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; 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 Issued by the U.S. Army Corps of Engineers

INTERVENORS DRIFTWOOD LNG LLC AND DRIFTWOOD PIPELINE LLC'S BRIEF

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CERTIFICATE OF INTERESTED PERSONS

No. 22-60397, *Healthy Gulf; Sierra Club v. United States Army Corps of Engineers; 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*.

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

Petitioners

Healthy Gulf and Sierra Club

Counsel: Sierra Club Environmental Law Program (Louisa Eberle, Thomas Gosselin)

Petitioners' Declarants: Roddy Hughes, James Hiatt, Roishetta Ozane, Natalie Lawton, Mary Woosley.

Respondents

U.S. Army Corps of Engineers

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Respondents-Intervenors

Driftwood LNG LLC and Driftwood Pipeline LLC.

Driftwood LNG LLC and Driftwood Pipeline LLC are wholly owned subsidiaries of Tellurian Inc. (NYSE: TELL), a publicly traded Delaware corporation with headquarters in Houston, Texas that has no parent companies. To our knowledge, no publicly held corporation has a 10% or greater ownership interest in Tellurian Inc.

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Fifth Circuit Rule 28.2.3, Intervenors believe that oral argument may assist the Court in understanding the legal issues and the administrative record in this case. Intervenors therefore request oral argument.

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GLOSSARY

BUDM: Beneficial Use of Dredged Material

CWA: Clean Water Act

EIS: Environmental Impact Statement

EPA: U.S. Environmental Protection Agency

FERC: Federal Energy Regulatory Commission

ITM: Inland Testing Manual

LDEQ: Louisiana Department of Environmental Quality

LDNR: Louisiana Department of Natural Resources

LDWF: Louisiana Department of Wildlife and Fisheries

LNG: Liquid natural gas

LRAM: Louisiana Wetland Rapid Assessment Method

NEPA: National Environmental Policy Act

NGA: Natural Gas Act

INTRODUCTION

Sierra Club and Healthy Gulf's (together, "Petitioners") challenge to Intervenors' "dredge-and-fill" permit (the "Permit") issued by the U.S. Army Corps of Engineers ("the Corps") under Section 404 of the Clean Water Act ("CWA") should be dismissed. In addition to the arguments made by the Government (Respondent's Brief ("RB") 23-71), the equitable doctrine of laches requires dismissal of Petitioners' claims. Petitioners inexcusably delayed objecting to the Permit by waiting six years after initial notice of the permitting process and three years after issuance of the Permit to bring their Petition. Intervenors Driftwood LNG and Driftwood Pipeline (together, "Driftwood") are highly prejudiced by Petitioners' late-filed objections and the Petition should be dismissed based on Petitioners' unjustifiable delay.

Additionally, Petitioners' arguments on the merits of Driftwood's Permit fail because (1) Petitioners' preferred alternative site was already permitted to another company and not available for Driftwood's use, and (2) the Permit's wetland mitigation plan reflects a careful balance of mitigation methods closely tailored to the Project and does

not violate federal regulations. The Corps' issuance of Driftwood's Permit was not arbitrary and capricious, and vacatur is unwarranted.

* * *

Driftwood is the developer of the $25 billion "Driftwood Project," consisting of the Driftwood liquefied natural gas ("LNG") export terminal and associated Driftwood pipeline (collectively, the "Project"). The LNG export terminal ("Terminal") is located on approximately 1,200 acres in Calcasieu Parish, Louisiana, and will include up to 20 liquefaction trains, three LNG storage tanks and three marine berths. The Terminal is authorized to export domestically-produced LNG in a volume equivalent to approximately 5.4 billion cubic feet (Bcf) per day.

Driftwood is fully committed to completing the Project. Driftwood has advanced the Project by securing land, improving roads and other infrastructure as needed, paying for engineering and design work, securing all necessary permits for construction, and taking other steps crucial to the Project. As Petitioners are fully aware, Driftwood commenced construction on the Project in April 2022, creating 200 construction jobs. (*See* Fig. 1 below.) Since April 2022, Driftwood has cleared and leveled approximately

5,500 precast piles, and poured significant amounts of concrete foundation, among other milestones. Driftwood has invested approximately $1 billion into the Project. In 2023, Driftwood plans to install additional concrete and between 14,850 and 18,000 precast piles and continue dry excavation.

Figure 1. January 2023 photo of construction progress at Driftwood Terminal Site[1]

Once operational, the Project will create hundreds of permanent jobs in Louisiana. The Project is and will continue to be a cornerstone of the Louisiana economy and serve a crucial global energy need.[2] Any

[1] *Driftwood LNG LLC*, FERC Docket No. CP17-117-000, Monthly Construction Report at 4 (Jan. 20, 2023), https://tinyurl.com/m993ckrx.
[2] *See* Dep't of Energy, *Driftwood LNG, LLC*, FE Docket No. 16-144-LNG, Order No. 4373 at 1, 50 (May 2, 2019), https://tinyurl.com/4cf7c3ry. The Court may take judicial notice of this

delay to the Project would meaningfully disrupt the supply of LNG to the country's allies and trading partners.

Petitioners' attempt to undermine the Project is late and unfounded. Driftwood began the permitting process more than six years ago in coordination with multiple federal, state, and local agencies—including the Federal Energy Regulatory Commission ("FERC"), the Corps, the U.S. Environmental Protection Agency ("EPA"), the Louisiana Department of Wildlife and Fisheries ("LDWF"), the Louisiana Department of Environmental Quality ("LDEQ"), and the Louisiana Department of Natural Resources ("LDNR")—to ensure the Project complies with statutory and regulatory requirements. By 2019, all relevant federal and state agencies had granted Driftwood the permits necessary to proceed with construction.

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and other agency determinations relating to the Project approval, including the Department of Energy authorization cited above, filings from the FERC dockets for the Project, and documents prepared by LDEQ. These documents are subject to judicial notice because they are matters of public record and involve related proceedings. *See Aurora Flight Scis. Corp. v. Swindol*, 805 F.3d 516, 518-19 (5th Cir. 2015); *In re Missionary Baptist Found. of Am., Inc.*, 712 F.2d 206, 211 (5th Cir. 1983) (taking judicial notice of prior related proceedings); *Carter v. Am. Tel. & Tel. Co.*, 365 F.2d 486, 491-92 (5th Cir. 1966) (taking judicial notice of agency order); Fed. R. Evid. 201(b)(2).

Petitioners now belatedly challenge Driftwood's Section 404 Permit. AR4-245. The Petition is a baseless attempt to halt construction and thwart the Project. In addition to the reasons given by the Government for denying relief, the Petition should be dismissed because laches forecloses this action. Petitioners were notified of the Project over six years ago, yet they failed to raise the claims they now bring during the permitting process despite multiple opportunities for commenting and public meetings. And they did not file this petition for review until three years after the Permit issued.

Driftwood is unquestionably prejudiced by Petitioners' delay as it has devoted considerable resources, capital, and man hours to the Project in reliance on the Permit currently being challenged. To stop or delay the Project at this time would harm not only Driftwood, but also the hundreds of people who work on the Project, the local community, the State of Louisiana, and the U.S. LNG industry as a whole. Petitioners have sat on their hands, and the Petition should be dismissed based on this inexcusable delay alone.

Petitioners' merit arguments also fail. Petitioners first complain that the Corps did not appropriately consider whether building the

Project at an alternative location—"Site 6"—would be preferable. But Site 6 was unavailable because it had already been permitted by the Corps to another company for a different project—a fact known to the Corps, the public, and even Petitioners (one of which filed public comments opposing that company's permit). The applicable regulations make clear that the Corps had no obligation to consider or discuss unavailable sites as part of the Driftwood permitting process. And because Site 6 was and remains unavailable, Petitioners' argument that the Project should be located there is moot and cannot serve as a basis to vacate the Permit.

Petitioners also ask this Court to second-guess the Corps' approval of the plan to mitigate the Project's impact on wetlands. But the applicable regulation provides the Corps with substantial discretion to approve mitigation plans that use a mix of mitigation methods, as deemed appropriate by the Corps for each project. The plan the Corps approved here—developed in coordination with Driftwood, State of Louisiana authorities, and the EPA—requires most of the Project's impacts to be offset through the purchase of "mitigation bank credits." The plan also includes additional mitigation through the "beneficial use

of dredged material" ("BUDM"), through which the dredged material produced by the Project will be used to rebuild and enhance approximately 3,000 acres of coastal wetlands, employing established scientific techniques that have been used successfully for similar projects in Louisiana. This plan, which is consistent with State of Louisiana priorities, will address significant loss of wetlands from coastal erosion, reflects meticulous compliance with regulatory mitigation preferences and sound environmental judgment, and there is no basis for second-guessing the Corps' approval of it. The Petition should be dismissed.

JURISDICTIONAL STATEMENT

This Court has jurisdiction under 15 U.S.C. § 717r(d)(1), except over Petitioners' alternative site claim because that issue is moot.

STATEMENT OF THE ISSUES

1. Whether laches bars Petitioners' challenges where Petitioners waited to bring this action (i) more than six years after they were put on notice of the Project's permitting process and more than three years after the permit was issued, and (ii) until approximately $1 billion has been invested in the Project and significant work at the site has

progressed.

2. Whether the Corps properly exercised its permitting authority in not selecting an alternative site that was unavailable because it was already permitted to another company for a different project.

3. Whether the Corps acted within its broad regulatory discretion in approving a mitigation plan that is fully consistent with State of Louisiana priorities by using mitigation bank credits to offset the majority of Project impacts and requiring the beneficial use of dredged material to restore an expected 3,000 acres of coastal wetlands.

STATEMENT OF THE CASE

I. Statutory and Regulatory Background

The Corps issues dredge-and-fill permits as part of the permitting process with FERC.

Under the Natural Gas Act ("NGA"), FERC has "exclusive" authority to approve LNG terminals. 15 U.S.C. § 717b(e)(1). FERC does so after a lengthy public process culminating in an authorization to export natural gas under Section 3 of the NGA and a certificate of public convenience and necessity to construct facilities to transport natural gas in interstate commerce under Section 7(c) of the NGA. *Id.* §§ 717b(a) and (e)(1), 717f(e). As the lead agency overseeing an LNG

project, FERC coordinates all required federal authorizations for the project under a schedule that it establishes, ensures that the project complies with the National Environmental Policy Act ("NEPA"), and compiles the consolidated administrative record for purposes of any judicial review. *Id.* §§ 717n(b)(1), 717n(c)(1), 717n(d). Congress specifically established this process to achieve expeditious and timely coordination, processing, and consideration of LNG facilities, including of other associated permits and approvals such as those from the Corps. *See Islander E. Pipeline Co., LLC v. Connecticut Dep't of Env't Prot.*, 482 F.3d 79, 85 (2d Cir. 2006); 15 U.S.C. § 717r(d).

The Corps participates in the FERC review process as a cooperating agency and has jurisdictional authority to implement the CWA. The CWA prohibits unpermitted discharges into "navigable waters," which are defined as "waters of the United States." 33 U.S.C. §§ 1311(a), 1362(6), 1362(7), 1362(12). Section 404 of the CWA authorizes the Corps to issue permits for discharges of "dredged or fill material" into waters of the United States. 33 U.S.C. § 1344(a). The Corps reviews permit applications to ensure compliance with the Section 404(b)(1) Guidelines ("Guidelines"), found at 40 C.F.R. Part 230,

and the Corps' permit regulations at 33 C.F.R. Parts 320-332. *See* 33 U.S.C. § 1344(b)(1).

The Guidelines provide a framework for the Corps' decisions and give the Corps considerable discretion in approving mitigation plans.

The Guidelines specify that no discharge of dredged or fill material will be permitted if it will cause or contribute to significant degradation of waters of the United States. 40 C.F.R. § 230.10(c). The regulations confer substantial discretion to the Corps to approve mitigation plans that are suitable given the specifics of each project. The Corps' goal is "no net loss" of wetlands acreage and function, and it achieves that goal through a three-step mitigation framework by (1) avoiding impacts, (2) minimizing impacts, and (3) compensating for impacts that cannot be avoided or minimized. *See* Compensatory Mitigation for Losses of Aquatic Resources, 73 Fed. Reg. 19,594, 19,596 (Apr. 10, 2008). These steps are described below.

First, under the Guidelines, "no discharge of dredged or fill material shall be permitted if there is a practicable alternative … which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental

consequences." 40 C.F.R. § 230.10(a). To be "practicable," an alternative must be "available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes." *Id.* § 230.10(a)(2).

Second, where impacts cannot be avoided, "appropriate and practicable steps" to "minimize potential adverse impacts of the discharge on the aquatic ecosystem" are taken. 40 C.F.R. § 230.10(d).

Third, compensatory mitigation is used where appropriate to offset unavoidable adverse impacts and replace the "aquatic resource functions that will be lost as a result of the permitted activity." 33 C.F.R. § 332.3(a)(1); *see Shrimpers & Fishermen of the RGV v. United States Army Corps of Eng'rs*, ___ F.4th ___, 2023 WL 108558, at *5 (5th Cir. Jan. 5, 2023). Compensatory mitigation may involve restoring, enhancing, establishing, or preserving special aquatic sites. 33 C.F.R. § 332.3(a)(2).

When evaluating an application to fill wetlands, the Corps must consider what types of mitigation are appropriate and what amount will be required. *See id.* §§ 332.3(e) (type), 332.3(b) (method), 332.3(c) (approach), 332.3(d) (site selection), 332.3(f) (amount). There are three

different methods used to provide compensatory mitigation: (1) mitigation banks, (2) in-lieu fee programs, and (3) permittee-responsible mitigation. *See* 33 C.F.R. § 332.3(b)(2)-(6); 73 Fed. Reg. at 19,594. First, a permittee can purchase credits from a third party "mitigation bank," which conducts or sponsors mitigation projects. 73 Fed. Reg. at 19,594-19,595; *see also* 33 C.F.R. § 332.2. Second, in-lieu fee programs work similarly to mitigation banks, but are generally run by government or nonprofit organizations. 73 Fed. Reg. at 19,594-19,595. Finally, permittee-responsible mitigation requires the permittee to implement and ensure successful completion of a mitigation project, under strict, detailed permit conditions enforced by the Corps. *Id*. at 19,594.

The Corps' compensatory mitigation regulation, adopted in 2008, sets forth a general preference of mitigation types, requiring the Corps' district engineer to first "consider" the use of mitigation bank credits. 33 C.F.R. § 332.3(b)(1). In promulgating the regulation, the Corps explained that the preference "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." 73 Fed. Reg. at 19,628; *see* 33 C.F.R. § 332.3(b)(2) (stating that the district engineer may "override" the regulatory preference based technical and scientific analysis).

In addition to determining "what constitutes the most appropriate and practicable compensatory mitigation based on consideration of case-specific circumstances," 73 Fed. Reg. at 19,628, the Corps also determines how much mitigation is required to offset the project's impacts. 33 C.F.R. § 332.3(f)(1). For projects in Louisiana, the Corps developed the Louisiana Wetland Rapid Assessment Method ("LRAM") to "determine how much compensatory mitigation is required." *Atchafalaya Basinkeeper v. U.S. Army Corps of Eng'rs*, 894 F.3d 692, 700-01 (5th Cir. 2018) (recognizing that LRAM "is subject to particular judicial deference"). The LRAM "scores" wetlands based on a variety of factors, among them: the type of wetlands involved; their condition; the number of acres impacted; and how difficult these wetlands will be to replace. *See* U.S. Army Corps of Engineers, Louisiana Wetland Rapid Assessment Method for Use within the Boundaries of the New Orleans

District, Version 2.0, 12 (2017) (hereinafter "LRAM Version 2.0").[3]

II. Factual Background

Responding to surging global demand, Driftwood plans an LNG export terminal.

In 2016, Driftwood proposed its Project, which will help to "accommodate both domestic need and international export demand," AR262, and "improve energy security for many U.S. allies and trading partners."[4] The Project will also have a significant positive impact on the Louisiana economy, creating thousands of construction jobs and at least 200 permanent jobs in an area recently hard-hit by Hurricanes Laura and Delta. AR296, 2684-85.

Driftwood begins the permitting process, and Petitioners are repeatedly informed about the Project.

The permitting process for the Project began over six years ago, when Driftwood requested to initiate FERC's pre-filing review process on May 11, 2016. AR2426. Since that time, the public (including

[3] The Corps cites to and applies the LRAM in its decision. *See* AR301. As a public record, the LRAM manual is subject to judicial notice. *See Aurora Flight Scis. Corp.*, 805 F.3d at 518-19 (taking judicial notice of public records); Fed. R. Evid. 201(b)(2) (judicial notice may be taken where a fact "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned"); *see also Basinkeeper*, 894 F.3d at 700-01 (implicitly taking judicial notice of the LRAM).

[4] *See* Dep't of Energy Order No. 4373, *supra* note 2, at 1, 50.

Petitioners) have consistently received notice of Project developments. As required by FERC's regulations (18 C.F.R. § 157.21(d)(6)), in May 2016, Driftwood included in its initial FERC filing a list of potentially interested parties it contacted about the Project, which included both Petitioners.[5] The pre-filing review process allowed interested stakeholders to become involved early in Project planning and included eight public meetings. AR2426-27.

In addition, in October 2016, FERC sent notice of its three scoping sessions and a request for input on environmental issues to 1,600 interested parties, including both Petitioners. AR2427. The pre-filing process included public reports and coordination with the Corps on wetlands mitigation and BUDM.[6] Both Petitioners chose not to participate in the pre-filing process.

In March 2017, Driftwood submitted a formal application to

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[5] FERC 20160511-5289, Ex. 2, at 10, 11, https://tinyurl.com/bdfunwbj (identifying Sierra Club and Healthy Gulf (then Gulf Restoration Network) as interested stakeholders). (For convenience, citations to filings in the FERC dockets for the Project use FERC eLibrary Accession Numbers.)

[6] FERC 20161205-5416 at 2-6, https://tinyurl.com/4ba327vh; FERC 20160809-5196 at 1 (and page 2 of the table), https://tinyurl.com/3b7axsrz; FERC 20161209-5091 at 5 (and page 2 of the table), https://tinyurl.com/3cdentwz.

FERC. Driftwood LNG LLC, Driftwood Pipeline LLC; Notice of Application, 82 Fed. Reg. 18,140, 18,140 (Apr. 17, 2017). In April 2017, FERC published a notice of Driftwood's application in the Federal Register, describing how interested parties could participate in FERC's process. *Id.*; *see also* AR23166-168. Petitioners *still* did not intervene.

In 2018, FERC released a Draft Environmental Impact Statement ("EIS") analyzing the Project's potential environmental impacts, which was noticed in the Federal Register and mailed to both Petitioners. *See* AR2429.[7] FERC held a 45-day comment period and three public meetings on the Draft EIS. AR2429. *Again*, Petitioners chose not to submit any comments or otherwise participate. AR3169-3319.

In 2019, after years of analysis and consideration, FERC published the Project's Final EIS on its website, noticed it in the Federal Register, and mailed the notice to both Petitioners. AR2383, 2385, 3028, 3030; 84 Fed. Reg. 1,119 (Feb. 1, 2019). Both the Draft and Final EIS included extensive analysis of site alternatives. Among a number of alternatives, the FERC EIS assessed "Alternative Site 6,"

[7] FERC 20180914-3016, https://tinyurl.com/2uhytkec (DEIS Vol. II, App. B, at B-9, B-11).

and "determined that [the] site did not provide a significant environmental advantage to Driftwood's proposed site[.]" AR2524.

The EIS also assessed in detail the Project's wetlands impacts and mitigation strategy. *See* AR2408, 2424 (discussing Corps' role), 2478-2479 (describing BUDM), 2574-2576 (no-contamination finding), 2619-2621 (essential fish habitat), 2621-2627 (summarizing wetlands impacts). This information was included so that the EIS would "contain[] information needed by [the Corps] to reach decisions on" the Section 404 permit. AR2420-2424. Notably, Petitioners failed to comment or challenge any of the EIS findings.

On April 18, 2019, pursuant to its "exclusive" siting authority, (15 U.S.C § 717b(e)(1)), and after exhaustive review of the Project and its impacts, FERC authorized the Project to be sited at its current location.[8] FERC's order referenced the Project's wetland impacts, discussed Driftwood's BUDM proposal, and acknowledged that wetland and vegetation impacts would be mitigated consistent with federal requirements. 167 FERC ¶ 61,054, ¶¶ 76-78. Petitioners did not seek

[8] *Driftwood LNG LLC & Driftwood Pipeline LLC*, 167 FERC ¶ 61,054, ¶ 28 (2019), https://tinyurl.com/2kbxfh6n.

rehearing or judicial review of FERC's order, and any challenge to that order by Petitioners is now time barred. 15 U.S.C. § 717r(a)-(b); *see S. Union Gathering Co. v. FERC*, 687 F.2d 87, 91-92 (5th Cir. 1982).

The Corps reviews the Project and approves a compensatory mitigation plan.

In parallel with FERC's process, the Corps processed Driftwood's application for a Section 404 permit.[9] As part of its review, the Corps analyzed the Project's impacts on wetlands and Driftwood's efforts to avoid, minimize, and mitigate adverse impacts. AR277-302. The Corps also conducted a detailed analysis of site alternatives. AR279-282. It did not specifically mention the location FERC had referred to as Site 6, but the Corps had already permitted that site to another company for the Big Lake Fuels project in June 2015, rendering it unavailable.[10]

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[9] The Corps issued a Public Notice of the permit application and request for comment on March 5, 2018. AR4776-82. Petitioner Sierra Club did not file any comment. Petitioner Healthy Gulf—then Gulf Restoration Network—submitted a general comment. AR5291-5312. This comment did not raise any of the concerns related to Site 6 that Petitioners now complain of, or challenge the legality of BUDM. *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 764-65 (2004) (challenges to agency actions must be raised with sufficient clarity and detail to allow the agency a fair opportunity to address the concern).

[10] *See* Big Lake Fuels Permit, No. MVN-2013-02653-WII (2015). The Government has sought judicial notice of this permit. *See* Mot. for Judicial Notice, ECF No. 94-4.

The Corps also approved Driftwood's proposed compensatory mitigation plan, which employed a combination of mitigation bank credits and permittee-responsible mitigation. AR404-551. The Corps' approval included extensive analysis to support and explain its decision. The Corps found the Project as a whole would permanently impact 665.7 acres of wetlands. AR300, 419, 421-422. The mitigation plan required that 480.7 acres of those impacts be offset through the purchase of mitigation bank credits. *See* AR419, 421-22. The remaining 185 acres of impacts (associated with the Terminal) will be offset by permittee-responsible mitigation through BUDM.[11] AR300, 419.

Specific to the Terminal, four types of wetlands will be impacted. In accordance with its usual practice, the Corps used the LRAM to

[11] In an attempt to falsely suggest the BUDM was the primary form of mitigation adopted by the Corps, Petitioners' brief focuses myopically only on impacts from the Terminal. *See, e.g.*, Petitioners' Opening Brief ("OB") 27 (referring to 185 acres as the "majority" of wetlands impacted at the Terminal site). But the compensatory mitigation plan approved by the Corps here applies to the Project as a whole, including the impacts of the pipeline and Terminal. AR418-22. When the Project is properly viewed as a whole, it is unquestionable that the vast majority of Project impacts were offset using mitigation bank credits. *See* AR300, 419, 421-422.

calculate how many mitigation credits for each wetland type would be required to offset project impacts. AR414, 418-19. The plan provided that the purchase of mitigation credits by Driftwood would be used to offset impacts to Palustrine Forested ("PFO") and Mosaic PFO/Palustrine Scrub Shrub ("PSS") wetlands. *See* AR419, 2294 (Driftwood credit purchase). That left 185 acres requiring mitigation: 126.2 acres of impacts to Estuarine wetlands, and 58.8 acres of Palustrine Emergent ("PEM")/PSS wetlands. AR419. Driftwood proposed to offset the impacts to Estuarine and PEM/PSS wetlands through the BUDM—a proposal developed in cooperation not only with the Corps but also LDNR, the EPA, and the LDWF. AR420, 265, 300-301, 902-907 (LDNR approval), 3468 (EPA approval), 2275 (LDWF approval), *see also* RB 50-51 (describing agency consultation process).

Modeled after similar beneficial use projects in Louisiana, the BUDM will carefully place dredged material to recreate the topography of coastal marshes before they eroded, converting open water back into marshland. AR484-85. These areas will then be revegetated by hand-planting local vegetative stock grown by licensed wetlands nurseries. AR494-95. Driftwood explained that the use of BUDM as part of the

overall mitigation plan would "result in a positive impact through the creation and nourishment of additional marsh habitats" and that "there would be no cumulative net loss of waters of the United States in the Project watershed." AR273.

After several years of reviewing and requiring revisions to the plan, *see* AR920-25, 554-55, 6361-62, the Corps approved the revised BUDM proposal, concluding that the BUDM "will restore degraded … coastal marsh habitat and these results are expected to outweigh the traditional mitigation bank credit program." AR299. In other words, the Corps expressly found that the benefits of the proposed BUDM outweighed the benefits of requiring Driftwood to buy additional mitigation bank credits to offset impacts to Estuarine and PEM/PSS wetlands. *Id*. The LRAM calculations supported this determination. They showed that the BUDM proposal will be the functional equivalent of ***four*** times the mitigation credits required to fully offset the Terminal's impacts on Estuarine and PEM/PSS wetlands. AR301, 433, 435.

In addition, the record reflects that the Corps correctly concluded that employing BUDM as part of the overall mitigation plan will

further Louisiana's ongoing efforts to address the significant rate of coastal wetland loss in the state. AR296-297, 2478. Shoreline erosion is a major concern in southern Louisiana. AR2782. The BUDM will contribute dredged material to create and restore approximately 3,000 acres of coastal marshland that was eroded away and converted into open water. AR259, 299-301, 2478. As such, the BUDM proposal is in accordance with Louisiana law (43 La. Admin. Code Pt. I, § 723) and consistent with the State of Louisiana Comprehensive Master Plan for a Sustainable Coast, the goals of the Chenier Plain Coastal Restoration and Protection Authority, and the Coastal Zone Management Act. AR296-297, 2478, 2439-2440.

The Corps issues the Section 404 permit and construction advances.

Based on its detailed analysis, the Corps issued a memorandum explaining its approval of Driftwood's application. AR256-322. The Corps concluded that "[a]ll unavoidable project related wetland impacts were minimized/offset/compensated for by purchasing mitigation bank credits and the marsh creation/restoration from the Beneficial Use of project related Dredge Material." AR274. The Corps further concluded that the permit action would not have a significant impact on the

quality of the human environment, that the Project complied with the Guidelines, and that the Project was not contrary to the public interest. AR322. Accordingly, on May 3, 2019, the Corps issued the Section 404 permit. AR6. Petitioners did not seek judicial review at that time.[12]

Driftwood's investment in the Project, which it made in reliance on the Permit, now totals approximately $1 billion. With the Permit in place, based on FERC authorization, Driftwood has commenced site preparation work—including vegetation clearing, grading, and dry excavation, as well as extensive work in wetlands.[13]

Driftwood's considerable investment has advanced the Project by securing the necessary land, improving roads and other infrastructure, completing engineering and design work, securing necessary permits, and other expenses crucial to the Project. To date, Driftwood has cleared and leveled approximately 450 acres, installed approximately 5,500 precast piles, and poured significant amounts of concrete

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[12] Driftwood notified FERC of the Permit's issuance and posted the Permit in a public filing to FERC's docket on May 3, 2019. FERC 20190503-5070, https://tinyurl.com/e9kafked (including Permit in Attachment 10 at 89).

[13] FERC 20191211-3019, https://tinyurl.com/3bzws6c3; *see also* C. Davis, *Driftwood LNG Awards $15.2B EPC Contract to Bechtel*, Natural Gas Intelligence (Nov. 22, 2017), https://tinyurl.com/59xhau2w.

foundation, among other milestones.[14] Additionally, construction has commenced and there are over 200 people working on site.

More than three years after the Permit issued, Petitioners file a Petition for Review.

On July 19, 2022, Petitioners filed their Petition for Review. On August 4, 2022, the Court granted Driftwood's Motion to Intervene.

SUMMARY OF THE ARGUMENT

I. Petitioners' claims are barred by laches. The equitable doctrine of laches "prevent[s] the assertion of stale claims" and bars suit where petitioners have inexcusably delayed pursuing their claims and the delay is prejudicial to the adverse party. *Env't Def. Fund, Inc. v. Alexander*, 614 F.2d 474, 478 (5th Cir. 1980) (barring action brought to halt construction of waterway by Corps after significant expenditures made and construction commenced); *Save Our Wetlands, Inc. v. U.S. Army Corps of Eng'rs*, 549 F.2d 1021, 1026 (5th Cir. 1977) (barring challenge brought 19 months after Corps permit issuance). Petitioners' claims here are inexcusably delayed because they waited to file their

[14] Petitioners have recently filed a complaint with FERC to halt ongoing Project construction. The allegations in their complaint are meritless and not before this Court. *See* FERC 20221212-5170, https://tinyurl.com/m6njzzxa (Driftwood Response).

Petition until six years after they were notified of the Project and more than three years after the Corps issued the challenged Permit. The delay is highly prejudicial to Driftwood because Petitioners seek to vacate the Permit after approximately $1 billion has been invested, workers are on site, and construction has commenced. Laches therefore requires that the Petition be dismissed.

II. Petitioners' argument that the Corps failed to consider Site 6 is wholly meritless because the site was already permitted and not available for Driftwood. In addition to the Government's reasons for denying relief (RB 23-39), the Petition should be denied because the Corps has no obligation during the permitting process to consider or discuss an alternative site that is unavailable because it has already been permitted to another entity for another project. *City of Shoreacres v. Waterworth*, 420 F.3d 440, 448-49 (5th Cir. 2005) (site permitted to a third party is not "available" and therefore not a "practicable alternative"). And because there is no meaningful relief available to Petitioners, the issue is also moot.

III. Petitioners' argument that the Corps violated its regulations by approving the mitigation plan is also meritless. The regulations

confer substantial discretion to the Corps to approve mitigation plans that are suitable for the circumstances of specific projects. Although the regulations governing wetland mitigation plans indicate a general preference for mitigation bank credits over permittee-responsible mitigation, that preference is not absolute, and flexibility is given for the Corps' expert judgment. Here, the Corps approved a plan that requires Driftwood to purchase mitigation bank credits to offset the majority of its wetlands impacts, and also requires Driftwood to use the dredged material produced during construction to restore degraded wetlands in the same watershed. This plan reflects a careful balance of mitigation methods closely tailored to the Project's circumstances and designed to comport with state law requirements. The Corps did not violate its regulations by the approving the plan.

IV. The suggestion of vacatur as a remedy is baseless. Vacatur is warranted only where there are fundamental flaws in the agency's approach. Petitioners' arguments that the Corps needs to further explain its decision as to Site 6 or make technical adjustments to the mitigation plan hardly qualify as fundamental and cannot support vacatur. Moreover, the disruptive consequences of vacating the permit

granted more than three years ago counsel strongly against that remedy. Vacating the permit at this late date would halt Driftwood's ongoing wetlands restoration efforts, threaten hundreds of jobs, and place an approximately $1 billion investment at risk. There is no justification for such an extreme disruption. Vacatur is not appropriate here.

STANDARD OF REVIEW

The Court reviews the Corps' issuance of a CWA permit under the Administrative Procedure Act ("APA"). *See Shoreacres*, 420 F.3d at 445. Under the APA, a court will uphold an agency action unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Under this "highly deferential standard of review, a reviewing court has the least 'latitude in finding grounds for reversal.'" *Sabine River Auth. v. U.S. Dep't of Interior*, 951 F.2d 669, 678 (5th Cir. 1992) (internal quotation omitted). The court "is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Where, as here, an agency is making a complex scientific determination that falls particularly within its expertise, "a reviewing

court must generally be at its most deferential." *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 377 (1989).

ARGUMENT

I. Laches Bars Petitioners' Challenge.

Petitioners' challenge is barred by laches because they waited for years to bring their claims while substantial investment was made in the Project. The equitable doctrine of laches bars suit when "(1) [there is] a delay in asserting a right or claim; (2) … the delay was not excusable; and (3) … there was undue prejudice to the party against whom the claim is asserted." *Save Our Wetlands*, 549 F.2d at 1026. This Court has consistently applied laches to dismiss challenges to regulatory permits where the petitioners unduly delayed pursuing their claims. *See Alexander*, 614 F.2d at 478 (explaining that "the applicability of the doctrine of laches to environmental litigation is no[t] … open to doubt" and holding that laches barred environmental suit attempting to halt construction permitted by Corps); *Save Our Wetlands*, 549 F.2d at 1029 (applying laches to bar challenge by environmental group to Corps permit). Laches is similarly applicable and appropriate here.

A. Petitioners Inexcusably Delayed In Challenging The Permit.

Petitioners' delay is long and inexcusable. "The period for laches begins when the plaintiff knew or should have known" of the conduct of which they now complain. *Elvis Presley Enters., Inc. v. Capece*, 141 F.3d 188, 205 (5th Cir. 1998); *see also Alexander*, 614 F.2d at 478-79 (assigning knowledge to plaintiffs who participated in the project approval process). Here, Petitioners delayed bringing this action until more than three years after the Permit was issued and six years after they knew about the Project. Petitioners have known about the Project plans from the very start—indeed, they were named interested stakeholders since the inception of the FERC proceeding for the Project in *May 2016*, more than six years ago. *See supra* at 14-15 & note 5.

Although aware of the Project and its plans, neither Petitioner participated in the FERC process, and Sierra Club never participated in the Corps' permit process. Petitioners could have participated and "alert[ed] the agency to their position in order 'to allow the agency to give the issue[s now raised] meaningful consideration'" at the appropriate time. *Shrimpers*, 2023 WL 108558 at *3. But they chose not to do so before FERC. During the Corps proceedings, Sierra Club

wholly failed to "make objections or even … ask questions" about the Permit application. *Save Our Wetlands*, 549 F.2d at 1027. And while well aware of the Corps' issuance of the Section 404 permit in May 2019, Petitioners sat on their hands for three years before bringing this Petition.[15]

This Court and others have barred challenges to permits in cases involving far shorter delays and less dilatory circumstances than those at issue here. *See, e.g.*, *Sierra Club v. Hassell*, 503 F. Supp. 552, 564 (S.D. Ala. 1980) (six-month delay inexcusable where plaintiffs allowed key dates to pass without objection, including publication of permit application and announcement of permit), *aff'd*, 636 F.2d 1095 (5th Cir. 1981); *see also Save Our Wetlands*, 549 F.2d at 1026-28 (inexcusable delay where: (i) plaintiffs waited more than two and a half years after public notice of permit application and 19 months after permit issued to bring suit; (ii) there was "extensive advertising and visibility" of project; and (iii) plaintiffs "failed to present comments, make objections or even to ask questions concerning the permit application"); *In re Citizens &*

[15] *See supra* note 12 (May 3, 2019, Driftwood filing on FERC docket for the Project including the Permit).

Landowners Against the Miles City/New Underwood Powerline, 513 F. Supp. 257, 262-64 (D.S.D. 1981) (delay of more than two years inexcusable where plaintiffs were "continually reminded" of project through public meetings and other publicized project milestones), *aff'd*, 683 F.2d 1171 (8th Cir. 1982); *Clark v. Volpe*, 342 F. Supp. 1324, 1327 (E.D. La. 1972) (barring action filed nine months after final project approval). Petitioners' multi-year delay here is equally inexcusable.

B. Petitioners' Inexcusable Delay Is Highly Prejudicial To Driftwood.

Petitioners' inexcusable delay threatens to cause Driftwood undue prejudice, given the massive investments already made in the Project. *See Save Our Wetlands*, 549 F.2d at 1028 (considering the expenditures already made by the defendants). In their recent filing opposing the Government's motion for an extension, Petitioners specifically noted that they waited three years until construction was imminent. Pet'rs Resp. to U.S. Army Corps of Engineers' Second Mot. for Extension of Time to File Responsive Br. at 5 n.1, ECF No. 81. In other words, Petitioners intentionally sat on their hands and waited three years to bring this action, while Driftwood invested approximately $1 billion and commenced construction, which is now well underway. *See Save Our*

Wetlands, 549 F.2d at 1028-29 (laches barred claims where developer had already expended $26 million and the preparation of an EIS would have little, if any, environmental benefit).

If Driftwood were required to halt work on the Project at this stage, it would potentially incur millions of dollars in demobilization or cancellation costs under the terms of its construction contracts, disrupt hundreds of workers, and risk having to pay significantly higher contract and supply costs when work resumes. Halting the Project also would delay the much-needed export of LNG to the country's allies and trading partners.

Petitioners' delay also threatens to harm the environment. The belated review sought by Petitioners imperils Driftwood's effort to restore and create thousands of acres of wetlands, a critical effort that serves key State of Louisiana environmental priorities. That environmental harm supports the application of laches here. *Save Our Wetlands, Inc.*, 549 F.2d at 1028-29 (laches barred suit where construction was already underway and, where given the progress of the project, "very little, if any, environmental benefit" would ultimately result if the petition was successful).

Petitioners bring this action seeking equitable relief in the form of vacatur of the Permit, but "equitable remedies are not available if granting the remedy would be inequitable to the defendant because of the plaintiff's long delay." *Alexander*, 614 F.2d at 478. Given the substantial prejudice to Driftwood, the workers hired in reliance on the Permit, and the harm to the environment and the public—all due to Petitioners' inexcusable delay—Petitioners' claims are barred. *Cf. Alexander*, 614 F.2d at 480 (finding undue prejudice and applying laches where between $176-286 million was expended, there were obligations on outstanding construction contracts, and "[r]eshaping the project would not only entail waste of much of those expenditures but also the outlay of additional funds."). Thus, the Petition should be dismissed.

II. The Court Should Dismiss Or Deny The Petition As To Site 6 Because That Site Was Permitted For A Different Project And Unavailable.

If this Court reaches the merits of Petitioners' claims, the Petition should be denied. Petitioners first argue that the Permit should be vacated because the Corps did not properly analyze Site 6 as part of its permitting decision. In addition to the reasons given by the

Government (at RB 23-39), this argument is meritless because the Corps had no legal obligation or practical reason to consider Site 6 as part of Driftwood's permit application. The Corps had already issued a permit to a different company to build a facility at Site 6 in 2015, several years before the Corps issued the Driftwood permit at issue here.[16] The issue is also moot because there is no meaningful relief that could be awarded on Petitioners' claim.

A. The Corps Had No Obligation to Consider Site 6.

The Corps was not required to consider an unavailable alternative site that was already permitted to another project. The Guidelines provide in relevant part that "no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences." 40 C.F.R. § 230.10(a). The preamble to the final rule promulgating the Guidelines expressly states:

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[16] *See* Big Lake Fuels Permit, No. MVN-2013-02653-WII (2015) (Mot. for Judicial Notice, ECF No. 94-4); U.S. Army Corps of Engineers, New Orleans District, *Joint Public Notice: Construct a New Gas to Gasoline Facility in Calcasieu Parish* 4 (Dec. 23, 2013) (Mot. for Judicial Notice, ECF No. 94-3) (showing project location), https://tinyurl.com/36b83rev.

"we emphasize that the only alternatives which must be considered are *practicable* alternatives." Guidelines for Specification of Disposal Sites for Dredged or Fill Material, 45 Fed. Reg. 85,336, 85,339 (Dec. 24, 1980) (emphasis in original).

The Guidelines specify an alternative is "practicable" only "***if it is available*** and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes." 40 C.F.R. § 230.10(a)(2) (emphasis added). An alternative site not presently owned by the applicant can be "considered" only if it "could reasonably be obtained, utilized, expanded or managed in order to fulfill the basic purpose of the proposed activity." *Id.*

Consistent with this regulation, this Court has held that an alternative site that is already permitted to another project is not a "practicable alternative" as a matter of law. In *Shoreacres*, the Court held that the Corps did not abuse its discretion by declining to "consider" an alternative site that was already permitted to another entity. 420 F.3d at 448-49. This commonsense conclusion squarely controls here. A site already permitted for another project is manifestly not "available" and cannot "reasonably be obtained." 40 C.F.R.

§ 230.10(a)(2). Here, there is not even a "theoretical possibility of acquiring the alternative site" and using it for the Project. *Shrimpers*, 2023 WL 108558, *5 (quoting *Shoreacres*, 420 F.3d at 449) (rejecting challenge based on "[a] mere, unsupported theoretical possibility of acquiring the alternative site"). The Corps therefore had no obligation to consider this unavailable site and Petitioners' challenge should be dismissed.

B. The Corps Did Not Err By Not Expressly Noting The Unavailability Of Site 6.

In issuing the Permit, the Corps was not required to note or discuss alternative sites that were not available. A reviewing court must "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *State Farm*, 463 U.S. at 43 (internal quotation marks omitted). Here, the Corps plainly passed over Site 6 because the site was already permitted to another project. The same Corps regional office that issued the Driftwood permit issued the permit approving Site 6 as the location of the Big Lake Fuels facility on June 11, 2015, just two years before Driftwood filed its permit application. *See* Permit No. MVN-2013-02653-WII (2015) (Mot. for Judicial Notice, ECF No. 94-4). In fact, the two permits were drafted by the same

permit writer (as indicated by the "WII" code in the permit numbers and the contact details in the permit notices). *See id*; AR4 (Permit No. MVN-2016-01501-WII).

Moreover, the public was well aware of the issuance of the Big Lake Fuels permit, which was repeatedly disclosed in public notices. In 2013, the Corps issued a joint public notice of the Big Lake Fuels permit application.[17] In 2016, the developer broke ground on the facility, which was publicized in regional news.[18] On February 4, 2019 (three months before Driftwood's Permit approval), the Corps issued a public notice advertising plans to modify the Big Lake Fuels permit.[19] And as recently as April 2020 (almost a year after the issuance of Driftwood's Permit), the Corps issued a joint public notice for a proposed

[17] Dec. 23, 2013 Joint Public Notice, *supra* note 16, at 4 (showing project location).
[18] *See* Erica Bivens, *Big Lake Fuels Plant Breaks Ground*, KPLC News, (Jan. 13, 2016), https://tinyurl.com/5cwap72y. This Court may take judicial notice of facts generally known as a result of newspaper articles. *See Wash. Post v. Robinson*, 935 F.2d 282, 291 (D.C. Cir. 1991).
[19] *See* U.S. Army Corps of Engineers, New Orleans District, *Public Notice: MVN-2013-02653-MG* (Feb. 4, 2019), https://tinyurl.com/drkxkmxx.

modification to the Big Lake Fuels permit.[20]

Indeed, the public record shows that Petitioners themselves were aware of the Big Lake Fuels project and its occupation of Site 6. In 2014, the local chapter of the Sierra Club wrote to the LDEQ "to request a public hearing for the proposed Big Lake Fuels facility which would be located in South Lake Charles" and noted that the Sierra Club wished to raise location-specific objections to the project.[21]

It is wholly baseless for the Sierra Club to now argue that the Corps Permit for this Project should be vacated because the Corps did not discuss Site 6, when the Corps, the public, and specifically the Sierra Club knew that Site 6 was unavailable from the start.

C. Any Conceivable Error in Not Explicitly Stating That Site 6 Was Unavailable Is Harmless.

Although under the governing regulation, the Corps had no obligation to note an alternative site that was unavailable, *see* 40 C.F.R.

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[20] U.S. Army Corps of Engineers, New Orleans District, *Joint Public Notice: Lake Charles Harbor and Terminal District Permit Modification for the Big Lake Fuels Facility in Calcasieu Parish* 2 (Apr. 20, 2020), https://tinyurl.com/n8tutf68 (Mot. for Judicial Notice, ECF No. 94-6).

[21] Letter from Haywood Martin, Chair, Sierra Club Delta Chapter, to Pub. Participation Grp., Louisiana Dep't of Env't Quality (Apr. 27, 2014), https://tinyurl.com/2rxedcu4.

§ 230.10(a)(2), any error in not explicitly stating that Site 6 was not evaluated because it was unavailable would be plainly harmless and would not support the grant of any relief. "The harmless error rule applies to agency action because '[i]f the agency's mistake did not affect the outcome, if it did not prejudice the petitioner, it would be senseless to vacate and remand for reconsideration.'" *City of Arlington v. F.C.C.*, 668 F.3d 229, 243 n.65 (5th Cir. 2012).

Any alleged error here in not specifically discussing Site 6 in the Corps' permitting decision is harmless. A remand to the Corps to issue an amended decision to explicitly note Site 6's unavailability would be a "senseless" exercise and would not affect the outcome of the Corps' determination. *City of Arlington*, 668 F.3d at 243 n.65. Thus, even if the Corps erred, which it did not, the Court should nonetheless deny relief under the harmless error principle.

D. Petitioners' Site 6 Argument Is Moot.

Finally, Petitioners' argument that the Corps should have considered Site 6 is also moot, because the Court is "no longer capable of providing meaningful relief" to Petitioners on this issue. *Ctr. for Biological Diversity, Inc. v. BP Am. Prod. Co.*, 704 F.3d 413, 425 (5th

Cir. 2013). "[A]ny set of circumstances that eliminates actual controversy after the commencement of a lawsuit renders that action moot." (quoting *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 661 (5th Cir. 2006)). Here, there is no "meaningful relief" that the Court could offer on Petitioners' claim at this juncture. Because Big Lake Fuels holds a permit for Site 6, the site is not available for use for the Driftwood Project as a matter of law.

In addition, it is well established that "challenges to [a] permit" may be "mooted by the completion of construction or irreparable alterations to the [site]." *Atchafalaya Basinkeeper v. U.S. Army Corps of Eng'rs*, 715 F. App'x 399, 400 (5th Cir. 2018) (Owen, J., concurring); *see also Bayou Liberty Ass'n, Inc. v. U.S. Army Corps of Eng'rs*, 217 F.3d 393, 396 (5th Cir. 2000) (A "case may become moot when a substantial portion of that project is completed."). Given that Driftwood has made significant investments in the Project and already begun construction at its permitted site, ordering the Corps to reconsider Site 6 would serve no "meaningful" purpose. *Ctr. for Biological Diversity*, 704 F.3d at 425.

As such, Petitioners' claim is moot and should be dismissed.[22]

* * *

For the foregoing reasons, the Court should reject Petitioner's Site 6 argument.

III. The Corps Acted Well Within Its Discretion In Approving A Mitigation Plan That Primarily Relies On Bank Credits And Also Includes Beneficial Use Of Dredged Material.

Petitioners next argue that the Corps erred in approving the Project's mitigation plan. OB 48. But the Corps' approval of the plan was fully consistent with the Corps' regulations. Contrary to Petitioners' argument, the relevant regulation does not require the

[22] In addition to being moot, Petitioners' alternative site argument also represents an improper collateral attack on FERC's approval of the Project's location. *E.g.*, OB 36, 42-43, 46-48. FERC has "exclusive authority to approve or deny an application for the siting … of an LNG terminal." 15 U.S.C § 717b(e)(1). Having failed to participate in FERC's siting decision, and having "failed to avail themselves of the exclusive review scheme established by Congress under [15 U.S.C. § 717r] for adjudicating" disputes arising from FERC's decision, Petitioners cannot now argue that the siting decision reached by FERC was in error. *Adorers of the Blood of Christ U.S. Province v. Transcon. Gas Pipe Line Co.*, 53 F.4th 56, 65 (3d Cir. 2022) (where the "essence" of a petitioner's claim "could and should have been contested before FERC during the certification proceedings where such issues were to be resolved," such "claim is now barred as an impermissible collateral attack.").

exhaustion of all mitigation credits available before other mitigation methods can be considered. Rather, the regulations grant the Corps considerable discretion to approve mitigation plans tailored to the specifics of a project. Approval of this plan—which offsets the vast majority of Project impacts through purchase of mitigation bank credits, and also includes use of material dredged from the Project site to restore degraded wetlands—fully conforms to the regulation and falls squarely within the Corps' broad discretion. *See* 33 C.F.R. § 332.3; *Shrimpers*, 2023 WL 108558, at *2 (Corps' decision must be upheld if the Corps "'examine[d] the relevant data and articulate[d] a satisfactory explanation for its action'" based on "'consideration of the relevant factors'") (quoting *Sw. Elec. Power Co. v. EPA*, 920 F.3d 999, 1013 (5th Cir. 2019)). As this Court recently confirmed, "[t]his court must be 'most deferential' to the agency" where the agency's decision "is based upon its evaluation of complex scientific data within its technical expertise." *Shrimpers*, 2023 WL 108558, at *6 (quoting *Sierra Club v. EPA*, 939 F.3d 649, 680 (5th Cir. 2019)).

A. The Corps Is Charged With Approving an Appropriate Mitigation Plan Given the Specifics of Each Project.

1. The CWA regulations grant the Corps discretion to approve project-specific mitigation plans.

There is no requirement that mitigation bank credits be fully exhausted before other types of mitigation can be used. *Cf.* OB 55. Rather, Corps regulations provide only that when reviewing options for compensatory mitigation plans, the Corps district engineer must "*consider*" mitigation options in a certain order, *see* 33 C.F.R. § 332.3(b)(1) (emphasis added), and that the compensatory mitigation requirements "*may*" be met by securing mitigation bank credits, *see* 33 C.F.R. § 332.3(b)(2). The regulations clearly contemplate the Corps' flexibility to *choose* the most appropriate type or combination of types of mitigation. *See* 33 C.F.R. § 332.3(b)(2) ("When permitted impacts are located within the service area of an approved mitigation bank, and the bank has the appropriate number and resource type of credits available, the permittee's compensatory mitigation requirements *may* be met by securing those credits from the sponsor." (emphasis added)).

Contrary to Petitioners' assertion, the Corps regulations only instruct the district engineer to "consider" mitigation bank credits

before considering permittee-responsible mitigation. *Id.* § 332.3(b)(2)-(b)(6). To "consider" an option is "to think about [it] carefully," "to take into account," to "judge" or evaluate it. Merriam-Webster Dictionary, "Consider," https://tinyurl.com/yv8yzmmv (last visited Jan. 24, 2023). The regulations also recognize that mitigation bank credits are not always the most suitable mitigation. *See* 33 C.F.R. § 332.3(b)(2).

The Corps explained when promulgating this regulation that the use of "may" recognizes that even when mitigation bank credits are available, 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." 73 Fed. Reg. at 19,628. That is, the Corps *may* but is not *required* to approve a mitigation-banking-*only* plan; for example, the Corps can approve a plan that uses banking as well as permittee-responsible mitigation, such as BUDM.

The Corps knew how to use mandatory terms to limit discretion when that was the intent. While subsection (b)(2) uses the terms "may" and "consider," subsection (c) states: "The district engineer *must use* a watershed approach…*to the extent appropriate and practicable*." 33

C.F.R. § 332.3(c)(1) (emphasis added). Under that provision, it is not enough for the district engineer to "consider" the watershed approach—the district engineer must "*use*" it unless it is impracticable or inappropriate. *Id.*; *see also* AR 417, 419, 479.

It is a fundamental principle of textual interpretation that a drafter "generally acts intentionally when it uses particular language in one section of a [regulation] but omits it in another." *Dep't of Homeland Sec. v. MacLean*, 574 U.S. 383, 391 (2015). Here, the Corps carefully chose discretionary language in some sections and mandatory language in others. *See* 73 Fed. Reg. at 19,598 ("we have carefully evaluated all of the discretionary language in the proposed rule").

Moreover, although use of mitigation bank credits "can help reduce risk and uncertainty." 33 C.F.R. § 332.3(b)(2), the use of such credits may not be preferable in all cases. The flexible phrasing in the Corps regulations recognizes that full exhaustion of all available credits is not necessarily the best approach for every project. Indeed, the regulation provides only that "the district engineer *should* give preference to the use of mitigation bank credits *when these considerations are applicable*." *Id.* (emphasis added). Here, the Corps

reasonably found that while bank credits would be the primary mitigation method, other considerations warranted the use of BUDM to offset a portion of wetlands impacts. AR300-01.

In short, Petitioners' argument that the district engineer must mandate the full exhaustion of available mitigation bank credits for every project, OB 55, is patently inconsistent with the plain text of Section 332.3(b) and the Corps' statements at the time it promulgated the regulation.

2. *Atchafalaya Basinkeeper* does not support Petitioners' position.

Unable to find support in the regulatory text, Petitioners cite *Basinkeeper*, 894 F.3d 692, to bolster their position. But *Basinkeeper* did not reach the issue of the Corps' discretion to allow BUDM as part of a mitigation plan; the decision did not divest the Corps of that discretion at all. *See id*.

Basinkeeper involved a challenge to the Corps' determination that a project's impacts would be mitigated partially through in-kind mitigation bank credits and, when those were exhausted, through out-of-kind/in-basin credits. 894 F.3d at 699. The plaintiffs there claimed that permittee-responsible mitigation—specifically, requiring the

permittee to clean up spoil banks in the area—would have been preferable to the use of out-of-kind mitigation credits, and that the Corps had insufficiently explained why it only required a further credit purchase instead. *Id*. at 700. In other words, the plaintiffs claimed the Corps had to do more to explain why it chose to *adhere* to the mitigation hierarchy. This Court rightly rejected that argument. Because Section 332.3 sets out a general preference for first considering the use of mitigation bank credits, *see id*. at 699-700, the Corps was entitled to choose out-of-kind credits over permittee-responsible mitigation without the need for extensive discussion of other mitigation options. *Id*. at 701.

None of this Court's reasoning, however, supports reading the regulations to mandate that mitigation bank credits must always be completely exhausted before the Corps considers other forms of mitigation as part of a comprehensive plan. Petitioners' contrary argument rests entirely on two sentences in *Basinkeeper*, which state: "[T]he district court stated that Section 332.3 does not 'impos[e] a mechanical and rigid hierarchy' establishing a preference for out-of-kind mitigation. This was incorrect." *Id*. at 699. Indeed, under Section 332.3, there is a general preference for the use of mitigation bank

credits over other types of mitigation. But Petitioners mistakenly extrapolate that statement to mean that the district engineer *must* use mitigation bank credits as compensatory mitigation for as long as they remain available before permitting other mitigation types. OB 52.

When read in proper regulatory context, *Basinkeeper* does not alter the settled proposition that the district engineer must "consider" the mitigation options in the order set forth in the regulations, but may still craft a project-specific mitigation plan combining different mitigation types as appropriate under the circumstances.

B. The Corps Properly Concluded the Project's Compensatory Mitigation Plan Is Consistent With Corps Regulations.

The record shows that the Corps not only properly "consider[ed]" the use of mitigation bank credits but also fully explained why BUDM was appropriate to include in the mitigation plan here.

Petitioners contend the Corps violated Section 332.3 because it "did not even consider other forms of mitigation" besides BUDM. OB 55. But that is incorrect: mitigation bank credits are the primary type of compensatory mitigation for the Project. Approximately 480 acres, or 72% of Project impacts, have been offset through the plan's primary

mitigation type—the purchase of over 3,400 bank credits.[23] AR259, 300, 419, 421-422. Only 185 acres, or 28% of impacts at issue, were offset through the secondary mitigation type in the plan, BUDM. AR419. Ensuring that the vast majority of project impacts will be offset through the use of mitigation bank credits is hardly a "rejection" of Section 332.3's preference for bank credits. OB 56-57.

The Corps properly recognized the value of including BUDM as part of the mitigation plan here. The Project may produce a substantial amount of dredged material—up to approximately eight million cubic yards. AR412, 420. Putting this dredged material to good use will create 496.4 acres of salt marsh and 149.4 acres of fresh marsh. AR300. The plan also includes the "long term restoration/creation" of approximately 3,000 acres of coastal marsh habitat through the use of dredged material. *Id.*

[23] Notably, before the Corps issued the permit, it carefully evaluated the BUDM and required improvements as needed. RB 45. For instance, Driftwood was required to purchase many more mitigation bank credits than initially proposed to offset specific wetland impacts. *Compare* AR18439 Table 3 (initial Driftwood proposal to offset 30.7 acres of Terminal facility impacts using mitigation bank credits) *with* AR419 (final Corps-approved plan requiring credit purchases for 134.3 acres—*i.e.*, an additional 103.6 *additional* acres).

After "consider[ing]" the available options in line with Section 332.3, the Corps properly found that, under these facts, using the Project dredged material to restore nearby wetlands was an appropriate mitigation method, particularly when combined with the substantial number of mitigation bank credits mandated by the plan. As the Corps explained in promulgating Section 332.3, "using a combination of on-site"—*i.e.*, permittee-responsible—"and off-site compensatory mitigation" such as mitigation banks or in-lieu fee programs "is often necessary or preferable to successfully offset the functions lost at the impact site." 73 Fed. Reg. at 19,629. That is precisely what the Corps did here.

C. The Corps' Approval of BUDM as Part of the Mitigation Plan Is Well Reasoned and Supported by the Record.

Petitioners contend that requiring Driftwood to offset a portion of the Project impacts through the BUDM was arbitrary for two reasons. First, Petitioners claim the Corps did not demonstrate the BUDM was the best compensatory mitigation option. OB 60-62. Second, Petitioners claim the Corps inadequately addressed concerns regarding the BUDM's capacity for hydrologic connectivity and potential use of

contaminated material. OB 63-65. Neither argument has merit.

1. The Corps sufficiently supported its decision to approve BUDM as part of the compensatory mitigation plan.

There is no basis to second-guess the Corps' decision to approve BUDM as part of Driftwood's compensatory mitigation plan. This Court's review is limited to determining whether the Corps "examine[d] the relevant data and articulate[d] a satisfactory explanation" when it approved the use of BUDM as part of the mitigation efforts. *State Farm*, 463 U.S. at 43. Here, the Corps' detailed explanation was more than adequate. And the record clearly supports the Corps' conclusion that the use of BUDM as a component of the mitigation plan was "expected to outweigh the traditional mitigation bank credit program" for impacts to estuarine and PEM/PSS wetlands. AR299.

First, the Corps properly considered the LRAM calculations in assessing the benefits of BUDM.[24] The Corps regulations provide that,

[24] Petitioners claim the LRAM cannot justify the Corps' decision to approve the BUDM as compensatory mitigation because it is a "post-hoc rationalization." OB 59. But the Corps clearly referenced the LRAM in its explanation to determine the amount of mitigation required to offset the Project's impact. *See* AR301 (discussing the number of LRAM credits that would be produced by the BUDM); *see also Basinkeeper*, 894

where available, "functional or condition assessment methods … should be used … to determine how much compensatory mitigation is required." 33 C.F.R. § 332.3(f)(1). As noted, the LRAM is a functional assessment tool used to ensure that restored wetlands are the functional equivalent of the original impacted wetlands. *Supra* at 13; *Basinkeeper*, 894 F.3d at 701.[25] As this Court has acknowledged, "the use of scientific methodology like that contained in the LRAM is subject to particular judicial deference." *Basinkeeper*, 894 F.3d at 701 (citing *Marsh,* 490 U.S. at 377-78).

The LRAM calculations reflected in the record support the Corps' approval of BUDM in the mitigation plan and Petitioners' critiques are unfounded. LRAM calculations showed that "[t]he BUDM areas in which the dredged material will be placed have the capacity to generate up to 2,805.5 brackish/salt marsh credits and 6,171.1 fresh/intermediate

F.3d at 701 ("How the LRAM was utilized in the instant 404 EA is clearly referenced.").

[25] LRAM "assigns a numerical value to wetlands that will be affected by a Corps permit" based on the "aquatic functions and services" that these wetlands provide, taking into account "how difficult particular wetlands are to replace," and the habitat and hydrologic condition of the wetlands. *Basinkeeper*, 894 F.3d at 701. LRAM is then used to score the restored wetlands that are being proposed as compensatory mitigation. *See* LRAM Version 2.0, *supra* at 5.

marsh credits." AR301; *see also* AR433, 435 (LRAM sheets). Overall, the use of BUDM under the mitigation plan is expected to generate 8,976.6 wetland credits—more than *four times* the number of credits Driftwood would have been required to purchase from a mitigation bank.[26] Given this stark difference, there is a clear "rational connection between the facts found and the choice made" by the Corps. *See State Farm*, 463 U.S. at 43.

Petitioners ask this Court to second-guess the LRAM calculations used by the Corps, arguing that the BUDM will offset "high quality" wetlands with "low-quality restored wetlands," making the approved mitigation plan inadequate. OB 61. Petitioners, however, ignore that the LRAM score totals, assessing functional replacement value of the restored wetlands, already account for wetland quality and functional capacity. *Basinkeeper*, 894 F.3d at 701; *see also* LRAM Version 2.0, *supra* at 12 (impact value calculation accounts for wetland status and

[26] Under the approved plan, 185 acres of estuarine and PEM/PSS wetlands are to be offset using BUDM. AR257, 259. As the Corps explained, the LRAM calculations showed Driftwood would have needed to purchase 1,489.2 brackish/salt marsh credits and 448.1 fresh/intermediate marsh credits to offset impacts to these 185 acres. AR301, 433-36 (LRAM sheets).

condition). Because the proposed BUDM would produce wetlands whose functional capacity, at first, would be lower, the LRAM requires that more acres of these restored wetlands be used to offset Project impacts. This is why the Corps concluded that offsetting 185 acres of impact required the restoration of more than 645 acres, AR300, the equivalent of four times the number of mitigation credits. *See* RB 55-57.

Predicting wetlands functionality and determining how much compensatory mitigation is required involves complex scientific judgments that are particularly within the Corps' expertise. Here, the Corps' decision is fully supported by the record and is subject to deference to the Corps' expert scientific judgment. *Basinkeeper*, 894 F.3d at 701. Thus, there is no basis to second-guess the agency's expert determination. *State Farm*, 463 U.S. at 43.

In addition, the Corps' decision to approve the use of BUDM in the mitigation plan was purposefully consistent with Louisiana law and environmental goals. AR296-97 (citing the State of Louisiana Master Plan for Coastal Protection (2017)). In promulgating Section 332.3, the Corps made clear that "coordination among federal, state, and local

governments" is encouraged "to avoid duplicate or conflicting compensatory mitigation requirements." 73 Fed. Reg. at 19,607. That is just what happened here.

The State of Louisiana has concluded that "[b]eneficially using dredged material to rebuild wetlands is a strategy whose widespread adoption is universally supported and long overdue." *See* State of Louisiana Master Plan for Coastal Protection at 144 (2017), https://tinyurl.com/378xj3wf.[27] Accordingly, State regulations require that projects expected to generate over 25,000 cubic yards of dredged material either (1) put that material to beneficial use, (2) provide the material for beneficial use by another project, or (3) make a contribution to a state fund. 43 La. Admin. Code, Pt. I, § 723(H)(1)(b)(i)-(iv).

Construction of the Terminal's marine berth will generate over 8 million cubic yards of dredged material. AR420. Once the marine berth pocket is excavated, the Louisiana Coastal Zone will extend into the newly dredged areas, triggering the State regulation requiring beneficial use of the dredged material. AR412, 2440, 2621. The LDNR

[27] The Master Plan is subject to judicial notice as a public record. *See supra* note 3.

Office of Coastal Management therefore joined the Corps in overseeing the permitting process. AR2621; *see also* AR22987 (joint permit application submitted to LDNR and the Corps).

The record shows that the BUDM plan here was developed in coordination with the LDNR to implement the State requirement that dredged material be beneficially used. AR412. Under these facts, it was entirely reasonable for the Corps to take into account the State's BUDM requirements when determining how to best offset project impacts.

2. Petitioners' criticisms do not support second-guessing the approval of the BUDM plan.

The record fully supports the Corps' expert determination that the BUDM was likely to successfully restore wetlands and Petitioners' arguments to the contrary are wholly baseless. As a threshold matter, Petitioners mistakenly assume that mitigation banks are always more successful at restoring wetlands. However, the Corps has found that "mitigation banks have experienced many of the same problems as permittee-responsible mitigation." 73 Fed. Reg. at 19,606. The Section 332.3 preference for mitigation banks that Petitioners rely on "is based on administrative," not "ecological criteria." *Id*. at 19,605. Thus, the

circumstances of each project must be assessed to determine the best path.

Here, the Corps relied on extensive scientific analyses supporting the design and construction plan for the BUDM, which is based on similar successful beneficial use projects in Louisiana. AR484. Pursuant to the BUDM plan, dredged material will be used to recreate the topography of the original coastal marshes before they degraded, converting open water to marshland. AR484-485. By recreating the natural topography of the area, the BUDM ensures dredged material will be placed in a manner that encourages nutrient carbon exchange and the creation of suitable wildlife habitats. AR494. Within a year after construction of the BUDM areas or when consolidation of dredged material in those areas will support planting crews, the BUDM areas will be planted by hand using local vegetative stock grown by licensed wetlands nurseries. AR494-95. Given the success of similar projects throughout the state, the Corps was well within its expert discretion in finding that the BUDM was likely to successfully restore wetlands.

Petitioners also complain that the BUDM will be too slow in creating or restoring wetlands. OB 63. Petitioners argue that it could

take five years before the dredged material settles, which would delay planting. OB 62 (citing AR491). But the very estimate Petitioners cite shows most of the settlement would occur within the first two years. AR491. Moreover, the schedule set out in the BUDM plan approved by the Corps—which Driftwood is required to adhere to as a condition of the permit—provides that the site must "have substrate suitable for marsh vegetation growth" within one year, after which point planting can begin. AR496, 11. Driftwood is also required to resolve any issues delaying the restoration within 30 days of notification. AR11 (condition 36.a).

Finally, Petitioners claim the BUDM contains insufficient performance standards. OB 62. But, as Petitioners acknowledge, the mitigation plan requires that there be "substrate suitable for marsh vegetation growth" within a year of material placement, and that 80% of the areas suitable for marsh vegetation be vegetated with native wetland species after three growing seasons. AR496. And these are not the only performance criteria. The plan also includes performance criteria to monitor marsh elevation, water turbidity, tidal exchange, and successful revegetation. *See* AR490-495.

The Permit approval includes a lengthy, detailed plan for the BUDM (AR404) as part of the broader mitigation plan. Full compliance with that BUDM plan is an explicit requirement of Driftwood's Section 404 Permit. AR11 (condition 36). Driftwood is also required to provide the Corps with detailed monitoring reports for at least 20 years after completing the BUDM project. AR12, 903 (condition 11(b) imposing a similar monitoring requirement by LDNR). If the BUDM does not adequately meet benchmarks, both the Corps and LDNR can require additional compensatory mitigation "to fully offset any temporal lag in benefits accrued, or to offset any unrecoverable deficiencies in the BUDM Plan." AR11 (Corps condition 36.a), *see also* 903 (LDNR condition 11(b)). These conditions provide robust assurances that adequate mitigation will be provided. *Cf. Shrimpers*, 2023 WL 108558 at *6 (deference is particularly warranted where an agency decision is "based upon [an] evaluation of complex scientific data within [the agency's] technical expertise.").

3. Petitioners' other concerns do not provide a basis to second-guess the Corps decision.

Petitioners argue that the Corps failed to address potential concerns with the BUDM plan. OB 63-69. First, Petitioners argue that

the Corps failed to address LDWF's suggestion to add fish gaps to a rock dike abutting BUDM area 4. OB 63-64. Petitioners ignore that after Driftwood explained that the rock dike had been erected by the State to combat erosion—a goal that would be severely undermined by creating gaps in the dike—LDWF withdrew its concerns. AR2275, 3470-71, 3473; *see* RB 59-60.[28]

Next, Petitioners complain that the dredged material to be used for the BUDM could be contaminated. OB 65. This issue was raised and resolved during the FERC process, in which the Corps was heavily involved as a cooperating agency. *See* AR2573-77, RB60-63. Notably, neither Petitioners nor any other commenters raised any further concerns about contamination before the Corps during the comment period. *See* AR263-76 (Corps response to comments). Since the record also did not raise concerns about contamination, the Corps was not obligated to second-guess the EIS's no-contamination determination. *See Public Citizen*, 541 U.S. at 764-65.

[28] In doing so, LDWF noted that notwithstanding any possible issues with area 4, area 8—which was fully ecologically functional—would produce far more credits than required to offset project impacts. AR2326-27.

The record examined by the Corps shows that the area where Driftwood will be dredging is not contaminated. AR2574-76, 3131, 3133. The EIS thoroughly examined the possibility of contamination (from a concrete pit located outside the LNG facility footprint) in the area Driftwood would be dredging. *See* AR3131, 3133. Based on historical State records and updated test results, the EIS determined the dredging area was not contaminated. AR2574-76; *see also* AR2575 (map identifying contaminated area).[29]

In addition, Petitioners assert that the Corps should have revisited the EIS's findings because, in their view, FERC wrongly used Louisiana state contamination standards to determine whether the dredged material was suitable for beneficial use. OB 67. That, of

[29] Petitioners argue that the FERC EIS erroneously found there was no contamination outside the historical shipyard site. OB 67. But the question before FERC was not whether there was contamination outside the shipyard site; it was whether Driftwood would be dredging in a contaminated area. FERC identified the boundaries of the contamination and found the contaminated area would not be dredged. AR2576. In any event, Petitioners could have—but did not—raise this argument in a challenge to the FERC order. Petitioners cannot raise this argument now when they "failed to avail themselves of the exclusive review scheme established by Congress under [15 U.S.C. § 717r] for adjudicating" disputes arising from FERC's decision. *Adorers of the Blood of Christ United States Province*, 53 F.4th at 65.

course, is not an issue Petitioners ever raised to the Corps. Thus, this attempt to sandbag the Corps for failing to expressly address an issue Petitioners never raised to the Corps is wholly improper. *Shrimpers*, 2023 WL 108558, at *3 (citing the failure to "alert the agency to their position in order 'to allow the agency to give the issue[s now raised] meaningful consideration'" at the appropriate time).

In any event, the argument is without merit. The dredged material was found suitable for beneficial use pursuant to Corps guidelines using the Inland Testing Manual ("ITM"). *See* AR915; 2574.[30] The ITM provides that if "readily available, existing information" is sufficient to determine the presence of contamination, no further testing is required. ITM, *supra* note 30 at 3-1. Here, the EIS explained that there was sufficient information to make an ITM no-contamination determination based on the LDEQ's historical records and the recent testing of the area where the dredging will take place, which showed no contamination. AR915, 2574-76, 3884. This was a

[30] *See also* Evaluation of Dredged Material Proposed for Discharge in Waters of the U.S. – Testing Manual (1998), https://tinyurl.com/5n89pxd8. The ITM is subject to judicial notice as a public agency record. *See supra* note 3.

well-reasoned conclusion that is supported by the record.

In addition to FERC's finding that the dredging area was not contaminated, the record before the Corps contained Driftwood's Risk Management Plan, which was approved by the State agency responsible for water quality, the LDEQ. This plan explains the procedures Driftwood would implement to avoid any areas where contamination was a concern. AR2576-77, 3131-50.[31] LDEQ's confidence in the plan and the water quality testing data led it to issue a Section 401 Water Quality Certification to Driftwood.[32] AR2577, 4580.

The Corps' decision to approve BUDM—based on the detailed Risk Management Plan and findings from both FERC and LDEQ that the area subject to dredging was not contaminated—was hardly arbitrary and capricious. This Court should decline Petitioners' invitation to

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[31] Adherence to this plan is a condition of the FERC order. *See* 167 FERC ¶ 61,054 at 47 (condition 1). And, under the LDEQ-approved Unanticipated Discoveries plan, in the unlikely event that contaminated material is encountered, Driftwood must immediately stop dredging, contain the suspect material, and contact regulatory authorities. AR2576-2577, 3152, 3160.

[32] Applicants for Section 404 permits for discharges into navigable waters must first obtain a 401 certification that such discharges will comply with state water quality standards. 33 U.S.C. § 1341(a)(1); *see also O'Reilly v. U.S. Army Corps of Eng'rs*, 477 F.3d 225, 229 n.2 (5th Cir. 2007).

"substitute its judgment" of the four expert agencies—the Corps, FERC, LDEQ, and LDNR. *See State Farm*, 463 U.S. at 43.

IV. There Is No Basis For Vacatur.

Finally, Petitioners' demand for the extraordinary remedy of vacatur (OB 69) is baseless. Vacatur is warranted only where the flaws in the agency's approach are so "fundamental" that the agency "must redo its analysis from the ground up." *North Carolina v. EPA*, 531 F.3d 896, 929 (D.C. Cir. 2008). Arguments that an agency needs to further explain a decision or "cure [the] defect" do not support vacatur. *Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 198 (D.C. Cir. 2009); *Radio–Television News Dirs. Ass'n v. FCC*, 184 F.3d 872, 888 (D.C. Cir. 1999); *see also Texas Ass'n of Mfrs. v. United States Consumer Prod. Safety Comm'n*, 989 F.3d 368, 389 (5th Cir. 2021) (vacatur is unwarranted if "there is at least a serious possibility that the agency will be able to substantiate its decision given an opportunity to do so."). Any claimed failure of not addressing an unavailable site (already permitted to another project) hardly qualifies as such a "fundamental flaw." And Petitioners' technical complaints about the compensatory mitigation analysis, even if accepted, do not present a situation where

the Corps must "redo" its analysis "from the ground up." *North Carolina*, 531 F.3d at 929.

Moreover, the "the disruptive consequences of vacatur" counsel strongly against the remedy of vacatur. *Texas v. Biden*, 20 F.4th 928, 1000 (5th Cir. 2021), *rev'd and remanded on other grounds*, 142 S. Ct. 2528 (2022); *see also Cent. & S. W. Servs., Inc. v. EPA*, 220 F.3d 683, 692 (5th Cir. 2000). The extraordinary remedy of vacatur would be extremely disruptive at this late date. As stated, Driftwood's investment in the Project, which it made in reliance on the Permit, now totals approximately $1 billion. Driftwood's considerable investment has advanced the Project by securing the necessary land, improving roads and other infrastructure, completing engineering and design work, securing necessary permits, and other expenses crucial to the Project. More than 200 people currently work on site, and Driftwood has cleared and leveled approximately 450 acres, installed approximately 5,500 precast piles, and poured significant volumes of concrete foundation, among other milestones.

Vacating the Permit would trigger a suspension of Driftwood's FERC work authorization and would halt the Project. *See* 167 FERC

¶ 61,054, 61,347 (condition 10). This would cause harmful delays to the ongoing wetlands restoration efforts, impact hundreds of workers at the Project site, trigger potential contractual issues, and cause severe financial hardship to Driftwood and its investors and subcontractors.

There is no possible justification for forcing this extreme disruption on Driftwood and the local community for the Corps to "cure" the alleged defects in the Permit here. *See Alabama Ass'n of Ins. Agents v. Fed. Rsrv.*, 533 F.2d 224, 236 (5th Cir. 1976) (court will not vacate agency action "because of merely formal or technical flaws."), *vacated in part on other grounds by,* 558 F.2d 729 (5th Cir. 1977). That is particularly so because Petitioners—who knew about the Project for more than six years and sat on their hands for three years after the Permit was issued—have long since forfeited any claim to equitable relief in the form of vacatur. *Supra* at 27-33; *see Texas v. Biden*, 20 F.4th at 942.

CONCLUSION

For the foregoing reasons, and those provided in Respondent's brief, the Petition should be dismissed.

Respectfully submitted,

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January 25, 2023

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on January 25, 2023.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because this brief contains 12,861 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

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