do so. *See* Corps Br. 13.

³² *See, e.g.*, Joint Petition for Review of Agency Decision, *Sierra Club v. FERC*, No. 16-1329 (D.C. Cir. Sept. 21, 2016) (petition for review filed 14 days after FERC entered order denying rehearing).

Administrative exhaustion principles ensure that regulators have a fair opportunity to address and potentially remediate concerns with a proposed action. They also protect the interests of other regulated parties, including (as here) permit applicants. “Simple fairness to those who are engaged in the tasks of administration, *and to litigants*, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.” *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) (emphasis added).³³ Exhaustion principles are particularly important for private parties who must deploy massive resources and capital in reliance on federal permitting decisions. Given the reliance interests at stake, permits also should not be vacated based on arguments that not only lack merit, but would at most result in a finding of harmless error. *See* 5 U.S.C. § 706; *see also* Corps Br. 31-38 & Driftwood Br. 33-40 (explaining that Petitioners’ proposed alternative site was already permitted for a different project).

B. Petitioners misread the Corps’ compensatory mitigation framework in ways that would render it unworkable.

Petitioners’ compensatory mitigation arguments suffer from numerous overlapping flaws, including a misreading of the regulatory text. *See* Corps Br. 39-

³³ Indeed, the Corps’ Part 325 regulations provide an opportunity for applicants to respond to public comments, which benefits the Corps and the public. Often applicants are best situated, and have the relevant information and expertise, to respond to specific public comments.

45; Driftwood Br. 41-64. *Amici* add only that, if accepted, Petitioners' cramped interpretation of the compensatory mitigation regulations would prejudice project developers of all kinds by unduly constraining the agency's discretion to tailor mitigation approaches to particular circumstances.

The regulatory text directs the Corps to *consider* the various types and locations of compensatory mitigation measures available to them and creates a hierarchy of *preference*. See 33 C.F.R. § 332.3(b); see also *Atchafalaya Basinkeeper v. U.S. Army Corps of Eng'rs*, 894 F.3d 692, 699-701 (5th Cir. 2018). But the regulation does not, as Petitioners suggest, establish a rigid hierarchy of *outcomes*, whereby the Corps would be required to exhaust one type of mitigation measure before selecting a less preferential type. *Cf.* Pet'r Br. 32. Rather, the regulation states that “[w]hen considering options for successfully providing the required compensatory mitigation, the district engineer shall consider the type and location options in the order presented in paragraphs (b)(2) through (b)(6) of this section.” 33 C.F.R. § 332.3(b)(1). The ordering requirement provided by this regulation is tied to the word “consider,” evincing a process-level requirement, not an outcome-oriented one.

In fact, the regulation repeatedly emphasizes process and the consideration of site-specific conditions. See 33 C.F.R. § 332.3(b)(2), (3) (instructing Corps engineers to “give preference to” mitigation bank credits and in-lieu fee program

credits when site-specific “considerations are applicable” and stating that such preferences may be “overrid[den], where appropriate”); *id.* § 332.3(c)(2)(i) (“[A watershed] approach considers how the types and locations of compensatory mitigation projects will provide the desired aquatic resource functions, and will continue to function over time in a changing landscape.”). As the Corps has explained: paragraphs (b)(2) through (b)(6) create “a preference hierarchy that does not override a district engineer’s judgment as to what constitutes the most appropriate and practicable compensatory mitigation based on consideration of case-specific circumstances.” *Compensatory Mitigation for Losses of Aquatic Resources*, 73 Fed. Reg. 19,594, 19,628 (Apr. 10, 2008); *see generally* Corps Br. 40-45.

This process-based approach to selecting mitigation makes sense given the Corps’ broader obligation, “[w]hen evaluating compensatory mitigation options,” to “consider what would be environmentally preferable” and to determine “what is practicable and capable of compensating for the aquatic resource functions that will be lost as a result of the permitted activity.” 33 C.F.R. § 332.3(a)(1). The inflexible, outcome-driving hierarchy that Petitioners propose would improperly limit the Corps’ discretion to choose a combination of mitigation measures that is preferable and practicable in particular circumstances.³⁴

³⁴ As the Corps and Driftwood ably explain, *see* Corps Br. 42-45; Driftwood Br. 46-48, this Court’s decision in *Atchafalaya Basinkeeper v. U.S. Army Corps of Engineers*, 894 F.3d 692 (5th Cir. 2018), does not compel a different conclusion.

Petitioners’ overly rigid reading of the Corps’ compensatory mitigation regulations would negatively affect Clean Water Act permitting for a broad range of projects. In Petitioners’ apparent view, the regulations would deprive the Corps of discretion to tailor compensatory mitigation to particular circumstances. And Petitioners’ position could foreclose the Corps from adopting an approach—such as the mitigation approved here, in which the amount of beneficially restored wetlands will far exceed the acreage affected by project development—that would result in *greater* environmental benefits.

IV. Vacatur Is Highly Disruptive Where Project Development Has Progressed in Reliance on Key Permits.

Petitioners seek vacatur of Driftwood’s permit. Pet’r Br. 69-74. But, under Circuit precedent, an inadequately reasoned administrative order “does not require vacatur.” *Cent. & S. W. Servs., Inc. v. EPA*, 220 F.3d 683, 692 (5th Cir. 2000). Instead, this Court’s cases state that “remand [without vacatur] is generally appropriate when ‘there is at least a serious possibility that the [agency] will be able

There, this Court upheld the Corps’ selection of mitigation bank credits—the first step in the mitigation hierarchy—rather than the plaintiffs’ preferred measure of having the project developer clean up previously degraded areas. *See* 894 F.3d at 700. This Court acknowledged that the regulatory text sets up a hierarchy of preference and identified considerations that may warrant departure, *see id.* at 699-701. Then this Court *accepted* the Corps’ rationale for exercising discretion and flexibility in selecting out-of-kind mitigation credits as the appropriate mitigation measure for the project. *See id.* at 701-03.

to substantiate its decision’ given an opportunity to do so, and when vacating [the agency’s order] would be ‘disruptive.’” *Id.*

The Corps and Driftwood persuasively explain why remand without vacatur would be the only appropriate remedy if the Court were to find merit in any of Petitioners’ arguments. *See* Corps Br. 67-71; Driftwood Br. 64-66. *Amici* add the following points:

First, vacating key permits for major infrastructure at a late stage of project development is enormously disruptive. Project developers carefully plan construction schedules, make contractual commitments, and mobilize resources in reliance on the permits obtained. Section II.A, *supra*. Setbacks in one area can impede progress in other areas. For large, complex energy infrastructure projects that require numerous overlapping federal authorizations, the vacatur of even one permit can have a cascading impact on a developer’s ability to keep a project on schedule, secure customers, attract capital, and ultimately begin construction. *San Diego Gas*, 913 F.3d at 136; *Sage*, 361 F.3d at 828-29. Other courts have properly declined to vacate key federal authorizations where doing so would delay the construction of a complex infrastructure project. *See, e.g., Food & Water Watch v. FERC*, 28 F.4th 277, 292 (D.C. Cir. 2022); *Vecinos para el Bienestar de la Comunidad Costera v. FERC*, 6 F.4th 1321, 1332 (D.C. Cir. 2021).

Second, and relatedly, permit vacatur can have highly disruptive consequences even where a project has not reached the very final stages of development—or, indeed, where a project still faces other obstacles to proceeding. *Contra* Pet’r Br. 71-74. Project developers must navigate a complex web of related regulatory requirements, where one permit or authorization may be a prerequisite to obtaining others. As Petitioners are well aware, vacating individual permits can lead to incremental, cumulative delays. *See Wild Virginia*, 24 F.4th at 925 n.6 (discussing how three successful challenges contributed to eventual cancellation of a pipeline project).³⁵

Third, even putting aside concerns about disruption, vacatur is inappropriate under this Court’s cases where an agency can readily remedy defects on remand. Corps Br. 68-69. That standard is satisfied where—as is often the case in administrative-law challenges to infrastructure permits—Petitioners primarily dispute the adequacy of an agency’s explanation. Petitioners incorrectly imply that disruption and a likelihood of remedy on remand must *both* be shown. Pet’r Br. 69. But this Court’s cases support remand without vacatur based *either* on the possibility that an agency can substantiate its decision on remand *or* the risk of disruptive consequences. *See Tex. Ass’n of Mfrs. v. U.S. Consumer Prod. Safety Comm’n*, 989

³⁵ *See also* Doug Jackson, *BREAKING: Atlantic Coast Pipeline Cancelled*, Sierra Club (July 5, 2020), <https://tinyurl.com/2vdywp6v>.

F.3d 368, 389 (5th Cir. 2021) (remanding without vacatur given serious possibility that the agency could “remedy its failures,” without considering whether vacatur would be disruptive).

CONCLUSION

The Court should deny the petition for review.

Dated: January 25, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure, I hereby certify that, on January 25, 2023, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system, and served copies of the foregoing via the Court's CM/ECF system on all ECF-registered counsel.

Dated: January 25, 2023

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 6,445 words, excluding the parts of the motion exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6), because this motion has been prepared in a proportionally spaced typeface using Microsoft Office 365 in Times New Roman 14-point font.

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