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

REPLY BRIEF OF PETITIONERS

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Dated: February 8, 2023

CERTIFICATE OF INTERESTED PERSONS
CASE 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.

Petitioners

1. Healthy Gulf; and
2. Sierra Club

Petitioners are nonprofit organizations. Healthy Gulf is organized and exists under the laws of Louisiana. Sierra Club is organized and exists under the laws of California.

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GLOSSARY

The following acronyms and abbreviations are used in this brief:

APA	Administrative Procedure Act
Corps	United States Army Corps of Engineers
EA	Environmental Assessment
EIS	Environmental Impact Statement
EPA	Environmental Protection Agency
FERC	Federal Energy Regulatory Commission
Healthy Gulf.	Petitioners Healthy Gulf and Sierra Club
LNG	Liquefied Natural Gas
LRAM	Louisiana Wetland Rapid Assessment Method
NEPA	National Environmental Policy Act

INTRODUCTION

The Corps' attempts to excuse its violations of the Clean Water Act § 404(b) Guidelines fail.

The Corps' decision to issue the Driftwood § 404 permit was arbitrary because it failed to explain its rejection of—or even to consider—an alternative site ("Alternative Site 6") that would have impacted at least 50 fewer acres of wetlands, reducing wetlands impacts by 15%. AR2524, 3245. The Corps does not dispute that this alternative would impact fewer wetlands. *See* Corps' Br. 23-39. And the Corps concedes that it did not consider this alternative. *Id.* at 31.

Yet, the Corps seeks to avoid liability for this inadequate analysis in two ways. First, the Corps argues Healthy Gulf waived this claim by not mentioning Alternative Site 6 in its comments to the Corps. This alternative was, however, both obvious and otherwise brought to the Corps' attention through public comments to FERC, on which the Corps was copied, that prompted analysis of that alternative in the final EIS that the Corps adopted when issuing its permit. The Corps even

discussed those comments internally and included them in the administrative record, indicating it was aware of Alternative Site 6.

Second, the Corps has identified for the first time in its brief a § 404 permit for an allegedly conflicting, completely different project—Big Lake Fuels—which it admits it neither considered nor mentioned in the administrative record. Yet, essential information like the most recent permit is missing. Regardless, the Corps' failure to analyze Alternative Site 6 under the Clean Water Act § 404(b)(1) Guidelines was arbitrary, regardless of whether *post-hoc*, extra-record evidence shows that site was partially covered by the Big Lake Fuels permit. And serious questions requiring remand remain unresolved, including whether the Big Lake Fuels permit entirely precludes Alternative Site 6 and whether the Corps would reach different outcomes with respect to alternatives, cumulative impacts, or mitigation.

The Corps also seeks to justify its failure to apply 33 C.F.R. § 332.3(b)'s rigid mitigation hierarchy. The Corps asserts an argument counter to this Court's holding in *Atchafalaya Basinkeeper v. U.S. Army Corps of Engineers*, 894 F.3d 692, 699-700 (5th Cir. 2018), and to its

own position in that case. Rather than consider and apply the first element required, wetlands mitigation bank credits, it chose the very last alternative: off-site, permittee-responsible wetlands creation. Corps Br. 48. Because the Corps lacks discretion to do so, *see Basinkeeper*, 894 F.3d at 699-700, its mitigation decision was arbitrary, capricious, and an abuse of discretion under 5 U.S.C. § 706(2)(A).

Driftwood's equitable laches defense—not raised by the Corps—similarly fails. Laches is unavailable where, as here, suit was filed within the statute of limitations. Regardless, Driftwood failed to demonstrate that Healthy Gulf's filing was unreasonably delayed and caused significant prejudice.

The Court should vacate the Driftwood permit under 5 U.S.C. § 706(2)(A). Neither of the two equitable vacatur exceptions apply. First, the Corps' errors are significant and not easily remedied on remand. And, second, potential temporary construction delay is not a sufficient reason to avoid vacatur.

ARGUMENT

I. The Corps' Failure to Consider Alternative Site 6 Violated the § 404(b) Guidelines and was Arbitrary and Capricious.

A. Because Alternative Site 6 was obvious and brought to the Corps' attention, exhaustion does not bar Healthy Gulf's claim.

Delaware Riverkeeper Network v. U.S. Army Corps of Engineers is on point concerning exhaustion. 869 F.3d 148, 155 (3rd Cir. 2017). There, the plaintiff's § 404 comment did not address the alternative at issue. Recognizing that NEPA challenges are subject to a prudential waiver rule, the court declined to address whether that rule applies to a Clean Water Act challenge because, even if it did, the plaintiff had "not waived its claims" under two exceptions. *Id.*

First, because "the agency bears the primary responsibility to ensure that it complies with" its obligations, "flaws might be so obvious that there is no need for a commentator to point them out specifically." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 765 (2004); *Del. Riverkeeper*, 869 F.3d at 155 (same). The Fifth Circuit has recognized this exception as well. *See Shrimpers & Fishermen of the RGV v. U.S.*

Army Corps of Eng'rs, 56 F.4th 992, 997 (5th Cir. 2023) (petitioners "'must structure their participation to alert the agency to their position in order 'to allow the agency to give the issue meaningful consideration,' unless a flaw is so obvious that there is no need to point out the shortcoming").[1]

Second, "a commenter does not waive an issue if it is otherwise brought to the agency's attention." *Del. Riverkeeper*, 869 F.3d at 154 (quoting *Sierra Club, Inc. v. Bostick*, 787 F.3d 1043, 1048 (10th Cir. 2015)). The Ninth Circuit has consolidated these exceptions into one. *See Barnes v. U.S. Dep't of Transp.*, 655 F.3d 1124, 1132 (9th Cir.

[1] *Shrimpers* applied exhaustion to § 404 claims based on two NEPA cases, without addressing the distinction between the doctrine under the Clean Water Act. 56 F.4th at 999. *But see Sw. Elec. Power Co. v. U.S. EPA*, 920 F.3d 999, 1022 n.23 (5th Cir. 2019) (quoting *Am. Forest & Paper Ass'n v. U.S. EPA*, 137 F.3d 291, 295 (5th Cir. 1998)) ("EPA has failed to identify any provision in the [Clean Water Act] that suggests a party's failure to comment waives its right to seek judicial review."). Regardless, *Shrimpers* is distinguishable because the court found the specific alternative was not raised in *any* comments. 56 F.4th at 998-99; *see also Am. Forest*, 137 F.3d at 295 (failure to raise an issue in comments did not constitute waiver where other comments had raised it); *Sw. Elec. Power Co.*, 920 F.3d at 1022 n.23 (following *Am. Forest* over more recent, conflicting precedent and holding that omission of an issue from comments did not waive it).

2011) (the "so obvious" standard requires the agency "have independent knowledge of the issues").

Whether one exception or two, Alternative Site 6 was both "obvious" and "brought to the agency's attention," for two reasons. *See Del. Riverkeeper*, 869 F.3d 148; *Bostick*, 787 F.3d at 1048.

First, FERC identified Alternative Site 6 in Section 3.5.1.1 of its EIS. AR2524. As a cooperating agency, the Corps was required to "[p]articipate in the NEPA process at the earliest practicable time." 40 C.F.R. § 1501.8(b)(1). AR2383. FERC specifically requested the Corps' help to develop an EIS that the Corps could adopt "without the need to" supplement. AR10805. And the Corps ultimately adopted all of EIS Section 3.5. AR256 (noting sections of the final EIS are "identified and incorporated by reference" throughout), AR279 (adopting "FEIS Section 3.5").

Second, this alternative was brought to the Corps' attention by Kenneth Teague, a PWS Certified Senior Ecologist, who submitted comments to FERC, copying the Corps. He stated that the draft EIS did "not adequately evaluate all the reasonable alternatives." AR3245.

Including a map from the U.S. Fish and Wildlife Service National Wetlands Inventory, he identified the Alternative Site 6 location as a "better alternative" that would "impact fewer wetlands, and may not contain contaminated soils." AR4522-23, 4387-88, 3252. FERC subsequently called this location "Alternative Site 6." AR3245.

The Corps was well aware of this comment, and Corps employees discussed how to address it. AR4516 (Corps staffer noting that Teague had sent "at least 4 emails" detailing concerns about the FERC draft EIS), AR4381 (emails between Corps staff regarding how to respond to Teague in October 2018). FERC's final EIS also reproduced Teague's comment. AR3245. And Teague resubmitted his concerns to the Corps (and FERC) in response to the final EIS. AR1921-23. Even Driftwood brought Teague's comments to the Corps' attention. AR4417.

While the Corps suggests otherwise, Corps. Br. 29, the comment was sufficient to put the Corps on notice as it triggered FERC to include Alternative Site 6 in the final EIS. *See Nat'l Parks & Conservation Ass'n v. Bureau of Land Mgmt.*, 606 F.3d 1058, 1065 (9th Cir. 2010) (issues only need to be raised with "sufficient clarity" to be exhausted).

Additionally, the Corps must "pay particular attention to the display in the final EIS of comments received on the draft EIS." 33 C.F.R. § 230.19(c). To be clear, the Corps' § 404 alternatives analysis must be more rigorous than FERC's NEPA analysis. 40 C.F.R. § 230.10(a)(4); *see also Del. Riverkeeper*, 869 F.3d at 156; *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1262 n.12 (10th Cir. 2003) ("[U]nder the [Clean Water Act], it is not sufficient for the Corps to consider a range of alternatives to the proposed project: the Corps must rebut the presumption that there are practicable alternatives with less adverse environmental impact."). And where, as here, the Corps adopted FERC's analysis, the Corps must conduct the basic due diligence of examining that analysis, including related comments. 40 C.F.R. § 1506.3 (authorizing a cooperating agency to adopt the lead agency's EIS only after "independent review"). This "alternative is thus fair game for litigation and cannot come as a surprise to the Corps." *Del. Riverkeeper*, 869 F.3d at 155.

The Corps also objects that FERC's EIS and the Teague comment were submitted after its comment period. Corps Br. 28-29. But that is

immaterial because they were both known to the Corps well before its May 2019 Memorandum for the Record. AR322. The final EIS was dated January 2019. AR2383. Teague's submitted comments on the draft and final EIS in October 2018, AR4520, and January 2019, AR1921-23, respectively.

Nor could Teague—or any commenter—have identified or critiqued specific alternatives based on the Corps' public notice, which provided no information about possible alternatives. AR4776-80.[2] Thus, the public at large had no alternatives analysis on which to comment until FERC's EIS. Like in *Delaware Riverkeeper*, it was "impracticable" to formally lodge specific comments about Alternative Site 6 during the Corps' 20-day notice period in March 2018. 869 F.3d at 156. Nevertheless, Healthy Gulf and EPA noted the Corps' obligation to avoid filling wetlands unless there is no alternative. AR5793-94, 5737. While not necessary, these comments reiterated the Corps' obligation to

[2] This notice also omitted mention of the Big Lake Fuels project, making it impossible for individuals to comment on potential overlap.

carefully evaluate alternatives, including those subsequently identified in the EIS.

In sum, "[b]ecause the Corps had independent knowledge'" of Alternative Site 6, and that alternative was "obvious" in FERC's EIS, Healthy Gulf did not need "to point [it] out specifically in order to preserve its" claim. *See Pub. Citizen*, 541 U.S. at 765; *Del. Riverkeeper*, 869 F.3d at 156.

B. The Corps' error was not harmless.

1. The Corps did not consider the Big Lake Fuels Project, and it is not in the administrative record.

The Corps' and Driftwood's harmless error argument violates two core tenets of administrative law. First, judicial review of agency actions is confined to the record. *Camp v. Pitts*, 411 U.S. 138, 142 (1973). Second, agency action can only be upheld upon the rationale the agency presented in making its decision. *Sec. & Exch. Comm'n v. Chenery Corp.*, 318 U.S. 80, 95 (1943); *Texas v. U.S. EPA*, 829 F.3d 405, 425 (5th Cir. 2016).

The record is silent on Big Lake Fuels. Nevertheless, with its brief, the Corps filed a Motion for Judicial Notice of over 110 pages of

materials pertaining to the Big Lakes Fuels project. Corps Br. 33 n.5. These are extra-record and inadmissible. *See* Healthy Gulf's Resp. to Corps' Mot., ECF No. 109. Even if the Court takes judicial notice, the documents are not in the record.

Regardless, the Corps' argument is a prohibited *post-hoc* rationalization that does not establish harmless error. *Texas*, 829 F.3d at 425. Because the Corps did not discuss Alternative Site 6, it never identified Big Lake Fuels as a reason for rejecting that alternative. AR2524.

The authorities cited in the Corps' brief demonstrate that harmless error must be established in the record based on the agency's explanation for its decision. Corps Br. 31, 37-38. For example, in *Wages and White Lion Investments, LLC v. Food and Drug Administration*, the agency's failure to consider detailed marketing plans was harmless where it had considered plan summaries and explained in the administrative record why consideration of detailed plans would not alter its ultimate decision. 41 F.4th 427, 439-42 (5th Cir. 2022), *vacated pending reh'g en banc by* -- F.4th --, 2023 WL 312977 (5th Cir. 2023);

see also Tex. Tech Physicians Assocs. v. U.S. Dep't of Health & Human Servs., 917 F.3d 837, 846-47 (5th Cir. 2019) (basing harmless error on administrative record evidence of contemporaneous agency findings that nullified otherwise unconsidered defenses); *City of Arlington v. Fed. Commc'ns Comm'n*, 668 F.3d 229, 243-44 (5th Cir.), *aff'd*, 569 U.S. 290 (2012) (notice and comment violation was harmless where administrative record showed federal register notice sufficiently raised the issue such that dozens of entities, including plaintiffs, successfully commented).[3] The Corps cited several new cases for the first time in its Reply in Support of Motion for Judicial Notice, ECF No. 115 at 4, where the alleged harmless error was based on new *legal* arguments or intervening precedent. *See Oglala Sioux Tribe v. U.S. Nuclear Regul. Comm'n*, 45 F.4th 291, 300 (D.C. Cir. 2022); *Envirocare of Utah, Inc. v. Nuclear Regul. Comm'n*, 194 F.3d 72, 79 (D.C. Cir. 1999). Another reversed the lower court's finding of error because the administrative

[3] The Corps' Motion for Judicial Notice, ECF No. 94 at 7, further cites *National Association of Home Builders v. Defenders of Wildlife*, which also found harmless error based on record evidence. 551 U.S. 644, 659 (2007).

record showed the agency's "command is not seriously contestable." *See Nat'l Lab. Rels. Bd. v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969). None of those cases are applicable here.

Because the harmless error argument here is both extra-record and a *post-hoc* rationalization, the Court should reject it.

2. The Big Lake Fuels materials do not demonstrate the Corps' error was clearly harmless.

This complete silence on Alternative Site 6 materially impacted the Corps' analysis and prejudiced Healthy Gulf. *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 444 (5th Cir. 2001) ("Agency mistakes constitute harmless error only where they 'clearly had no bearing on the procedure used or the substance of decision reached.'").

The only support for the Corps' argument is the proposed judicial notice materials. Even if the Court accepts them, those materials establish only: (1) that the Big Lake Fuels permit was issued in 2015 and expired in 2020; and (2) that the permit authorized construction within an unknown portion of Alternative Site 6. Corps Br. 33 n.5.

These bare facts raise more questions than answers and leave central issues in dispute. For example, what percentage of Alternative

Site 6 would Big Lake Fuels occupy? Is there space for both facilities' riverfront needs? Instead of answering, the Corps asks the Court to compare two maps, *id.* at 35-36—that are different sizes, show different geographical features, and have seemingly different perspectives—leaving this Court to weigh this evidentiary question in the first instance. *Rhoa-Zamora v. Immigr. & Naturalization Serv.*, 971 F.2d 26, 34 (7th Cir. 1992) ("[A]n appellate court is not the appropriate forum to engage in fact-finding in the first instance."). Even if Big Lake Fuels occupies some of Alternative Site 6, could Driftwood also use the site? Is the Big Lake Fuels project defunct, such that it would be irrelevant on remand? Could Driftwood transfer LNG for loading onto ships offsite, as other LNG facilities propose to do? The materials fail to answer these necessary questions. And had the Corps considered Alternative Site 6 or referenced Big Lake Fuels, the public could have raised these same questions.

The Corps has not established that this permit renders Alternative Site 6 unavailable. 40 C.F.R. § 230.10(a)(2) (Corps must consider alternatives not presently owned by the applicant). The Corps

solely provides the 2015 permit, which expired in 2020. The Corps has not provided a copy of the modified permit purportedly issued January 8, 2021, so there is no information on its terms and conditions, configuration, expiration date, or anything else.[4] Nor has the Corps demonstrated that work on the Big Lake Fuels site has commenced or will occur.

Given this dearth of evidence, the Corps has not clearly demonstrated its error was harmless. *Sierra Club*, 245 F.3d at 444 ("Absence of such prejudice must be clear for harmless error to" apply). *Cf. Envirocare*, 194 F.3d at 79 (harmless error where "there is not the slightest uncertainty as to the outcome" on remand due to intervening legal precedent); *Wyman-Gordon Co.*, 394 U.S. at 766 n.6 (plurality) (overturning lower court's remand when "[t]here is not the slightest uncertainty as to the outcome of a proceeding" because the agency's "command is not seriously contestable"). Rather, the Corps has many questions to answer on remand. *Rhoa-Zamora*, 971 F.2d at 34.

[4] The Corps' Motion attached a screenshot of its online permit tracker, but did not request judicial notice of that screenshot, Motion at 3, so the Court cannot consider it.

Furthermore, because the Corps' "error plainly affected the procedure used, [the Court] cannot assume that there was no prejudice to petitioners." *See U.S. Steel Corp. v. U.S. EPA*, 595 F.2d 207, 215 (5th Cir. 1979). The Corps' omission from its analysis of the allegedly obvious Big Lake Fuels permit calls into serious question the thoroughness and accuracy of that analysis. The Corps may well discover additional unconsidered alternatives on remand.

The Corps' reply on judicial notice asserts that Healthy Gulf waived any argument that the Corps did not follow proper procedure. Reply 7-8, ECF No. 115. But Healthy Gulf's initial brief asserted that the Corps violated 40 C.F.R. § 230.10's procedure for approving § 404 permits and the Administrative *Procedure* Act by entirely failing to consider an important aspect of the problem. *See, e.g.*, Initial Br. 17, 20, 35-37, 42-44, 46. Regardless, the Corps' error plainly impacted "the substance of decision reached" and thus cannot be harmless. *Sierra Club*, 245 F.3d at 444.

3. *Shrimpers* and *Shoreacres* are inapposite because the Corps considered the alternative permit in those cases.

The Corps and Driftwood argue that the mere existence of the Big Lakes Fuels permit is dispositive because a site covered by another § 404 permit is not "available" and is thus "impracticable." Corps Br. 31-32; Driftwood Br. 35.[5] Neither case they cite—*Shrimpers and Fishermen of the RGV*, 56 F.4th 992 nor *City of Shoreacres v. Waterworth*, 420 F.3d 440 (5th Cir. 2005)—controls here.

In *Shrimpers*, the court upheld the Corps' conclusion that an alternative pipeline was unavailable because the Corps considered and rejected that alternative. 56 F.4th at 999. Here, the Corps concedes it did not consider Big Lake Fuels. Corps Br. 31.

Shoreacres also upheld the Corps' stated rejection of an unavailable site. The Corps rejected the alternative site for two reasons not at issue here: it was not "logistically feasible" because the permittee could not acquire the site with bonds, and it would not meet the "overall

[5] Driftwood further argues the claim is moot. Driftwood Br. 39-41. That argument fails for the same reasons that the Corps' error is not harmless.

project purpose." *City of Shoreacres*, 420 F.3d at 448. The Corps also argued another § 404 permit covered the site, but unlike this case, there is no indication that this was not the Corps' rationale during the permitting process or that the alternative permit was extra-record. *Id.* The Corps there further identified "a serious impediment" to obtaining land at the alternative site. *Id.* Here, the Corps did not consider Alternative Site 6 let alone whether Driftwood would face "serious impediment[s]" to obtaining it.

II. The Compensatory Mitigation Hierarchy Is a Legal Question, and the Corps Is Not Entitled to Deference.

A. *Basinkeeper* rejected arguments that § 332.3(b) allows flexibility.

The Corps concedes that Driftwood's permittee-responsible dredged material plan is at the bottom of 33 C.F.R. § 332.3(b)'s compensatory mitigation hierarchy. Corps Br. 48. But the Corps pushes back against "Healthy Gulf's view" that the Corps must "mechanically" pursue mitigation bank credits before permittee-responsible mitigation. Corps Br. 40. This is not "Healthy Gulf's view"—it is the holding in *Basinkeeper*. That the regulations establish a strict hierarchy has been

resolved, and the Corps is not entitled to deference. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) ("If uncertainty does not exist, there is no plausible reason for deference.").

In *Basinkeeper*, the Corps asserted that it need not analyze permittee-responsible mitigation because the regulations established a "strict priority" order. 310 F. Supp. 3d 707, 731 (M.D. La.), *vacated and remanded*, 894 F.3d 692 (5th Cir. 2018) (describing the Corps' argument). This Court agreed: "the district engineer *shall consider* the type and location[s] options *in the order presented*" in 33 C.F.R. § 332.3(b)(2)-(6). *Basinkeeper*, 894 F.3d at 699-700 (quoting 33 C.F.R. § 332.3(b)(1)) (emphasis added by the Court).

The Corps now asks this Court to overrule *Basinkeeper* by finding that the hierarchy is an overridable preference. Corps Br. 41-42. This argument is virtually identical to arguments that this Court already rejected. In *Basinkeeper*, the district court relied on the same provisions the Corps now cites, criticizing the Corps' failure to provide the rigorous analysis necessitated by flexibility in 33 C.F.R. § 332.3(b). 310 F. Supp. 3d at 731-35 (quoting § 332.3(b)(2)) ("[T]hese same considerations may

also be used to override this preference, where appropriate."). This Court overturned the district court's determination that 33 C.F.R. § 332.3(b) did not "impos[e] a mechanical and rigid hierarchy," holding that the district court "was incorrect" about any flexibility. *Basinkeeper*, 894 F.3d at 699.

The Corps also points to *Basinkeeper*'s separate holding regarding flexibility under 33 C.F.R. § 332.3(e)(1), arguing that the same flexibility applies to § 332.3(b)'s mitigation hierarchy. Corps Br. 43. But § 332.3(e)(1) merely provides that, "[i]n general, in-kind mitigation is preferable to out-of-kind mitigation . . . ." This general preference is inherently more flexible than § 332.3(b)(1)'s explicit requirement that the Corps "shall consider" mitigation bank credits first.

B. Even if the Corps can deviate, it declined to justify its deviation here.

The Corps concedes that stating it complied with the mitigation hierarchy is error. Corps Br. 51; AR301. According to the Corps, then, the "question is whether the Corps sufficiently documented its decision to" depart from the hierarchy. Corps Br. 48. It did not.

The Corps noted "N/A" instead of providing justification. AR301. Even if it hadn't, the Corps failed to identify whether mitigation bank credits were available, let alone their type, quality, and locations. Without this information, the Corps could not—and did not—weigh unidentified mitigation bank credits against the dredged material plan.

C. The Corps' post-hoc rationalizations fail to justify its deviation.

Perhaps recognizing that its decision to mark "N/A" left a gaping hole in the record, the Corps now presents several *post-hoc* rationalizations, claiming it implicitly provided sufficient justification through: (1) the Louisiana Rapid Assessment Method ("LRAM") worksheets; (2) a sentence restating Driftwood's position; and (3) other, unrelated portions of the record. Corps Br. 46-52.

The Court cannot consider these post-hoc rationalizations. *Texas*, 829 F.3d at 425. Regardless, they do not demonstrate that the Corps compared the dredged material plan with mitigation bank credits.

1. The Corps cannot rely on its LRAM worksheets to justify deviating from the rigid hierarchy.

The Corps' reliance on the LRAM is misplaced, for two reasons.

First, neither the LRAM manual nor the specific LRAM worksheets here discuss the mitigation hierarchy. The LRAM manual offers one worksheet for mitigation bank credits and another for permittee-responsible mitigation, but it does not explain when or how to compare mitigation methods. *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* at 38-39 (2017). The LRAM worksheets simply help calculate how many acres would offset destroyed wetlands, assuming the dredged material plan is the correct mitigation type. AR301 (listing LRAM as providing the "[r]ationale for required compensatory mitigation *amount*" (emphasis added)).

Second, as an informal agency policy, the LRAM cannot override 33 C.F.R. § 332.3(b)'s mandatory hierarchy. This Court endorsed reliance on the LRAM in *Basinkeeper* where the Corps' decision to approve mitigation banks *complied* with the hierarchy. 894 F.3d at 701. But to the extent that *Basinkeeper* allowed using the LRAM to deviate from § 332.3(e)'s preference for in-kind mitigation, it did not hold that the LRAM could override § 332.3(b)'s mandatory hierarchy. Nor could

it. *Medellin v. Bustos*, 854 F.2d 795, 799 (5th Cir. 1988) (a regulation "carries the force of law" and must be "give[n] effect" over an agency's informal technical guidance).

2. The Corps' recitation of Driftwood's position was not an independent justification for deviating from the hierarchy.

The Corps claims that Healthy Gulf overlooked the Corps' statement that it expected the dredged material plan to outweigh mitigation bank credits. Corps Br. 52. But the Corps was simply restating *Driftwood's* position, not the Corps' independent conclusion:

> Through initial discussions with the USACE and LDNR-OCM, *Driftwood proposes that* . . . these results are expected to outweigh the traditional mitigation bank credit program[.]

AR299 (emphasis added).

Regardless, this conclusory statement fails to justify overriding the codified hierarchy. "Mitigation banks typically involve larger, more ecologically valuable parcels, and more rigorous scientific and technical analysis, planning and implementation than permittee-responsible mitigation." 33 C.F.R. § 332.3(b)(2); *see also Basinkeeper*, 894 F.3d at 699-700. Uncritical acceptance of a single sentence from an applicant, without independent analysis, is insufficient here. *Cf. Utahns for Better*

Transp. v. U.S. Dep't of Transp., 305 F.3d 1152, 1165 (10th Cir. 2002) (finding the Corps' NEPA review inadequate because it failed to verify cost estimates used to reject an alternative).

3. The Corps' other *post-hoc* assertions lack rigorous analysis.

The Corps identifies several other reasons that it claims the dredged material plan is preferable to mitigation bank credits. Corps Br. 49-51. None of these were articulated in the record as such and are impermissible *post-hoc* rationalizations. Regardless, each argument fails to resolve the central question here: whether the dredged material plan would restore wetlands *better* than the codified first choice of mitigation bank credits.

D. Technical concerns about the dredged material plan underscore why mitigation bank credits are superior.

Healthy Gulf's technical concerns about the efficacy of the dredged material plan—namely, that the plan lacked sufficient safeguards to guarantee timely and productive wetlands and that the plan could transfer contaminated soils into the deposition areas—underscore why mitigation banks should receive higher preference. The Corps argues

that the broad general assertions of maintenance in its permit, conditions in permits issued by other agencies, and the technical review it conducted will ensure the dredged material plan succeeds. Corps Br. 59-67. But the Corps ignores clear inconsistencies in its own reasoning. *See* Initial Br. 63-69.

III. Driftwood's laches defense is legally barred and meritless.

Citing outdated caselaw, Driftwood, alone, asserts a laches defense. Driftwood Br. 28-33. But laches cannot bar claims, like these, filed within the statutory limitations period. And even if it could, Driftwood failed to satisfy its burden.

A. Laches cannot bar a suit filed within the statute of limitations.

The defense of laches is unavailable where, as here, suit was filed within the statute of limitations. *See Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 677 (2014) (laches could not bar suit brought within the 3-year statute of limitations); *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 580 U.S. 328, 335 (2017) ("Laches is a gap-filling doctrine, and where there is a statute of limitations, there is

no gap to fill." (citing *Petrella*, 572 U.S. at 680-81)). To the extent that Driftwood cites caselaw establishing otherwise, those cases have been invalidated. *See* Driftwood Br. 28-33 (citing cases from 1972-1998).

Healthy Gulf filed its petition within the statutory limitation period. *Sierra Club v. U.S. Dep't of the Interior*, 899 F.3d 260, 267-68 (4th Cir. 2018) (statute of limitations for claims brought under 15 U.S.C. § 717r(d)(1) is either four or six years). Laches is unavailable.

B. Driftwood has not demonstrated laches.

Even if laches were available, "[t]he defendant must show" (1) an inexcusable "delay in asserting a right or claim" that (2) caused "undue prejudice to the party against whom the claim is asserted." *Ecology Ctr. of La., Inc. v. Coleman*, 515 F.2d 860, 867 (5th Cir. 1975).

1. Driftwood fails to demonstrate unreasonable delay.

Even if a statute of limitations does not strictly preclude laches, "there is a strong presumption that a plaintiff's suit is timely if it is filed" within the statute of limitations. *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs*, 781 F.3d 1271, 1286 (11th Cir. 2015).

Moreover, a plaintiff's "need to investigate further can serve as reason for delay." *Id.* at 1285.

In the period between the Corps issuance of the permit and the filing of this lawsuit, the U.S. LNG export industry was largely dormant. In early 2021, two LNG projects were canceled entirely.[6] Numerous developers postponed final investment decisions, and Driftwood *still* has not made one.[7] Between May 2019 and December 2021, only two of 13 FERC-approved LNG projects commenced construction.[8] It was reasonable, then, for Healthy Gulf to hold off on burdening itself, this Court, and the parties with litigation when there was significant reason to doubt that this project would move forward.

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[6] *See, e.g.*, Order Vacating Authorization of Annova LNG, 175 FERC ¶ 61,030 (Apr. 15, 2021), https://elibrary.ferc.gov/eLibrary/filelist?accession_number=20210415-3044&optimized=false.

[7] *See* Initial Br. 71-72.

[8] *See, e.g.*, Magnolia LNG, January 2023 Status Report (February 1, 2023), https://elibrary.ferc.gov/eLibrary/filelist?accession_number=20230201-5147&optimized=false (no construction by December 2022, despite obtaining FERC authorization and § 404 permit in 2016).

Despite this uncertainty, Healthy Gulf diligently investigated this matter. But developing a legal case like this requires time. *See Black Warrior*, 781 F.3d at 1285 (it was reasonable to await Freedom of Information Act responses and investigate case before suing). In November 2021, Sierra Club sent a Freedom of Information Act request for permit materials; the Corps responded in December. Sierra Club then retained an expert to evaluate the permit's legality. Healthy Gulf filed suit roughly three months after receiving the expert's opinion.

Thus, Healthy Gulf filed as soon as it was able to reasonably evaluate the merits of the case. To hold otherwise "would create a powerful and perverse incentive for plaintiffs to file premature and even frivolous suits to avoid the invocation of laches." *Black Warrior*, 781 F.3d at 1285.

2. Driftwood fails to demonstrate prejudice.

Laches requires the proponent to establish "undue prejudice," *Ecology Center of Louisiana*, 515 F.2d at 867, meaning that it was "made significantly worse off" by the delay. *Black Warrior*, 781 F.3d at 1286. The proponent's harm is weighed against potential

"environmental benefits" of proceeding. *Save our Wetlands, Inc. v. U.S. Army Corps of Eng'rs*, 549 F.2d 1021, 1028 (5th Cir. 1977); *Black Warrior*, 781 F.3d at 1286. And laches is heavily disfavored where environmental harms extend beyond a particular plaintiff. *Daingerfield Island Protective Soc'y v. Lujan*, 920 F.2d 32, 37 (D.C. Cir. 1990).

Most of Driftwood's expenses would likely have been incurred regardless of when Healthy Gulf sued, and Driftwood does not show otherwise. *See Baylor Univ. Med. Ctr. v. Heckler*, 758 F.2d 1052, 1058 (5th Cir. 1985). Regardless, Driftwood only alleges it incurred roughly 3% of total project cost,[9] which does not establish prejudice. *See Env't Def. Fund, Inc. v. Alexander*, 614 F.2d 474, 480 (5th Cir. 1980) (no prejudice if the expenses incurred "represent[] a relatively small

[9] At 27.4 million metric tonnes, the entire Driftwood project will cost between $32.9 and $38.4 billion. Corey Paul, *Finding $6B for LNG projects will be 'critical' amid cost pressures – Tellurian*, S&P CAPITAL IQ (Jan. 10, 2023), https://www.capitaliq.spglobal.com/web/client?auth=inherit#news/article?id=73780232&KeyProductLinkType=58&utm_source=MIAlerts&utm_medium=scheduled-news&utm_campaign=Alert_Email&redirected=1 (estimating project costs between $1,200 to $1,400 per metric tonne and noting, "We still don't know where the equity is going to come from" for Driftwood LNG).

percentage of the total expenditures anticipated."); *accord Daingerfield Island*, 920 F.2d at 38-39.

Proceeding with the suit will produce significant environmental benefits. A laches defense cannot lie where, as here, the suit would protect Louisiana's coastal wetlands, which are "among the most productive ecosystems on earth." *Ecology Ctr. of La.*, 515 F.2d at 869.

IV. The Court Should Apply the Standard Remedy of Vacatur.

A. Vacatur is the proper remedy under the APA.

Under 5 U.S.C. § 706(2)(A), "[i]n all cases agency action must be set aside if the action was 'arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.'" *Fed. Commc'ns Comm'n v. NextWave Pers. Commc'ns*, 537 U.S. 293, 300 (2003) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413-14 (1971)). If the agency's decision "'is not sustainable on the administrative record made, then the . . . decision must be vacated and the matter remanded.'" *Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976) (quoting *Camp*, 411 U.S. at 143). Thus, "[t]he

default rule is that vacatur is the appropriate remedy." *Data Mktg. P'ship, LP v. U.S. Dep't of Lab.*, 45 F.4th 846, 859 (5th Cir. 2022).

Departure from that default rule is inappropriate here as the Corps is unlikely to substantiate the same decision on remand and vacatur would not be disruptive. *See Texas v. Biden*, 20 F.4th 928, 1000 (5th Cir. 2021), *rev'd on other grounds*, 142 S. Ct. 2528 (2022); *Allied-Signal, Inc. v. U.S. Nuclear Reg. Comm'n,* 988 F.2d 146, 150-51 (D.C. Cir. 1993).

B. The Corps' violations are serious and not easily remedied.

In this case, the Corps entirely failed to consider an alternative that would have significantly reduced wetlands impacts. While the Corps asks the Court to consider *post-hoc* rationalizations and extra-record materials, they do not cure the Corps' error. *See* Section I.B.2. Nor may the Corps pre-judge the outcome of a re-opened alternatives analysis, including because the public may provide new information to the agency. *See Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 985 F.3d 1032, 1052 (D.C. Cir. 2021) ("When an agency bypasses a fundamental procedural step, the vacatur inquiry asks not whether

the ultimate action could be justified, but whether the agency could, with further explanation, justify its decision to skip that procedural step.").

Similarly, the Corps' blatant failure to follow the requisite hierarchy in determining mitigation cannot be cured by more or better explanation on remand. *See* Section II. Instead, the Corps will have to alter its decision—*i.e.* by changing the mitigation scheme for the project. As a result, vacatur is appropriate because the Corps' analysis is "so crippled as to be unlawful." *Radio-Television News Dirs. Ass'n v. Fed. Commc'ns Comm'n*, 184 F.3d 872, 888 (D.C. Cir. 1999).

This case is fundamentally different from *Central and South West Services, Inc. v. U.S. Environmental Protection Agency*, which the Corps cites for support. Corps Br. 67. There, EPA provided an insufficient rationale for rejecting demands for a national exemption from an electric utility industry rule, but the record showed that the agency had nevertheless evaluated the issue, enabling remand for better explanation based on the record. *Cent. & S. W. Servs., Inc.*, 220 F.3d 683, 692 (5th Cir. 2000).

In contrast, the Corps' errors in this case necessitate conducting a new and adequate permitting process on remand, including new opportunities for public comment. This will involve analyzing the alternative and mitigation bank credits that it failed to consider and, since the Big Lake Fuels project would be new to that analysis, the Corps would have to re-consider its cumulative impacts and mitigation measures in light of that permit as well. *See* 40 C.F.R. § 230.10(a) and (d); 33 C.F.R. § 320.4. It would then make a new decision taking this information into account.

C. Temporary disruption of an applicant's project does not require remand without vacatur.

Some disruption does not necessitate remand without vacatur. *Allied-Signal*, 988 F.2d at 150-151; *see also Friends of the Earth v. Haaland*, 583 F. Supp. 3d 113, 160 (D.D.C. 2022) ("[R]emand without vacatur is not required when there are *any* disruptive consequences, but rather when those consequences are unacceptable in light of the seriousness of the error." (emphasis in original)). To the contrary, vacatur may be appropriate even when it would cause "severe economic disruption." *Texas v. Biden*, 20 F.4th at 1001 (describing *Standing Rock*

Sioux Tribe, 985 F.3d at 1053). While vacatur would necessitate more time, the Corps must conduct a new permitting process to comply with Clean Water Act. *Cf. Steubing v. Brinegar*, 511 F.2d 489, 497 (2d Cir. 1975) ("[C]ompliance with NEPA invariably results in delay and concomitant cost increases, and Congress has implicitly decided that these costs must be discounted.").

Potential project delays alone are not a valid reason for agencies to avoid acting lawfully. *See Realty Income Tr. v. Eckerd*, 564 F.2d 447, 456 (D.C. Cir. 1977) ("'The substantial additional costs which would be caused by court-ordered delay' may well be justified by the compelling public interest in the enforcement of NEPA."). To the contrary, "it would make little sense and cause even more disruption if defendants were to proceed with the project while the" Corps re-evaluates the § 404 permit, "only to subsequently determine that another alternative [or different mitigation] is preferable." *See Friends of the Cap. Crescent Trail v. Fed. Transit Admin.*, 200 F. Supp. 3d 248, 254 (D.D.C. 2016).

This case is distinguishable from the cases the Corps cites, Corps Br. 67-68, which involved nationwide rules impacting entire industries.

See Cent. & S. W. Servs., Inc., 220 F.3d at 692 ("[I]t would be disruptive to vacate a rule that applies to other members of the regulated community."); *Black Warrior*, 781 F.3d at 1291 (remanding to the district court for additional fact-finding on vacatur of Nationwide Permit 12, which could impact hundreds of projects nationwide); *Tex. Ass'n of Mfrs. v. U.S. Consumer Prod. Safety Comm'n*, 989 F.3d 368, 389 (5th Cir. 2021) (declining to vacate an industry-wide rule limiting harmful chemicals in children's toys). Vacatur here, by contrast, would only impact a single permit for a single facility.

Vacatur is unlikely to meaningfully delay Driftwood's completion if the Corps ultimately reaffirms its decision. Driftwood has not secured necessary financing, and the project faces substantial headwinds unrelated to this challenge. *See* Initial Br. 71-73. Even if the project proceeds, construction would take seven years. AR2470. Nor would vacatur meaningfully disrupt national interests in supplying LNG abroad because other, more viable LNG projects are moving forward on a faster schedule. Initial Br. 73-74. Furthermore, vacatur is likely to result in environmental benefits as the Corps will need to conduct a

more comprehensive analysis on remand. *See Sierra Club v. U.S. Army Corps of Eng'rs*, 803 F.3d 31, 43 (D.C. Cir. 2015) ("More extensive environmental analysis could lead the agencies to different conclusions, with live remedial implications.").

CONCLUSION

For the reasons stated above, in addition to those in its initial brief, Healthy Gulf requests that this Court vacate the Corps' § 404 permit for the Driftwood LNG and Driftwood Pipeline projects, and remand to the Corps for consideration of the issues identified herein.

Dated: February 8, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 8, 2023, I electronically filed the foregoing Reply Brief of Petitioners with the Clerk of the Court using the CM/ECF system, which will send notice of such filing to all registered CM/ECF users.

s/ *Louisa Eberle*
Louisa Eberle

CERTIFICATE OF COMPLIANCE

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

1) the type-volume limitations of Rule 32(a)(7) because it contains 6,500 words, excluding the parts of the brief exempted by Rule 32(f); and
2) the typeface and type style requirements of Rule 32(a)(5)-(6) because it has been prepared in a proportionally spaced typeface (14-point) using Microsoft Word (the same program used to calculate the word count).

s/ *Louisa Eberle*
Louisa Eberle

CERTIFICATE OF ELECTRONIC COMPLIANCE

I certify that in the foregoing brief filed using the Fifth Circuit CM/ECF system, (1) the required privacy redactions have been made, Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document, Fifth Circuit Rule 25.2.1; and (3) the document has been scanned for viruses with the most recent version of a commercial virus scanning program, Microsoft Defender Antivirus, which indicated that the document is free of viruses.

s/ *Louisa Eberle*
Louisa Eberle

ADDENDUM

Code of Federal Regulations
Title 33. Navigation and Navigable Waters
Chapter II. Corps of Engineers, Department of the Army
Part 230. Procedures for Implementing NEPA (Refs & Annos)

33 C.F.R. § 230.19

§ 230.19 Comments.

Currentness

District commanders shall request comments as set forth in 40 CFR 1503 and 1506.6. A lack of response may be presumed to indicate that the party has no comment to make.

(a) Time extensions. District commanders will consider and act on requests for time extensions to review and comment on an EIS based on timeliness of distribution of the document, prior agency involvement in the proposed action, and the action's scope and complexity.

(b) Public meetings and hearings. See 40 CFR 1506.6(c). Refer to paragraph 12, 33 CFR part 325, appendix B for regulatory actions.

(c) Comments received on the draft EIS. See 40 CFR 1503.4. District commanders will pay particular attention to the display in the final EIS of comments received on the draft EIS. In the case of abbreviated final EISs, follow 40 CFR 1503.4(c). For all other final EISs, comments and agency responses thereto will be placed in an appendix in a format most efficient for users of the final EIS to understand the nature of public input and the district commander's consideration thereof. District commanders will avoid lengthy or repetitive verbatim reporting of comments and will keep responses clear and concise.

(d) Comments received on the final EIS. Responses to comments received on the final EIS are required only when substantive issues are raised which have not been addressed in the EIS. In the case of feasibility reports where the final report and EIS, Board of Engineers for Rivers and Harbors (CEBRH) or Mississippi River Commission (CEMRC) report, and the proposed Chief's report are circulated for review, incoming comment letters will normally be answered, if appropriate, by CECW–P. After the review period is over, CECW–P will provide copies of all incoming comments received in HQUSACE to the district commander for use in preparing the draft record of decision. For all other Corps actions except regulatory actions (See 33 CFR part 325, appendix B), two copies of all incoming comment letters (even if the letters do not require an agency response) together with the district commander's responses (if appropriate) and the draft record of decision will be submitted through channels to the appropriate decision authority. In the case of a letter recommending a referral under 40 FR part 1504, reporting officers will notify CECW–RE and request further guidance. The record of decision will not be signed nor any action taken on the proposal until the referral case is resolved.

(e) Commenting on other agencies' EISs. See 40 CFR 1503.2 and 1503.3. District commanders will provide comments directly to the requesting agency. CECW–RE will provide comments about legislation, national program proposals, regulations or other major policy issues to the requesting agency. See appendix III of CEQ regulations. When the Corps is a cooperating agency, the Corps will provide comments on another Federal agency's draft EIS even if the response is no comment. Comments should

be specific and restricted to areas of Corps jurisdiction by law and special expertise as defined in 40 CFR 1508.15 and 1508.26, generally including flood control, navigation, hydropower, and regulatory responsibilities. See appendix II of CEQ regulations.

SOURCE: 53 FR 3127, Feb. 3, 1988, unless otherwise noted.

AUTHORITY: National Environmental Policy Act (NEPA) (42 U.S.C. 4321 et seq.); E.O. 11514, Protection and Enhancement of Environmental Quality, March 5, 1970, as amended by E.O. 11991, May 24, 1977; and CEQ Regulations Implementing the Procedural Provisions of NEPA (40 CFR 1507.3).

Current through Feb. 7, 2023, 88 FR 7890. Some sections may be more current. See credits for details.

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