No. 23-60027

IN THE

United States Court of Appeals for the Fifth Circuit

CITIZENS FOR CLEAN AIR & CLEAN WATER IN BRAZORIA COUNTY; TEXAS CAMPAIGN FOR THE ENVIRONMENT; CENTER FOR BIOLOGICAL DIVERSITY; TURTLE ISLAND RESTORATION NETWORK; and SIERRA CLUB,

Petitioners,

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION; PETE BUTTIGIEG, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE U.S. DEPARTMENT OF TRANSPORTATION; UNITED STATES COAST GUARD, AN AGENCY OF THE U.S. DEPARTMENT OF HOMELAND SECURITY; RICHARD V. TIMME; UNITED STATES MARITIME ADMINISTRATION, AN AGENCY OF THE U.S. DEPARTMENT OF TRANSPORTATION; ANN PHILLIPS, IN HER OFFICIAL CAPACITY AS ADMINISTRATOR OF THE U.S. MARITIME ADMINISTRATION; and LINDA L. FAGAN, IN HER OFFICIAL CAPACITY AS COMMANDANT OF THE U.S. COAST GUARD,

Respondents,

SPOT TERMINAL SERVICES LLC and ENTERPRISE PRODUCTS OPERATING LLC,

Intervenors.

On Petition for Review from the Maritime Administration
MARAD-2019-0011

BRIEF FOR INTERVENORS SPOT TERMINAL SERVICES, LLC AND ENTERPRISE PRODUCTS OPERATING LLC

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CERTIFICATE OF INTERESTED PARTIES

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 so that the judges of this court may evaluate possible disqualification or recusal.

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United States Maritime Administration, an Agency of the U.S. Department of Transportation;

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[1] Petitioners' Certificate of Interested Persons lists non-party "Enbridge, Inc. or its affiliate" as an interested party, on the theory that Enbridge and Intervenors' parent company, Enterprise Products Partners L.P., "executed a letter of intent to 'jointly develop and market SPOT' as well as to finalize an equity participation right for Enbridge, Inc. in the SPOT project." Pet. Br. vi (quoting the 2021 Enterprise Products Partners L.P. 10-K). That statement is based on stale information. The most recent 10-K, for 2022, shows that Enbridge is no longer part of the Sea Port Oil Terminal (SPOT) project. *See* Enterprise Products Partners L.P., Annual Report (Form 10-K) (filed Feb. 28, 2023). Neither the Federal Rules of Appellate Procedure nor this Court's Local Rules require Enbridge to be listed as an interested party.

STATEMENT REGARDING ORAL ARGUMENT

Intervenors agree with Petitioners and the United States that oral argument would assist the Court in considering the multiple issues raised in this case.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

Page

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Statutes:

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Other Authorities:

JURISDICTIONAL STATEMENT

Petitioners seek review of the Department of Transportation's (DOT) record of decision approving Intervenors' application for a license to construct and operate a deepwater port, the Sea Port Oil Terminal (SPOT), under the Deepwater Port Act of 1974, 33 U.S.C. Chapter 29 (DWPA), 33 U.S.C. § 1501 *et seq*. Petitioners invoke this Court's jurisdiction under 33 U.S.C. § 1516.

This Court lacks jurisdiction because Petitioners do not have Article III standing. *See infra* pp. 12-18. This Court further lacks jurisdiction over Petitioners' claim related to the timeliness of agency approval because that claim is properly brought, if at all, through a civil action in a U.S. district court under 33 U.S.C. § 1515. *See infra* p. 56.

INTRODUCTION

The current process for exporting crude oil from the Gulf of Mexico region, known as reverse lightering, requires using smaller ships to ferry oil from an onshore facility to larger carriers, anchored offshore, that cannot be fully loaded while in port. These repetitious trips emit pollutants into the air and water and increase the risk of vessels striking marine life or one another.

The project under review proposes to cut out the middleman by building two pipelines that will carry oil to an offshore platform in water deep enough to load the larger carriers directly. Known as the Sea Port Oil Terminal—or SPOT—the

project will significantly reduce the number of trips to and from shore. After a thorough and lengthy review process, the Transportation Department approved SPOT's construction and operation, finding SPOT to be in the national interest and an environmentally favorable alternative.

Petitioners' brief ignores all of the approving agencies' painstaking review. The Final Environmental Impact Statement runs nearly a thousand pages; the supporting appendices span thousands of pages more. The environmental analysis went through two substantial revisions, incorporating feedback from tens of thousands of comments. The Government's expert marine wildlife agency also prepared a thorough Biological Opinion. And the agencies relied on all of this analysis when they ultimately determined that SPOT was in the Nation's best interests.

Because the agencies could not reasonably have done more, Petitioners largely pretend the agencies did far less. Petitioners claim the agencies ignored a host of things—potential oil spills, species impacts, ozone emissions, and energy sufficiency—that are thoroughly canvassed in the extensive record. And Petitioners argue that, precisely because the agencies extensively addressed all of these issues, the decision must now be *vacated* because it was not issued faster.

But the Court need not address Petitioners' kitchen-sink arguments at all because they have not met their Article III burden to prove a concrete and

imminent injury-in-fact. Petitioners' assertions that their members will be injured rest on subjective and attenuated "concerns" that find no support in the record and ignore SPOT's extensive mitigation measures.

If the Court does reach the merits, however, it should reject each of Petitioners' arguments. The agencies thoroughly did their homework and even if the agencies' diligent review caused them to turn in their work late, Petitioners cite no authority for the counterintuitive notion that this Court should consequently impose even *more* delay by vacating the decision.

The petition should be dismissed for lack of jurisdiction and, if not, then denied on the merits.

STATEMENT OF THE ISSUES

1. Whether Petitioners have carried their burden to establish Article III injury-in-fact by relying on declarations asserting subjective "concerns" unsupported by the record.

2. Whether the agencies' Final Environmental Impact Statement containing detailed discussions of potential oil spills, species impacts, ozone emissions, and alternatives complies with procedural requirements of the National Environmental Policy Act (NEPA).

3. Whether this Court should vacate SPOT's approval because it was issued after the statutory deadlines had passed.

4. Whether the agency made an adequate finding that SPOT would serve the Nation's interest in "energy sufficiency" when it explained that SPOT would have only "minimal impact on the availability and cost of crude oil in the U.S. domestic market" because supply is driven by factors independent of U.S. export infrastructure.

5. Whether the remedy for any of the easily cured omissions from the NEPA analysis or record of decision alleged by Petitioners is vacatur.

STATEMENT OF THE CASE

A. U.S. Crude Oil Exports and Very Large Crude Carriers

The United States exports millions of barrels of crude oil every day from the Gulf of Mexico. Under the Deepwater Port Act of 1974, all deepwater ports, whether for import or export or both, must be licensed by the Secretary of Transportation. 33 U.S.C. § 1504(f). The Secretary has delegated authority to the Maritime Administration (MARAD) and the U.S. Coast Guard to process applications. *Organizations and Delegation of Powers and Duties*, 62 Fed. Reg. 11,382, 11,383 (Mar. 12, 1997). The Act lays out multiple factors for the agencies to consider before issuing a deepwater port license, including whether the port will be in the "national interest and consistent with national security and other national policy goals and objectives, including energy sufficiency and environmental quality." 33 U.S.C. § 1503(c).

Supplying other parts of the world with U.S. crude oil is in the United States' economic, geopolitical, and environmental interests. MAR.00208577-79. U.S.-produced crude is a better fit for many foreign refineries than for U.S. refineries because U.S. refineries—built before the boom in U.S.-produced light crude—are configured to process heavier, higher-sulfur crude. MAR.00023363. The United States therefore still imports a significant amount of the crude refined domestically, even as it approaches net-exporter status for crude oil overall. MAR.00208535.

The most-efficient way to export crude oil to foreign markets is by very large crude carriers (VLCCs), which—as the name suggests—are enormous tankers that can be loaded with 2 million barrels of crude oil. MAR.00023362-63. When fully loaded, VLCCs require about a 75-foot draft, meaning the channels and terminals these ships traverse must be at least 75 feet deep. MAR.00023362; MAR.00023938. But the channels and rivers servicing Gulf of Mexico nearshore terminals are typically between 40 and 50 feet deep. MAR.00023456. Rather than dredging nearshore channels to make them deeper—imposing recurring costs and inflicting substantial environmental damage—smaller ships load at coastal ports, then ferry crude oil to specified deeper waters where they transfer their cargo onto VLCCs. MAR.00023366-67. This "reverse lightering" practice requires many

trips and ship-to-ship transfers, which in turn increase air pollution, vessel traffic, collisions with marine life, and oil-spill risks. MAR.00023839.

B. SPOT Deepwater Port

Intervenors Enterprise Products Operating LLC and SPOT Terminal Services LLC designed SPOT to make loading VLCCs faster, more cost-effective, and more environmentally protective. MAR.00024091.

SPOT has onshore and offshore components. MAR.00023323-24. Onshore, the project will modify the existing Enterprise Crude Houston Terminal, on the southeast side of Houston, to connect it with a new 50-mile pipeline to a proposed new Oyster Creek Terminal. *Id.* The Oyster Creek Terminal will have a storage capacity of approximately 4.8 million barrels, and would be the last stop before pumping oil through two pipelines to the coast and then to a fixed platform 30 nautical miles off the coast of Freeport, Texas. *Id.* The platform, situated in water about 115 feet deep, will have vapor-combustion units to capture emissions from VLCC loading, an anchorage area, and safety zones limiting traffic near the project. *Id.* SPOT will reduce inefficient lightering trips, and thus reduce emissions, environmental impacts, and the likelihood of vessel collisions. MAR.00208577-78.

SPOT also has a unique pipeline-system design. It will be built with "emergency shutdown valves, which would allow crude oil to be sealed into a

number of isolatable sections in the event of a leak or rupture." MAR.00023551; MAR.00191703. By breaking the pipeline system into smaller, isolatable components, SPOT allows any "volume of oil leaked [to] be limited to the oil available in the section between valves when the shutdown valves are closed." MAR.00023551 & Table 3.3.7-8. The system then includes a leak-detection system, which MARAD's third-party analysis estimates would take 30 minutes to "detect a drop in pressure, shut down the affected pipeline, and shut in the affected isolatable section." MAR.00023976 n.2; MAR.00023965.

SPOT is not the only proposed deepwater port of its kind, but it is the only Texas project to have received approval. MAR.00024054-55. There are at least four proposed deepwater export terminals off the Texas coast. *Id.*

C. Agency Review and Approval

On January 31, 2019, SPOT submitted a license application to MARAD. MAR.00208558. The statute provides that applications should be approved or denied within one year, *see* 33 U.S.C. §§ 1504, 1505, although regulations contemplate extending that deadline under certain circumstances, *see* 33 C.F.R. § 148.276(a) (2021).

MARAD issued the draft environmental impact statement (EIS) on February 7, 2020, and hosted a public meeting to receive comments later that month. MAR.00208560. The comment period was extended to May 31, 2020, because of

COVID. MAR.00208561. MARAD and its cooperating agencies then issued a supplemental draft EIS, prompting another public comment period, which closed on December 13, 2021. *Id.* Petitioners took full advantage of the extended review process, submitting comments opposed to SPOT throughout.

The Final EIS (FEIS) issued on July 29, 2022. MAR.00208561-62. During the EIS comment periods, the agencies received tens of thousands of comments and revised the EIS extensively. MAR.00023368-71; MAR.00208549; MAR.00208552-53; MAR.00208588. The body of the FEIS is 892 pages, with 3,000 pages of appendices. MAR.00023291; MAR.00027794.

MARAD also worked with the National Marine Fisheries Service to issue a Biological Assessment, and later a Biological Opinion, addressing the various threatened or endangered species possibly impacted by the project. MAR.00026069-72 (Biological Assessment); MAR.00208624 (Biological Opinion). The Biological Assessment is an appendix to the FEIS. MAR.00026065; MAR.00023314. The Biological Opinion issued after the FEIS and is incorporated into the ultimate record of decision. MAR.00208627, MAR.000208600.

DOT issued its record of decision approving SPOT's application on November 21, 2022. MAR.00208528. The agency determined that SPOT's application "is in the national interest and consistent with other policy goals and

objectives, including energy sufficiency and environmental quality," particularly in light of the project's environmental profile "compared to current transportation methods for crude oil export" as well as the project's "benefits to local and national economic growth and the Nation's infrastructure resilience." MAR.00208579; MAR.00208620. The decision laid out various conditions to ensure SPOT meets all necessary requirements, including mitigation measures such as designing the pipeline system to include emergency shutdown valves and isolatable components to minimize any oil spills; using a "bubble curtain system" to reduce noise impacts of pile driving during construction; instituting safety zones around the project area to reduce risk of vessel collision; and installing vapor combustion units on the platforms to reduce emissions. MAR.00208598-611; MAR.00208621. DOT thus found that construction and operation of the project as proposed by SPOT was the "environmentally preferable alternative." MAR.00208618.

SUMMARY OF THE ARGUMENT

I. Petitioners lack Article III standing. Their claims to injury rest almost exclusively on subjective "concerns" of their members, not concrete demonstrations of imminent injury. When Petitioners do cite record evidence, it does not come close to establishing that Petitioners' members are likely to suffer concrete and particularized harm from SPOT's construction or operation.

II. The voluminous FEIS in this case more than satisfies NEPA's requirement to take a hard look at SPOT's potential environmental impacts and alternatives.

A. The FEIS thoroughly canvasses the potential for oil spills. It discloses that SPOT might result in spills ranging from 17.5 barrels to 687,602 barrels, discusses where spills might occur, and lists possible effects on water, plants, animals, and the ecosystem. Although not legally required to do so, the FEIS extensively discusses what might happen in a "worst-case" spill scenario and details SPOT's mitigation measures that make such a scenario highly improbable. The FEIS also includes species-by-species discussions of the effects that an oil spill might have on marine life.

B. The FEIS and incorporated Biological Assessment also discuss potential impacts on the Rice's whale and the cumulative impacts on Gulf species. The FEIS determined based on the available evidence that the Rice's whale is unlikely to be affected because it is not likely to be found near SPOT. Petitioners cite additional post-FEIS evidence regarding the whales, but that evidence is consistent with the discussion in the FEIS and did not require supplementation. Contrary to Petitioners' characterization, the FEIS also considers the cumulative impacts of SPOT and other industrial activities in the Gulf of Mexico, including four other proposed deepwater ports, on marine life.

C. The FEIS thoroughly considered SPOT's impacts on ozone, and correctly concluded that SPOT may well reduce ozone emissions by implementing mitigation technologies that capture ozone precursors and reducing the number of emissions-heavy lightering trips. The analysis adequately accounts for post-FEIS developments in the area's overall ozone status and relies on accurate calculations and complete disclosures.

D. The FEIS's detailed alternatives analysis satisfies NEPA. The FEIS did not need to consider a reduced-capacity alternative because Petitioners did not adequately raise that possibility during administrative proceedings. In addition, NEPA only requires an agency to consider alternatives that will meet the applicant's specified goals for the project. And the FEIS analyzed a no-action alternative based on reasonable predictions drawn from current conditions.

III. The DWPA does not require vacatur. In addition to the issues raised by the Government, this Court lacks jurisdiction over Petitioners' timeliness challenge because such a claim must be brought through a district court action under 33 U.S.C. § 1515. Even if this Court has jurisdiction, however, neither the DWPA nor the Administrative Procedure Act authorizes vacatur as a remedy for an untimely decision. The record of decision also contains an express finding that SPOT is in the Nation's "energy sufficiency" interest, in part because SPOT will

not materially affect the "availability and cost" of crude oil in the United States. MAR.00208579.

IV. Because the agencies could very likely cure any issues raised by Petitioners, any remand in this case should be without vacatur.

STANDARD OF REVIEW

This Court reviews the agencies' decision with "a considerable degree of deference," and "courts are to uphold the agency's decision unless the decision is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' " *Spiller v. White*, 352 F.3d 235, 240 (5th Cir. 2003) (ultimately quoting 5 U.S.C. § 706(2)(A)). This Court takes care to "not substitute its own judgment for that of the agency." *Sabine River Auth. v. U.S. Dep't of Interior*, 951 F.2d 669, 678 (5th Cir. 1992). In NEPA challenges, the Court limits its role to "ensuring that the [agency] took a 'hard look' at the environmental consequences." *Spiller*, 352 F.3d at 240 (citation omitted).

ARGUMENT

I. PETITIONERS LACK ARTICLE III STANDING.

"A petitioner who seeks review of agency action invokes federal jurisdiction and therefore bears the burden of establishing standing." *Center for Biological Diversity v. EPA*, 937 F.3d 533, 536 (5th Cir. 2019) (internal quotation marks and alterations omitted). Where, as here, organizational petitioners seek to assert

standing on their members' behalf, they must establish that at least one member has suffered a cognizable injury-in-fact that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks omitted). Petitioners' burden "with respect to standing that is similar to that required at summary judgment" and standing must therefore "be supported by citations to specific facts in the record." *Shrimpers & Fishermen of RGV v. Texas Comm'n on Env't Quality*, 968 F.3d 419, 423 (5th Cir. 2020) (internal quotation marks omitted).

Petitioners have not met their burden. They rely primarily on their subjective "concerns" without proof that they or anyone else will suffer the injuries alleged. When Petitioners do cite record evidence, they do not account for mitigation measures designed to avoid the precise injuries they claim will occur. At most, Petitioners have managed to identify "possible future injur[ies]," which "will not suffice" under Article III. *Abdullah v. Paxton*, 65 F.4th 204, 208 (5th Cir. 2023) (internal quotation marks omitted).

Petitioners claim injury based on possible pollution from SPOT's eventual operations, in the form of increased emissions or hypothetical oil spills. *See* Pet. Br. 22. Petitioners rely on their members' repeated expressions of "concern[]" that emissions will meaningfully increase or oil spills will occur if SPOT is built. *See* Harris Decl. ¶ 11; Oldham Decl. ¶¶ 35, 37-38; Robinson Decl. ¶ 24(g). Similar

statements refer to "potential" events that "may" occur, without attempting to assess the *likelihood* that they will come to pass. Oldham Decl. ¶ 39; Robinson Decl. ¶ 24(c) But "subjective concern" is not a cognizable injury under Article III and therefore "cannot serve as the basis for . . . standing." *Central & S. W. Servs., Inc. v. EPA*, 220 F.3d 683, 700 (5th Cir. 2000). Petitioners must instead present record evidence of an actual or imminent harm. *Shrimpers*, 968 F.3d at 423.

Petitioners' only attempt to satisfy that burden as to their increased-pollution concerns is a few pages of the FEIS that deal with onshore-air-quality impacts. *See* Pet. Br. 22 (citing MAR.00188878-85; MAR.00188849-54).[2] But the cited portion concludes that onshore emissions would be "in compliance with all Federal and state guidelines for acceptable" air pollution levels. MAR.00023834. Petitioners do not show how they would be harmed by legally compliant air emissions. *See* Pet. Br. 22.

Petitioners do not cite *any* record evidence related to likely oil spills in connection with their standing argument. That in itself defeats any claim of injury.

[2] To the extent Petitioners intend to rely on the FEIS's discussion of noise impacts from SPOT's operations, they do not prove that any of their members will be affected. *See* MAR.188884-85. The FEIS states that noise impacts will at most occur within a one-mile radius of the source, MAR.1888878-79, and the only onshore operational noise impacts occur at two terminals, MAR.188884-85. No petitioner's member suggests she would be adversely impacted by noise within a mile of either terminal. The only declarant who states that she goes within a mile of those terminals does not discuss noise-related issues. *See* Oldham Decl. ¶ 34.

See Center for Biological Diversity, 937 F.3d at 538-539. Even incorporating their oil-spill merits arguments, the cited evidence does not establish that any organization's member is *likely* to be exposed; indeed, even a charitable reading improperly relies on a "highly attenuated chain of possibilities" and "hypothetical harms." *Louisiana v. Biden*, 64 F.4th 674, 682-683 (5th Cir. 2023) (citation omitted). The FEIS discusses spills that may occur anywhere along the over 100-mile-long project at any time over its projected 30-year operational life—or may never occur at all. *See* Pet. Br. 24-32; *infra* pp. 20-22. FEIS data confirms that pipeline oil spills of 5 gallons or more are rare occurrences, with fewer than ten annual reported incidents across all U.S.-regulated offshore pipelines over a ten-year period. *See* MAR.00024017. It is purely conjectural to conclude that any of Petitioners' members will actually suffer adverse effects from a spill. *See Center for Biological Diversity*, 937 F.3d at 538-539.

Petitioners next allege possible injury to other species, but that claim is twice flawed. For one thing, Petitioners' argument is largely derivative of the hypothetical future oil spills. *See* Page Decl. ¶ 17; Robinson Decl. ¶ 24(b); Rice Decl. ¶¶ 25, 30-31; Steinhaus Decl. ¶¶ 14, 17. There is no evidence of a "geographic[al] nexus" between the species discussed and any likely spill. *Center for Biological Diversity*, 937 F.3d at 538-539. Petitioners also allude to possible harms from increased vessel traffic associated with SPOT, but they do not offer

any evidence showing that vessel strikes are likely to increase or where such an increase would occur. *See* Pet. Br. 22. Nor do Petitioners reckon with the fact that reduced dependence on reverse lightering would reduce vessel traffic required to load a VLCC. *See id.*

Any claim of injury based on other species' interests also fails because "Article III standing requires injury to the *petitioner* [or its members]. Injury to the environment is insufficient." *Center for Biological Diversity*, 937 F.3d at 537. Petitioners attempt to close the gap by asserting that members who *study* the species will be harmed if the species cease to exist, but any claim of possible extinction rests on a daisy-chain of speculation. The possibility that extinction would harm academic careers is another daisy down the chain. *See* Rice Decl. ¶ 30; Steinhaus Decl. ¶ 17.

Petitioners also contend (at 22) that the temporary construction activity associated with SPOT will injure them, citing FEIS discussions regarding noise from construction and possible air emissions from construction equipment. *See* MAR.00023858-64; MAR.00023830-32. But the FEIS discusses the extensive mitigation measures that SPOT plans to implement during construction to reduce noise to ambient levels. *See id.* Petitioners do not explain why those measures would be inadequate. *E.T. v. Paxton*, 41 F.4th 709, 717-718 (5th Cir. 2022) (no standing when plaintiffs did not show that existing mitigation measures were

insufficient to address concerns). As for construction emissions, the FEIS determines that any impacts will be "intermittent," "highly localized to construction sites," and so "minor" that they do not require separate permitting. MAR.00023918. Petitioners do not articulate how these minimal emissions would result in a cognizable injury. *See Shrimpers*, 968 F.3d at 425 (generalized evidence of potential air emissions within a fourteen-mile radius of a proposed facility did not establish "an actual or imminent harm").

Petitioners attempt to buttress their standing arguments with even more speculative and generalized injuries. They assert that they are concerned about reduced property values, damage to the local economy from decreasing tourism, and unspecified injuries due to more-rapid climate change. *See* Robinson Decl. ¶¶ 24(a), 28; Harris Decl. ¶¶ 14-15; Page Decl. ¶ 19; Oldham Decl. ¶ 25(b). These unsupported allegations are far removed from SPOT's licensure and depend on a host of potential intervening factors that Petitioners do not address, like interest rates, consumer preferences, and non-oil-related contributions to climate change. *See Glass v. Paxton*, 900 F.3d 233, 239 (5th Cir. 2019) (standing cannot rest "on a highly speculative and 'attenuated chain of possibilities' partially based on 'the decisions of independent actors' ") (citation omitted).

Petitioners also suggest (at 23) that their participation in the comment process constitutes injury. But this kind of "self-inflicted injury" is not cognizable

under Article III. *Zimmerman v. City of Austin, Texas*, 881 F.3d 378, 389 (5th Cir. 2018); *Center for Biological Diversity*, 937 F.3d at 540-541.

Finally, to the extent Petitioners claim an informational injury based on the alleged incompleteness of the FEIS, they do so only in half a sentence. *See* Pet. 23. The argument is therefore forfeited. *Center for Biological Diversity*, 937 F.3d at 542 (claim to informational injury forfeited when petitioners "did not adequately brief [the] issue"). That aside, Petitioners never explain why that injury would be concrete or particularized as opposed to a "generalized" injury shared by any interested member of the public. *Shrimpers*, 968 F.3d at 425.

Article III's standing requirement plays a vital role in ensuring that the courts do not become "some sort of super-agency." *Center for Biological Diversity*, 937 F.3d at 546 (internal quotation marks omitted). Petitioners lack standing, and the Court should dismiss without addressing the merits.

II. THE FEIS SATISFIES NEPA'S REQUIREMENTS.

NEPA "guarantees a process, not a certain result." *Gulf Restoration Network v. Department of Transp.*, 452 F.3d 362, 367 (5th Cir. 2006). "[O]nce an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences." *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227 (1980). So "[i]f the adverse environmental effects of the proposed action

are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs." *Robertson v. Methow Valley Citizens Counci*l, 490 U.S. 332, 350 (1989).

Reviewing courts—which are not experts in the technical analysis underlying a NEPA review—exercise a "narrowly defined duty of holding agencies to certain minimal standards of rationality." *Gulf Restoration Network*, 452 F.3d at 368. The court will "follow the rule of reason and a pragmatic standard which requires good faith objectivity but avoids fly specking." *Mississippi River Basin Alliance v. Westphal*, 230 F.3d 170, 175 (5th Cir. 2000) (cleaned up). Courts ask (1) whether the agency "has taken a hard look at the environmental consequences of a proposed action and alternatives;" (2) whether the EIS "provides detail sufficient to allow those who did not participate in its preparation to understand and consider the pertinent environmental influences involved;" and (3) whether the EIS's "explanation of alternatives is sufficient to permit a reasoned choice among different courses of action." *Id.* at 174.

Petitioners litigate the wisdom of the agencies' policy decisions, but that is not how NEPA works. NEPA does not endorse any particular policy, and it does not direct any particular outcome. It requires only a "hard look" at the environmental impacts of a particular action—and this particular action received a long, hard look.

A. The Agencies' Oil Spill Risk Analysis Thoroughly Considered A Wide Range of Oil Spill Sizes, Even An Improbable Worst-Case Scenario.

Petitioners' primary challenge to the oil-spill analysis is their claim that the FEIS "only consider[ed] a fixed-size, short-duration oil spill scenario" and not the worst-case scenario or other possible spill sizes. Pet. Br. 25. That is false. Below, Petitioners recognized the agencies considered a "worst-case spill," even as they accused the agencies of "downplay[ing]" that scenario." MAR.00157916-18.

The FEIS and its appendices analyzed an extensive range of oil spill sizes and locations. And although the NEPA regulations do not require a "worst case analysis," *Robertson*, 490 U.S. at 354, the FEIS calculated the possible worst-case scenario and discussed the possible impacts. The agencies then identified the most likely spill scenario and extensively analyzed its potential impacts, including on species. Petitioners' contrary claims, which reject the agencies' oil-spill discussions because they appear in different portions of the FEIS, elevate form over substance.

1. The agencies considered a range of oil-spill sizes and locations, including a worst-case spill.

The FEIS analyzed a wide range of oil spill sizes in various locations along the SPOT system. The oil spill risk analysis considered spills from 17.5 barrels to 687,602 barrels, MAR.00024002; MAR.00191738; MAR.00191720-24; MAR.00191730-38, including from pipeline ruptures that might occur nearshore

and further offshore in deep water, and from spills resulting from collisions, MAR.00023578; MAR.00023977; MAR.00027461, MAR.00027471. The FEIS also considered the annual probability over the life of the project of a spill of any size. MAR.00023962-63. And the FEIS modeled a worst-case oil-spill scenario and the most-likely oil-spill scenario, with occurrences across a range of locations. These models then informed the agencies' analysis of the potential impacts of potential spills. *See, e.g.*, MAR.00027461-62; MAR 00027485; MAR.00026119-22.

The FEIS assessed the impact of a range of onshore oil-spill sizes—including a 600,000-barrel onshore spill from the rupture of an onshore storage tank, MAR.00023979-80—and discussed the possible effects on groundwater, surface water, soil, wetlands, vegetation, habitats, onshore oyster reefs, wildlife, and listed and non-listed species. MAR.00023490-91; MAR.00023509-10; MAR.00023524; MAR.00023569-70; MAR.00023577-79; MAR.00023603; MAR.00023714. The FEIS noted that although impacts could be major, a large onshore spill would be unlikely because mitigation was built into the SPOT project's onshore design—including the design of both the pipeline system, with its emergency shutdown valves, and of the storage tanks, which would store oil within a concrete ring lined with an impermeable membrane. MAR.00023603; MAR.00023979; MAR.00191729.

The FEIS considered two different offshore oil-spill risk analyses. MAR.00023605 (discussing the variety of oil-spill models supporting SPOT's application); MAR.00191673 (Appendix H, which is the project's overall oil-spill analysis). One modeled oil-spill sizes ranging from 17.5-barrels to 15,500-barrels to the worst-case oil spill, which the FEIS determined to be an unmitigated spill of 687,602 barrels. MAR.00023963; MAR.00024002. The FEIS worst-case model assumed a rupture of both offshore pipelines during a period of maximum flow rate of 42,500 barrels-per-hour, followed by a 30-minute maximum time to isolation. MAR.00023983. The worst-case scenario assumed a puncture of the pipeline in the largest-volume isolatable section, leading to the largest possible spill after shutdown. *Id.* The second oil-spill analysis, meanwhile, modeled the most-likely spill volume, which the FEIS found to be 2,200 barrels based on the median spill size for large spills from 1996 to 2010. MAR.00023965.

The agencies' environmental analysis considered the impact that the range of possible spills could have on various species. The FEIS assessed the worst-case spill's hypothetical effect on the shoreline, water surface, and water column. MAR.00023577-79; *see also* MAR.00023995-4001 (plots showing the fate of oil spill across the surface and shoreline under each scenario). The FEIS noted that in "40 percent of the model runs for a nearshore spill . . . oil missed the shoreline," MAR.00023577, but also explained that the worst-case spill still "may harm

communities, contaminate the water source, and destroy or damage sensitive breeding grounds and important species." MAR.00024001. The FEIS further considered the risk that pool fires could ignite from oil pooling on the water surface from a range of oil-spill sizes, MAR.00024003 (analyzing pool-fire risk from an over 15,500-barrel spill and from worst-case spill), but noted that "none of the pool fire hazard scenarios evaluated reached another VLCC, neighboring platform, or the shipping fairway" so "there would be a minimal impact" on public safety, MAR.00024001, despite possible impacts on marine life, MAR.00026166; MAR.00026174; MAR.00026181.

The FEIS also incorporated, and summarized in chart form, the Biological Assessment's analysis of the various threatened and endangered species, which is included in full in Appendix E1. MAR.00023603 ("impacts on Federally listed threatened and endangered species are discussed in the [Biological Assessment] (Appendix E1)"); MAR.00023686-87 (same); MAR.00023700 (same); MAR.00023688-98 (chart); *see* MAR.00026065 (Appendix E1). After discussing the oil-spill risk analyses, the Biological Assessment evaluated the impact the modeled oil spills might have on the species. MAR.00026116 (most likely); MAR.00026119-22 (worst case); *see also* MAR.00026153-90 ("Analysis of Species Not Likely to be Adversely Affected," which includes species-specific discussions of oil-spill risk). This assessment detailed the "effects on marine

mammals," concluding that harm "would depend on [the species'] level of exposure," but in general that "[o]il spills, in particular, pose a serious risk to all marine life." MAR.00026115-16; MAR.00026122; *see also* MAR.00026166-67 (whale impacts). The assessment then detailed mitigation measures, including the pipeline's system of emergency shutdown valves and isolatable components. MAR.00026124.

Meanwhile, the Biological Opinion—which was incorporated into and discussed in the record of decision—also analyzed the worst-case scenario when analyzing impacts on Endangered Species Act listed species. MAR.00208768-69. The Biological Opinion concluded that, although "[p]ast experiences and mandatory response plans" indicate that a worst-case spill is "extremely unlikely," a worst-case spill and response efforts would cause "some potential adverse effects to [Endangered Species Act]-listed species" such as "vessel strikes, direct injury from skimming and burning, and indirect impacts from dispersant use." MAR.00208769.

Although the agencies repeatedly discussed the theoretical worst-case scenario of a 687,602-barrel spill, *see, e.g.*, MAR.00023577-78, MAR.00023972, MAR.00023983, MAR.00023992, MAR.00024002, they ultimately found this scenario to be extremely unlikely due to SPOT's design, *see* MAR.00023606 ("Safety mechanisms such as shutdown valves built into the pipeline system would

prevent a continuous release of oil."). Indeed, because the worst-case scenario "assumed that no response efforts took place to mitigate the impacts of the spill," SPOT's spill-response efforts would likely prevent that worst-case scenario from happening, meaning the agencies could narrow the scope of spill scenarios for modeling. MAR.00023992; *see also* MAR.00208769 ("Past experiences and mandatory response plans indicate that containment and clean-up efforts are extremely likely to occur in response to any large oil spill.").

Petitioners cite the draft EIS for the proposed Texas GulfLink project—a deepwater port that would be located about seven nautical miles away from SPOT, MAR.00024054—as an example of the analysis Petitioners say the agencies should have done in the SPOT EIS. The GulfLink draft EIS evaluated the risk of a range of spill sizes, from about 147,000 to 582,000 barrels, and, as Petitioners see it, considered impacts to species that SPOT's FEIS did not consider, like birds, benthic resources, and plankton. Pet. Br. 26. But the analysis here followed the same basic method. MAR.00024002; MAR.00191738; MAR.001911720-24; MAR.00191730-38; *supra* pp. 22-24. SPOT's FEIS also considered impacts on birds, MAR.00023589, MAR.00023699; benthic resources, MAR.00023610; and plankton, MAR.00023620.

What's more, the agencies' environmental analysis specifically incorporated by reference the analysis of the worst-case spill and its possible impacts on various

species—from the Biological Assessment, MAR.00023603; MAR.00023686-98; MAR.00023700; the FEIS safety section, MAR.00023605; MAR.00023664-65; and the appended oil spill risk analysis, MAR.00023576-77. And the NEPA regulations allow incorporation by reference in an EIS so long as the incorporated material is cited, briefly summarized, and made available within the time allowed for public comment, just as it was here. *See* 40 C.F.R. § 1501.12 (2022); *see also Piedmont Heights Civic Club, Inc. v. Moreland*, 637 F.2d 430, 438 (5th Cir. 1981) (the agency is "not required to reiterate facts and figures contained" in documents when they are "referred" to in the EIS and "were readily available to the public").

Petitioners repeatedly cite the FEIS's consideration of worst-case scenarios in the *safety* section, and claim the agencies should have analyzed that available data in the same document's *environmental analysis* section. Pet. Br. 28, 31. But the environmental-analysis section of the FEIS repeatedly incorporated the safety section's discussions of worst-case-scenario impacts. *See, e.g.*, MAR.00023605 (incorporating Section 4.6.3's discussion of potential impacts on various species); MAR.00023664 (incorporating Section 4.6.3's discussion of the worst-case, 687,602-barrel spill scenario model).

The environmental-analysis section also incorporated the Biological Assessment in Appendix E1 and the oil-spill risk analysis in Appendix H, each of which considered the worst-case scenario and were appended to the FEIS. *See,*

e.g., MAR.00023603; MAR.00023576-77. Meanwhile, the safety section incorporated the oil-spill risk analysis when discussing the worst-case-spill scenario. *See, e.g.*, MAR.00023980 (incorporating Appendix H-Spill Risk Analysis in FEIS safety section discussing worst-case spill); MAR.00023984 (same). Petitioners also ignore the Biological Opinion, which analyzed the largest-volume scenario when analyzing possible impacts on Endangered Species Act-listed species. MAR.00208769; MAR.00208778-84; *see also* MAR.00208600.

So even if the FEIS were lacking (which it isn't), there is "nothing to be gained by remanding the matter" for the agency to "consider the same information again" that it already adequately considered and explained in the safety section, the Biological Assessment, the oil-spill risk analysis, the Biological Opinion (which confirms the Biological Assessment's principal conclusions), and the record of decision. *Natural Res. Def. Council v. Nuclear Regul. Comm'n*, 879 F.3d 1202, 1210 (D.C. Cir. 2018) (declining to remand where post-EIS supplementation cured any defect and challengers had "not pointed to any harmful consequence" of the process).

By calculating and considering the impacts of a worst-case spill, the FEIS went above and beyond what NEPA requires. As Petitioners begrudgingly concede, the regulations require analysis of *reasonably foreseeable* spills—they do not require analysis of worst-case scenarios. Pet. Br. 30 & n.15; *Robertson*, 490

U.S. at 354 (reversing lower court that required worst-case analysis because regulations used to, but no longer do, require "worst case analysis"); 40 C.F.R. § 1502.21(c), (d) (requiring analysis only of "reasonably foreseeable significant adverse impacts . . . even if their probability of occurrence is low"). Once MARAD determined what was reasonably foreseeable, it was not required to do more. *Cf. City of Shoreacres v. Waterworth*, 420 F.3d 440, 453 (5th Cir. 2005) (in the face of "no concrete analysis" by petitioners showing the likelihood of a certain event, agency had no obligation to analyze cumulative impacts beyond the scope of events it determined to be reasonably foreseeable).

Petitioners cite no contrary authority. *See* Pet. Br. 32. They cite *Sierra Club v. Sigler*, but that case relied on a since-abrogated version of the NEPA regulations. 695 F.2d 957, 970 (5th Cir. 1983); *see Robertson*, 490 U.S. at 354. Petitioners also invoke *Standing Rock Sioux Tribe v. Army Corps of Engineers*, 985 F.3d 1032, 1048-49 (D.C. Cir. 2021), but that case holds that when the agency chooses to conduct an *unnecessary* analysis, then "it is only logical" that the court review the analysis to ensure it is reasonable. Petitioners do not argue that the agencies' worst-case analysis was unreasonable. *See Wise v. Wilkie*, 955 F.3d 430, 436 n.24 (5th Cir. 2020) (appellant forfeits argument not made in opening brief). They instead limit their argument (at 32) to the claim that the FEIS "fail[ed]" to do one, which is simply untrue.

2. The agencies considered the impacts of most likely spills on species.

Petitioners next characterize the FEIS as having "punt[ed] evaluation of direct harm" to species that the FEIS determined could be impacted by the most likely oil-spill scenario. Pet. Br. 27. But the FEIS *did* analyze the possible impacts on various species from such a spill, *see* U.S. Br. 21-23; Petitioners are just unhappy with the conclusions it reached.

The FEIS section on federally listed threatened and endangered species includes more than 10 pages charting its summary of the effects of the project on these species; included in that summary is the agencies' consideration of the impact of oil spills on numerous species. MAR.00023688-701. These determinations are summaries of the agency's more extensive species-by-species impact analysis incorporated from the Biological Assessment. MAR.00023686-87 (incorporating Biological Assessment analysis); MAR.00026065 (Biological Assessment appended at Appendix E to the FEIS). The Biological Assessment considered the impact of the most-likely and worst-case spills on various species, and reasonably explained that SPOT would have no effect on eight federally listed threatened or endangered species, and would be not likely to adversely affect 20 others. MAR.00023687; MAR.00026116 (most likely); MAR.00026119-22 (worst case).

Moreover, subsequent sections dealing with various additional categories of species incorporate by reference elements of the analyses in the Biological Assessment and the safety section. MAR.00023605-06; MAR.00023714; MAR.00023664; MAR.00023700. And all of these sections emphasize the key mitigating fact that led the agencies to find that any oil spill would be minimized: the pipeline's isolatable components and the emergency-shutdown valve design. MAR.00023606, MAR.00023665, MAR.00023714; U.S. Br. 22. So too for the Biological Assessment's impact analysis. MAR.00026124.

O'Reilly v. U.S. Army Corps of Engineers does not call this extensive review into question. 477 F.3d 225, 235 (5th Cir. 2007). In *O'Reilly*, the agency had already issued "72 other" permits "within a three mile radius" of the proposed project, yet the agency "presume[d]," "without any exposition," that specified "mitigation" would "remove or reduce" the expected impacts of all the projects combined. *Id.* That scanty analysis bears no relationship to the FEIS here, which thoroughly explained the mitigation techniques that SPOT will use and how they will reduce the risks of adverse environmental impacts.

Petitioners next claim the FEIS is deficient for failing to assess the harm to marine species and habitat in the project area from polycyclic aromatic hydrocarbons. Pet. Br. 28. That is incorrect. Table 3.4.4-2 presents SPOT's modeling of these hydrocarbons in the water column for the worst-case spill

scenario. MAR.00023578. The results were discussed throughout the FEIS, and indicated that "concentrations exceeding 1 [part per billion] would only occur for a short time and the distribution would be patchy before diluting to levels below the threshold of concern." MAR.0023629; *see also* MAR.00023549; MAR.00023618-19; MAR.00023664-65; MAR.00026117-18.

Finally, Petitioners claim that the agencies failed to consider the Deepwater Horizon spill. Pet. Br. 29. Wrong again. The FEIS recognized that "[a]n oil spill at one of the [deepwater ports] would not result in the magnitude of oil released during the [Deepwater Horizon] spill." MAR.00024072; *see also* MAR.00023703. The Deepwater Horizon spill, after all, comprised millions of barrels, whereas SPOT's worst-case spill is 687,602 barrels. This makes sense: The Deepwater Horizon spill resulted from the blowout of an underwater well at a drilling rig and could not be capped for 87 days, whereas even a worst-case spill at SPOT could be isolated and shut off far sooner given the pipeline system's design. MAR.00023631; MAR.00023976 & n.2.

Despite the dissimilarity of the two, the agencies considered the Deepwater Horizon spill throughout their analysis, including its impacts on the Rice's whale, MAR.00208761; vegetation, MAR.0023570; marine mammals, MAR.00023664-65; sea turtles, MAR.00208686, MAR.00208700, MAR.00208708; other listed

species, MAR.00208778-79; and habitat, MAR.00208746. Petitioners' contrary claim is once again belied by the record.

B. The FEIS Adequately Considers SPOT's Potential Impact On Gulf Species.

1. Rice's whale

Petitioners argue that the agencies' expertise-driven determination that the Rice's whale was not likely to occur near the SPOT project "failed to consider new," post-FEIS information" on the whale's "wide range" and thus failed to properly consider the impact of oil spills, noise, and vessel traffic. Pet. Br. 32-36. They are wrong.

An "agency need not supplement an EIS every time new information comes to light after the EIS is finalized." *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 373 (1989); *see id.* at 376 (arbitrary and capricious standard applies to agency's decision not to supplement EIS). An EIS must be supplemented only if there are "significant new circumstances or information." 40 C.F.R. § 1502.9(d)(1)(i)-(ii); *see Harrison Cnty., Mississippi v. Army Corps of Eng'rs*, 63 F.4th 458, 463-464 (5th Cir. 2023). Because an agency's determination whether information is significant enough to require supplementing the EIS requires "substantial agency expertise," courts must defer to the agency's "informed discretion." *Marsh*, 490 U.S. at 376-377; *see Louisiana Wildlife Fed'n, Inc. v. York*, 761 F.2d 1044, 1052 (5th Cir. 1985) (agency's decision not to supplement

"must be upheld" if it "is reasonable and made objectively and in good faith on a reviewable environmental record") (citation omitted).

The agencies here reasonably concluded that the new information on the Rice's whale was not significant enough to require supplementation. The Rice's whale is a non-migratory, year-round resident of the Gulf of Mexico, with likely fewer than 100 existing in nature. *See* MAR.00023691; MAR.0054292. The species occurs predominantly in the northeastern Gulf of Mexico off the coast of Florida in waters of 300-1300 feet. MAR.00054294. After analyzing various potential threats to the species, the FEIS ultimately determined that the project "[i]s not likely to adversely affect" the Rice's whale because the whale is "unlikely to be found near" the site. MAR.00023691; *see also* MAR.0026153-67.

In comments after the FEIS, Petitioners highlighted a scientific paper published in early 2022 that suggested the Rice's whale could appear in the western Gulf of Mexico near the SPOT project. MAR.00206554-58 (citing Melissa S. Soldevilla et al., *Rice's whales in the northwestern Gulf of Mexico: call variation and occurrence beyond the known core habitat*, 48 Endang. Species Res. 155-174 (2022)). This paper discusses recent passive acoustic-monitoring efforts that have detected Rice's whale vocalizations in the western Gulf of Mexico, including waters off the coast of Texas. MAR.00206554. The paper noted, however, that "[i]t remains unknown whether confirmed and potential Rice's

whale sightings in the western [Gulf] represent extralimital movements, if there has been a range contraction, . . . or if Rice's whales still occupy this northwestern region in low densities." MAR.00206760.

Petitioners claim that "MARAD failed to take this new information into account in evaluating SPOT's impacts, and assumed whales will not be present" near the project. Pet. Br. 35. That is wrong. The Final Biological Opinion and the record of decision each engage directly with the new information presented in the 2022 scientific paper. *See* MAR.00208678, MAR.00208683 (Biological Opinion discussing Soldevilla); MAR.00208591 (record of decision discussing "recent passive acoustic monitoring data" showing a "potential for Rice's whales to occur in the western Gulf offshore from the proposed Port"). Even considering that new information, the agencies explained, the whale's occurrence in the western Gulf near the SPOT project would be "extremely unlikely" and "quite rare," because the whale's core distribution area would still be "in water depths ranging from" 300-1300 feet, whereas the SPOT port will be in 115-foot waters. MAR.00208678. Given SPOT's likely reduction to overall vessel traffic related to VLCC loading, MAR.0002408, and the whale's known depth and core distribution area, the agencies reasonably found that any SPOT-related noise or vessel traffic "is not expected to transverse through the species' core distribution area,"

MAR.00208591-92. As a result, the risk posed by the project is "considerably lower" than a once-in-424-years risk, and thus discountable. *Id.*

As for the oil-spill risk, the agencies considered "the rarity of detections of Rice's whales in the western Gulf, coupled with the extremely low probability of a large oil spill that could reach out to the areas where Rice's whales might occur (100-400 m depth zone)." MAR.00208683 (Biological Opinion); *see also* MAR.00208592 (record of decision). Based on these facts, the agencies found that "the potential for a Rice's whale to be adversely affected by an oil spill from the [deepwater ports] is extremely unlikely to occur, and therefore discountable." *Id.*

As all of this establishes, MARAD did not "assume[] whales will not be present," Pet. Br. 35; it found, based on its expertise and in consultation with the National Marine Fisheries Service, that the whale was "extremely unlikely" to be found near SPOT or in waters where a large spill might spread. MAR.00208683. That was fully consistent with the FEIS's determination that Rice's whales are "unlikely to be found near" SPOT. MAR.00023691.

The agencies thus engaged with the new information on the Rice's whale and found it did not amount to "significant new circumstances or information" requiring a supplemented EIS. 40 C.F.R. § 1502.9(d)(1)(i)-(ii); *see Harrison Cnty.*, 63 F.4th at 463-464 ("§ 1502.9(d)(1) obligates agencies to supplement an EIS in situations where supplementation serves NEPA's requirement that agencies

take a 'hard look' at the environmental effects of their planned action") (cleaned up). The agencies' conclusion that the 2022 paper did not amount to significant new information requiring supplementation is a classic example of a factual determination to which this Court defers. *See Marsh*, 490 U.S. at 376-377.

2. Cumulative effects on protected species

Petitioners next argue that the FEIS omitted analysis of the cumulative effect SPOT and nearby proposed projects might have on the Rice's whale and other protected species. Pet. Br. 36. Agencies should evaluate cumulative impacts of "past, present, and reasonably foreseeable future" actions that may affect "the same area." *Gulf Restoration Network*, 452 F.3d at 368 (emphasis omitted). The FEIS did just that; it identified other Gulf industrial activity, including other proposed deepwater ports and existing oil and gas drilling, MAR.00024054-57, and it took a hard look at the cumulative effects SPOT and those activities might have on protected species, MAR.00024061-MAR.00024075. The FEIS noted that the "main categories of potential impacts from activities in the [Gulf of Mexico] are vessel strikes, underwater noise, entanglement, marine debris, and oil spills." MAR.00024064.

The FEIS then discussed each category of impact as it might affect various listed or protected marine mammals and sea turtles. *See, e.g.*, MAR.00024072-MAR.00024074, MAR.00023700-MAR.00023706. Within each species-specific

impact discussion, the FEIS considered the impacts not just of SPOT but also of various other deepwater port projects and other offshore oil and gas drilling activity. *See, e.g.*, MAR.00024065, MAR.00024074 (cumulative impact on marine mammals of vessel strikes from SPOT and neighboring projects); MAR.00024069-MAR.00024071 (same, as to noise); MAR.00024071 (same, as to entanglement); MAR.00024071 (same, as to marine debris); MAR.00024072 (same, as to oil spills).

The FEIS also considered the impact of oil and gas drilling activity near SPOT, MAR.00024047, MAR.00024057, MAR.00024065, as well as other proposed deepwater ports in the Gulf, MAR.00024054. The FEIS found that the cumulative effects on protected species would be the same on non-listed species, and thus incorporated the analysis on one set of species to the other. MAR.00023700; MAR.00023704; MAR.00024075; MAR.00023648 (section 3.5.7.2); MAR.00023595 (section 3.5.3.3).

Petitioners contend that SPOT's cumulative-effects analysis did not consider the effects that other projects, like GulfLink, might have on various species. As an example of impacts SPOT's analysis failed to consider, Petitioners point to the GulfLink project's Biological Opinion, which "lists the Rice's whale, Kemp's Ridley and Loggerhead sea turtles as species it would potentially impact." Pet. Br. 37 (citing MAR.00208788-809).

Here is the thing: The GulfLink and SPOT projects are covered by the *same* Biological Opinion. MAR.00208625. "Due to the close proximity of the two projects, the similarity of project effects, and the overlapping oil-spill impact areas," the agencies compiled one Biological Opinion for the two projects, which analyzed the projects' effect in a "singular action area." MAR.00208669. If the GulfLink Biological Opinion is sufficient, so is the SPOT Biological Opinion, *because they are the same Biological Opinion*. Indeed, the combined Biological Opinion—whose "more comprehensive spill range and risk analysis" Petitioners laud, Pet. Br. 37—used the theoretical worst-case spill from *SPOT* as the worst-case spill scenario for both projects. MAR.00208790. The agencies thus necessarily considered the cumulative impacts of SPOT and GulfLink, because the Biological Opinion *is itself* a cumulative analysis of the two projects. The Biological Opinion does not include substantially more information on these cumulative impacts than the FEIS itself does. *Compare* MAR.00024061-75 (FEIS), *with* MAR.00208784-816 (Biological Opinion). Petitioners are therefore wrong that the agencies failed to evaluate cumulative impacts of SPOT and GulfLink.

C. The Agencies' Hard Look At Ozone Emissions Revealed That SPOT Could Actually Result In Fewer Emissions Overall.

The agencies took a hard look at the ozone precursor emissions caused by SPOT, which allowed them to evaluate the project's ozone impacts.

MAR.00023832; MAR.00023835-40; MAR.00023845-50. The SPOT project will include combustion systems that will eliminate 99% of ozone-precursor volatile organic compounds at the Oyster Creek terminal and 95% at the platform. MAR.00208587. The agencies also considered the possible air quality cumulative impacts of the various proposed deepwater ports, MAR.00024084, and ultimately found that the "majority" of the emissions SPOT might create "likely already occur" in the crude oil supply chain, such as with the uncontrolled emissions from ship-to-ship transfers during reverse-lightering operations, and that SPOT would be replacing those already-existing emission sources. MAR.00024091. In fact, because of the reduction in reverse-lightering trips, SPOT could result in fewer emissions overall. *Id.*; MAR.00023839-40.

Petitioners argue that the agencies' ozone analysis is inadequate because it does not consider the Environmental Protection Agency's post-FEIS change in nonattainment status for the SPOT project's relevant geographic area. Pet. Br. 38-41. But they identify no substantive change that this would require. The agencies had already undertaken a "General Conformity" analysis, which is the main consequence of EPA's attainment-status classification, for the project's second year of construction. MAR.0023849-50; MAR.00193180-84.

The upshot of the change from "serious" to "severe" is that the General Conformity analysis would have needed to discuss mitigation strategies for the first

year of construction, too. MAR.00023850; 42 U.S.C. § 7511(c). But the strategies discussed for year two are the same ones that SPOT plans to use for year one. MAR.00193178-84; MAR.00023831. The change in attainment status therefore does not rise to the kind of significant new information that would have required a supplemental FEIS. 40 C.F.R. § 1502.9(d)(1)(i)-(ii).

Petitioners next take issue with the FEIS's conclusion that the ozone analyses "show that the total air quality impacts would be less than . . . the ozone" significant impact level, which is the Environmental Protection Agency's standard to evaluate compliance with the Clean Air Act. Pet. Br. 39-40 (quoting MAR.00023843). Petitioners state, without explanation, that they used the data from SPOT's application and calculated the total air quality impact to be greater than the ozone significant impact level. *Id.*

Although the agencies' conclusion was first issued in the draft EIS, then again in the supplemental draft EIS, Petitioners did not raise their alternative calculations in their comments on those initial documents; they instead waited to raise the issue until submitting their comments on the *Final* EIS—*after* the NEPA process had concluded. MAR.00206564. Petitioners thus forfeited the issue long ago. *See Department of Transp. v. Public Citizen*, 541 U.S. 752, 764 (2004) (NEPA objection forfeit where party "did not raise these particular objections to the" environmental assessment before it issued). Petitioners' calculations,

relegated to a footnote of their brief, *see* Pet. Br. 40 n.22, are exactly the kind of technical arguments that the agency must be given an opportunity to address; this Court is not equipped to do the math itself. *See Marsh*, 490 U.S. at 378. In any event, as the agencies explain, Petitioners mix apples and oranges by comparing an estimation of the entire project's total potential emissions to a benchmark used for assessing *individual* stationary sources. U.S. Br. 35-36.

Petitioners next argue the FEIS relied on incomplete or inaccurate information because the FEIS's calculations of SPOT's total ozone impact do not evaluate impacts from offshore and onshore components combined. Pet. Br. 40. But the Environmental Protection Agency recommends emission sources within a 31.1-mile range be grouped together for purposes of cumulative air quality modeling. MAR.00024086; MAR.00023845. The project's onshore components' air-quality impact calculations therefore do not affect offshore components' air-quality impact calculations because the port is over 31 miles offshore. MAR.00024039; MAR.00024041; MAR.00024056; *see also* MAR.00023323. There is nothing arbitrary about using an EPA-approved method. The offshore-construction emissions, moreover, would generally occur in a different construction year than the onshore-construction emissions. MAR.00023838. For similar reasons, the agencies reasonably did not combine SPOT's onshore and offshore air quality impacts with those of each of the other proposed deepwater

ports because each of those ports is over 31.1 miles away from SPOT's onshore facilities. MAR.00024056; MAR.00024085-86.

Finally, Petitioners argue the FEIS's cumulative air-quality impact assessment was incomplete because the data in the FEIS table, which includes the individual air quality impacts of the other proposed deepwater ports, listed the ozone precursor emissions rather than calculating the ozone level itself. Pet. Br. 40-42. But that is how the National Ambient Air Quality Standards are calculated. MAR.00023850; U.S. Br. 32, 38. Detailing the precursor emissions does not inhibit the public's ability to "understand and consider the pertinent environmental influences involved," *Westphal*, 230 F.3d at 174; it merely follows the same methodology as the national standards, which is neither arbitrary nor capricious.

D. The FEIS Adequately Analyzed Alternatives To SPOT.

NEPA requires an agency to analyze "a reasonable range of alternatives . . . that are technically and economically feasible, and meet the purpose and need of the proposal," 42 U.S.C. § 4332(2)(C)(iii), including a "no action alternative," 40 C.F.R. § 1502.14(c). The FEIS fully complied with those obligations here by including and analyzing a no-action alternative, and then walking through around two dozen alternatives for "meeting the purpose and need of the proposal" and the environmental impacts that those alternatives would entail. *See* MAR.00023450-77; MAR.00023926-46.

Petitioners claim the agencies nevertheless (1) unjustifiably refused to consider a "reduced capacity" alternative, Pet. Br. 42-47; and (2) improperly assumed when analyzing the no-action alternative that the "same volumes of oil" would be exported by other means, *id.* at 48. Neither contention has merit. Petitioners' first claim was not sufficiently developed before the agencies, U.S. Br. 38-40, and misunderstands the law; their second mischaracterizes the FEIS's analysis.

1. When assessing alternatives, "NEPA requires only that the [agency] consider alternatives relevant to the applicant's goals." *City of Shoreacres*, 420 F.3d at 450-451. The agency "is not to define what those goals should be." *Id.* at 451. This limitation on the universe of alternatives the agency must consider flows directly from NEPA's text, which directs consideration of alternatives that "meet the purpose and need of the proposal." 42 U.S.C. § 4332(2)(C)(iii).

Complying with this principle, the agencies identified the project's "purpose and need" as SPOT had defined it. That purpose is to export domestic crude oil "to the global market with reduced use of ship-to-ship transfers," MAR.00023450, by constructing a facility with a "maximum export capacity of 730 million barrels per year." MAR.00023363; *see also* MAR.00023452. The FEIS considered a wide range of alternatives designed "to meet [this] stated purpose." MAR.00023452. It considered expansion of existing onshore and offshore export facilities; six

possible onshore pipeline routes; four possible onshore terminal sites; two onshore terminal design options; three possible deepwater port locations; three possible deepwater port design options; various possible control technologies and alternate construction methods; and four options for SPOT's eventual decommissioning. MAR.00023452-77.

Because the "applicant's purpose" is to create a facility that can handle SPOT's maximum capacity, a reduced-capacity alternative need not be considered. *City of Shoreacres*, 420 F.3d at 450-451. The alternatives analysis must only identify any "alternatives to a project which would reduce environmental harm while still achieving the goals to be accomplished by the proposed action." *South Louisiana Env't Council, Inc. v. Sand*, 629 F.2d 1005, 1017 (5th Cir. 1980). This Court has therefore rejected arguments that "the range of alternatives considered was insufficient because each of the alternatives have the same end result." *Westphal*, 230 F.3d at 177. The agency need not consider alternatives "at odds with the Project's purpose." *Id.*; *see also Gulf Coast Rod, Reel & Gun Club, Inc. v. Army Corps of Eng'rs*, 676 F. App'x 245, 250-251 (5th Cir. 2017) (affirming alternatives analysis that "rejected six alternatives" because in each "at least one of the stated purposes of the project would not be met"). Even if the agency is not limited to "alternatives that it could adopt or put into effect" as a practical matter, *Environmental Defense Fund, Inc. v. Corps of Eng'rs of U.S. Army*, 492 F.2d 1123,

1135 (5th Cir. 1974), it need not consider alternatives that do not meet the project's "purpose and need," 42 U.S.C. § 4332(2)(C)(iii).

Petitioners' efforts to muster contrary authority fall short. The only Fifth Circuit decision that they cite is *Environmental Defense Fund, Inc. v. Corps of Engineers of U.S. Army*, 492 F.2d 1123, and the Court there emphasized that the agency's "directive is a thorough consideration of all appropriate methods of accomplishing the aim of the action." *Id.* at 1135. Petitioners' out-of-circuit authorities are no more helpful. Those circuits, like this one, recognize that an agency is entitled to take a project's goals as given when determining which alternatives to consider. Petitioners rely heavily on *Western Watersheds Project v. Abbey*, 719 F.3d 1035, 1052 (9th Cir. 2013), but that case recognized that alternatives need only be considered if they "could feasibly meet the project's goal." The agency's goals there were not defined with respect to a particular maximum of livestock grazing—the agency merely sought to "modify current grazing practices . . . so that progress can be made toward meeting [certain] standards." *Id.* (citation omitted).[3] Petitioners' other cases are similar; they involve alternate *methods* of accomplishing the same project goals. *See New*

[3] *Western Watersheds* was a case where the agency was setting its own policy goals rather than accepting those of an applicant—further distinguishing the case from this one. *Cf. Union Neighbors United, Inc. v. Jewell*, 831 F.3d 564, 575 (D.C. Cir. 2016).

Mexico ex rel. Richardson v. Bureau of Land Mgmt., 565 F.3d 683, 709 (10th Cir. 2009) ("reasonableness is judged with reference to an agency's objectives for a particular project"); *Union Neighbors United*, 831 F.3d at 575 ("the goals of an action delimit the universe of the action's reasonable alternatives") (citation and alteration omitted).

Petitioners cite one Second Circuit case, nearly 50 years old, that suggests in dicta that an agency might need to consider actions that "partially . . . meet the proposal's goal" (while recognizing that alternatives need not be considered if they require "significant changes in governmental policy"). *Natural Res. Def. Council, Inc. v. Callaway*, 524 F.2d 79, 93 (2d Cir. 1975). That partial-satisfaction alternative is plainly not the law in this Circuit. *Supra* pp. 43-45 (collecting cases). This Court has never followed this aspect of *Callaway*, nor has any other appellate court. And the Second Circuit has subsequently approved an FEIS that eliminated alternatives for failure to "substantially meet the purpose and need objectives" of the proposed project. *Natural Res. Def. Council, Inc. v. FAA*, 564 F.3d 549, 556-557 (2d Cir. 2009) (citation omitted).

Petitioners are therefore wrong to suggest that the agency had to consider any "likelihood that SPOT's full capacity will be unnecessary" when identifying the range of alternatives. Pet. Br. 45. But even if—contrary to this Court's longstanding precedent—MARAD had to justify the project's goals before

accepting them, it did just that. The FEIS did not make an "assumption that all of SPOT's capacity is necessary." *Id.* It acknowledged that "some analysts believe that oil demand has already peaked or will peak around the time that the proposed project would be built." MAR.00023362. And it considered Petitioners' views that "future changes" in policy might "reduce the volume of crude oil exports." MAR.00023363. But it rejected those analysts' views in light of a competing forecast from the Energy Information Administration (EIA), which predicts ample demand "through 2048." MAR.00023362.[4] The agencies explained the factors that led them to accept the latter forecast, including "technological advancement of exploration methods"; "the repeal of the U.S. crude oil export ban"; and the absence of domestic refining capacity for U.S.-produced crude oil. MAR.00023362-63.

Petitioners complain that the EIA's assessment "does not purport to forecast future energy market conditions." Pet. Br. 46. That is not accurate. As the EIA explains, the forecast "represents EIA's best assessment of how U.S. and world energy markets will operate through 2050, based on key assumptions intended to provide a baseline for exploring long-term trends." MAR.00263506. MARAD

[4] The EIA is "the statistical and analytical agency within the U.S. Department of Energy"; its "data, analyses, and forecasts are independent of approval by any other officer or employee of the U.S. Government." MAR.00263505.

explained the factors that led it to find the EIA's parameters more convincing. MAR.00023362-63. MARAD therefore "made a reasonable predictive judgment based on the evidence it had." *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1160 (2021). NEPA requires no more.

2. The FEIS also gave thorough consideration to the no-action alternative. *See* MAR.00023450-51. It explained that, in the no-action scenario, "the infrastructure proposed by the Applicant would not be built or brought online, and the potential beneficial or adverse environmental impacts identified in this EIS would not occur." MAR.00023450.

The no-action alternative, however, must also incorporate "predictable actions by others" that are likely to result. Council on Environmental Quality, *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, 46 Fed. Reg. 18,026, 18,027 (Mar. 23, 1981). MARAD determined that, even without SPOT, "it is likely that exports of oil that are already occurring due to international global demand . . . would continue to use shoreside terminals in combination with offshore ship-to-ship transfers." MAR.00023450. MARAD explained that "current excess production" already "exceeds the capacity of existing shoreside terminals," so other actions would likely rise to the occasion. *Id.* These might include "expansion or establishment of onshore oil terminals," which would involve "greater temporary construction impacts to coastal and

onshore resources," "substantially less offshore construction impacts," and "similar offshore operational impacts" given the ship-to-ship transfers required using onshore terminals. *Id.* These actions might also involve expansion of current or construction of new ports, which would include deeper dredging of access channels, and would cause similar offshore and onshore impacts as would the expansion of oil terminals. MAR.00023456; MAR.00024049; MAR.00024056. *Contra* Pet. Br. 49 (stating that Gulf ports are "physically constrained" from expansion or new construction).

The FEIS also acknowledged the possibility that "projects similar to the Proposed Action" might result as well, but explained that such projects would "include evaluation for environmental impacts" and therefore declined to speculate further about the possible impacts. MAR.00023451. The FEIS then noted that the fundamental problem that the project seeks to solve—that is, the goal of "fully load[ing] VLCCs offshore and minimiz[ing] the need for ship-to-ship transfers"—"would not be satisfied" through a no-action alternative. *Id.* This thorough discussion more than satisfies NEPA's requirements. *See South Louisiana Env't Council*, 629 F.2d at 1017 (sustaining no-action alternative analysis where agency recognized that, although the "adverse environmental effects would not take place" in the no-action-alternative scenario, "the transportation benefits achieved through

the use of the project would not be achieved through the use of existing waterways").

Petitioners' description of the FEIS's no-action alternative is wrong at every turn. They argue that the FEIS concluded "that taking no action would result in the same or worse impacts to the environment." Pet. Br. 47. The FEIS says no such thing. It contrasted the impacts associated with SPOT and those associated with onshore replacement facilities, noting those impacts would be more substantial onshore but less significant offshore. MAR.00023451-52. Although the FEIS noted that "projects similar" to SPOT might arise, it explained that such projects "would likely result in similar, greater, *or lesser* impacts than the Proposed Action" and declined to explore those possibilities in greater detail because any proposals would have to go through their own detailed environmental analysis before approval. MAR.00023451 (emphasis added). Thus, contrary to Petitioners' allegation, the FEIS does not state that "federal agencies would approve other identical ports." Pet. Br. 48.

Petitioners next charge that the agencies assumed that "existing ports would export the same volumes of oil as SPOT." *Id.* Once again, the alternatives analysis does not say that. Rather, it states that "it is *likely* that exports of oil that are *already occurring* . . . would continue" through existing facilities, and noted that "*current* excess production" already "exceeds the capacity of existing

shoreside terminals." MAR.00023450 (emphasis added). This, the FEIS continued, "*could* result in expansion or establishment of onshore oil terminals in other locations along the Gulf Coast." *Id.* (emphasis added). As the agencies explain, U.S. Br. 45, the FEIS's assessments are based on current conditions, and Petitioners do not challenge the current-conditions assessment, *see* Pet. Br. 48-51.

In one sentence of the alternatives analysis, the FEIS cites an appendix that estimates the number of reverse-lightering trips that would be saved by constructing SPOT. MAR.00023451. In tabulating that number, the FEIS used SPOT's maximum capacity as the volume of oil that would be exported. *See* MAR.00027756. But Petitioners do not dispute that SPOT would save *some* number of reverse-lightering trips, nor do they point to evidence that SPOT's estimation is so wrong that it is arbitrary or capricious. And, in any event, this calculation plays no other role in the no-action analysis. Notably, the no-action analysis regarding the projected volume of exports is based on the EIA's assessment that assumes *existing* regulatory conditions continue. *See supra* pp. 47-48.

Based on their inaccurate characterizations of MARAD's analysis, Petitioners fault the agency for assuming that "another action will perfectly substitute for" SPOT if it is not built. Pet. Br. 51 (citation omitted). But MARAD did not assume that. MARAD instead began from the premise that "*existing*"

facilities are inadequate to meet even "*current* excess production," and recognized that the market would likely account for this reality. MAR.00023450 (emphases added).

To be sure, in other parts of the FEIS, including its cumulative-impacts analysis, the agencies concluded that SPOT was not likely to significantly affect the overall volume of exports that occur into the future. *See* MAR.00024088. But the alternatives analysis considered whether existing facilities would be adequate to process the EIA's anticipated demand even *without* SPOT. *See* MAR.00023451-52; MAR.00024049; MAR.00024056. Thus, Petitioners' evidence purporting to challenge that conclusion, *see* Pet. Br. 49-50, is a red herring with respect to the FEIS's no-action analysis, and Petitioners have not challenged this aspect of the cumulative-impacts analysis.

Even if the FEIS had relied on its conclusion regarding SPOT's impact on export volumes when analyzing the no-action alternative, there would be no problem. The FEIS did not "ignore" the possibility that SPOT would induce additional exports of crude oil. Rather, it acknowledged "many comments claiming the proposed Project would induce production of crude oil." MAR.00024088. In consultation with DOT economists, MARAD then determined that both production and consumption were largely independent "of U.S. oil export infrastructure." MAR.00024091. Both were heavily driven by price, and the

"major drivers of oil price movements" included "global oil demand, wars and civil unrest, technological innovation, and government policy"—not Gulf Coast export infrastructure. *Id.* The FEIS acknowledged that SPOT would "marginally impact[]" costs and therefore U.S. oil production, but concluded that these marginal impacts paled in comparison to factors "independent of U.S. oil export infrastructure," especially price. *Id.* MARAD undertook this analysis in direct response to commenters citing the data favored by Petitioners from Peter Erickson. *See* MAR.00025627 (noting that "MARAD has reviewed the Eri[c]kson analysis with USDOT economists" and updated its analysis "to address the relationship of the proposed Project to induced production").

All of this explains why this case is nothing like the "NEPA reviews that circuit courts have thrown out" invoked by Petitioners. Pet. Br. 50. In several of those cases, the agency had assumed that the very project under consideration (or another one already rejected) would occur. *See Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1037-38 (9th Cir. 2008) ("the SEIS assumes, as the baseline, the existence of [a plan] which we previously found invalid"); *North Carolina Wildlife Fed'n v. North Carolina Dep't of Transp.*, 677 F.3d 596, 602 (agencies "concede[d]" that data in the no-action alternative "assumed the existence of the" proposed project). But here, the no-action alternative plainly

states that "the infrastructure proposed by the Applicant would not be built or brought online." MAR.00023450.

In other cases Petitioners cite, the agency assumed the project's presence or absence would not affect supply or demand without explaining its reasons or sources. *See Center for Biological Diversity v. Bernhardt*, 982 F.3d 723, 740 (9th Cir. 2020) (agency made assumption "without citations or discussion"); *Mid States Coal. for Progress v. STB*, 345 F.3d 520, 549 (8th Cir. 2003) (agency ignored effect on price of coal when "the stated goal of the project" was to reduce that price); *WildEarth Guardians v. Bureau of Land Mgmt.*, 870 F.3d 1222, 1234 (10th Cir. 2017) (agency's "assumption . . . lacks any support in the administrative record"); *Center for Biological Diversity v. Department of Interior*, 623 F.3d 633, 642-643 (9th Cir. 2010) (agency did not explain why activity would likely be the same). Here, however, the agencies did not rely on any conclusion about SPOT's impact on supply or demand in their no-action discussion, *see supra* pp. 50-51, and when they *did* rely on that determination elsewhere, they extensively explained the basis for their conclusion and stated that they developed their views in consultation with DOT economists after reviewing the data Petitioners cite, *supra* pp. 52-53.

At bottom, Petitioners are frustrated that the agencies did not *endorse* the data they submitted, but that is not NEPA's purpose. The agencies considered the

evidence, made a reasonable judgment, and reasonably explained it. That is all NEPA requires.

III. THE DEEPWATER PORT ACT DOES NOT COMPEL VACATUR.

A. Untimely Approval Does Not Warrant Vacatur.

The DWPA provides that deepwater port applications should be approved or denied within one year, *see* 33 U.S.C. §§ 1504, 1505. SPOT submitted its application on January 31, 2019. MAR.00208558. The regulatory clock was then suspended three times to allow the agencies to obtain additional information to develop the record, MAR.00208559-61, and the agencies took additional time to undertake an additional, voluntary supplemental draft EIS process. DOT approved SPOT's application on November 21, 2022, MAR.00208528, beyond the statutory deadline.

Petitioners' claim that SPOT's untimely approval compels vacatur rests on an untenable—even nonsensical—view of the law. If Petitioners are right, the remedy for delayed agency action would be to delay it even more. That cannot be the law and Petitioners cite no case saying it is.

As the agencies explain, Petitioners' challenge is meritless because they do not fall within the statutory zone of interests and because this Court lacks authority to impose vacatur as a remedy for the agencies' failure to meet their deadline. U.S.

Br. 49-55. This Court should reject Petitioners' timing argument for two other reasons, as well.

First, this Court lacks statutory jurisdiction over this claim. The DWPA creates two separate paths to federal court. The first, in 33 U.S.C. § 1515(a), grants district courts "jurisdiction" to, among other things, "order the Secretary to perform" an "act or duty under this chapter which is not discretionary with the Secretary." The second jurisdictional provision, in 33 U.S.C. § 1516, grants the courts of appeals jurisdiction over claims brought by someone "who is adversely affected or aggrieved by the Secretary's *decision* to issue, transfer, modify, renew, suspend, or revoke a license." *Id.* (emphasis added.)

A claim that the Secretary has failed to satisfy the statutory deadline is a claim that the Secretary has failed to perform "any act or duty . . . which is not discretionary with the Secretary," and therefore belongs in a district court. 33 U.S.C. § 1515(a)(2). Petitioners, however, brought their case in this Court under § 1516, claiming aggrievement from the Secretary's ultimate "decision to issue" SPOT's license. As a consequence, this Court lacks jurisdiction to consider Petitioners' delay claim.

Second, vacatur is not an appropriate remedy for unlawfully delayed action under the Administrative Procedure Act. The APA authorizes reviewing courts to "hold unlawful and set aside" agency action that is "found to be . . . not in

accordance with law." 5 U.S.C. § 706(2)(A). But a late-issued permit is no longer in violation of any statute. A *separate* APA provision tells courts what to do when agency action is "unlawfully withheld or unreasonably delayed"—"compel" the agency action in question. *Id.* § 706(1). But that remedy is no longer necessary once the agency has come into compliance voluntarily.

Tellingly, Petitioners cite no case that has ever vacated an agency's action after it was approved because of a missed statutory deadline. *See* Pet. Br. 53-57. And although they claim "the plain language of the DWPA" compels this outcome, *id.* at 53, there is no reference to mandatory denial or vacatur in any of the statutory or regulatory provisions they cite. *See* 33 C.F.R. pt. 1504; 33 C.F.R. §§ 148.107, 148.283.

At minimum, the Court should hold that any delay was harmless. *See* 5 U.S.C. § 706 (courts must give "due account" to "the rule of prejudicial error"); *accord Shinseki v. Sanders*, 556 U.S. 396, 406 (2009) (APA requires "the same kind of 'harmless-error' rule that courts ordinarily apply in civil cases"). Petitioners do not cite any way that the delay prejudiced them or negatively affected the outcome of the licensing proceedings. *See* Pet. Br. 53-57. If anything, the extended process served Petitioners' interests by allowing them more time to provide comments and ensuring that the FEIS was as thorough as it was. *See* U.S. Br. 51 (citing Petitioners' comment *requesting* additional delay).

B. DOT Made The Necessary Statutory Findings.

The DWPA provides that the DOT may issue a license after finding that "construction and operation of the deepwater port will be in the national interest and consistent with national security and other national policy goals and objectives, including energy sufficiency and environmental quality." 33 U.S.C § 1503(c)(3). Petitioners do not dispute that the record of decision found that SPOT "would be 'good for' the national interest," but they claim that it failed to make a finding specifically with respect to "energy sufficiency." Pet. Br. 57 (citation omitted).

The record of decision makes the very finding that Petitioners claim is missing, concluding that "[i]n light of the Project's benefits to local and national economic growth and the Nation's infrastructure resilience, its minimal impact on the availability and cost of crude oil in the U.S. domestic market, and [other factors], MARAD has determined that the approval of SPOT's application is in the national interest and consistent with other policy goals and objectives, including energy sufficiency and environmental quality." MAR.00208579. That finding defeats Petitioners' argument. After all, Petitioners do not challenge the *sufficiency* of the finding; they only contend it is absent. *See* Pet. Br. 58.

DOT also fully justified its conclusion. The agency explained that SPOT would have only "minimal impact on the availability and cost of crude oil in the

U.S. domestic market." MAR.00208579. And DOT gave several reasons why that is so, including that supply is driven by price, which in turn is primarily governed by factors—like geopolitical conditions—that are independent of U.S. export infrastructure. MAR.00023363; MAR.00024091. The agency also explained that U.S. refineries are not equipped to process even the *existing* volumes of crude oil produced in the United States, rendering Petitioners' evidence that most new production has gone to exports both unsurprising and irrelevant. *See* MAR.00023363; Pet. Br. 59-60.

IV. ANY REMAND SHOULD BE WITHOUT VACATUR.

If this Court determines that any of Petitioners' arguments are meritorious, the Court should remand without vacating the record of decision. "Remand, not vacatur, is generally appropriate when there is at least a serious possibility that the agency will be able to substantiate its decision given an opportunity to do so." *Texas Ass'n of Mfrs. v. Consumer Product Safety Comm'n*, 989 F.3d 368, 389 (5th Cir. 2021). That is certainly the case here. Petitioners' contentions, if accepted, essentially require the agencies to simply add detail to the already voluminous FEIS or record of decision. They would not compel a different outcome, and there is no indication that the agencies are likely to alter their decision after adding the necessary detail given their uniform findings that SPOT is in the national interest and is generally an environmentally favorable alternative to the inefficient existing

process of reverse lightering. *Supra* pp. 18-55; *see also* U.S. Br. 58 n.4. Given the "serious possibility" that the agencies can justify their decision by supplying additional reasoning, the Court should remand without vacatur. *Texas Ass'n of Mfrs.*, 989 F.3d at 389; *accord Basinkeeper v. Army Corps of Eng'rs*, 715 F. App'x 399, 400 (5th Cir. 2018) (staying district court's preliminary injunction halting construction on a project where the court should have granted the Corps the opportunity to address "the limited deficiencies noted in its opinion").

CONCLUSION

For the foregoing reasons, and those in the Government's brief, this Court should dismiss or deny the petition for review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I 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 July 17, 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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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,967 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Fifth Circuit Rule 32.1.

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