No. 20-60281

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SHRIMPERS AND FISHERMEN OF THE RGV;
SIERRA CLUB; SAVE RGV FROM LNG,
Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,
Respondent.

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

BRIEF FOR RESPONDENT

JEFFREY BOSSERT CLARK
Assistant Attorney General
ERIC GRANT
Deputy Assistant Attorney General
DAVID GUNTER
REBECCA JAFFE
Attorneys
Environment and Natural Resources Division
U.S. Department of Justice
Post Office Box 7415
Washington, D.C. 20044
(202) 305-0258
Rebecca.Jaffe@usdoj.gov

Of Counsel:

JAMES DEBERGH
MARK LUMEN
Attorneys
U.S. Army Corps of Engineers

CERTIFICATE OF INTERESTED PERSONS

No. 20-60281

SHRIMPERS AND FISHERMEN OF THE RGV;
SIERRA CLUB; SAVE RGV FROM LNG,
Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,
Respondent.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 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.

1. Petitioners
    a. Shrimpers and Fishermen of the RGV
    b. Sierra Club
    c. Save RGV from LNG
2. Declarants on Petitioners' Behalf
    a. Amber Thomas
    b. Mary Angela Branch
    c. Rebekah Lynn Hinojosa
    d. Madeleine T. Sandefur

3. Counsel for Petitioners

    a. Nathan Mathews, Sierra Club

    b. Erin Gaines, Texas RioGrande Legal Aid

    c. Thomas Gosselin, Texas RioGrande Legal Aid

4. Intervenors

    a. Rio Grande LNG, LLC, owned by NextDecade

    b. Rio Bravo Pipeline Company, LLC, owned by Enbridge

5. Counsel for Intervenors

    a. Michael B. Wigmore, Vinson & Elkins

    b. Jeremy C. Marwell, Vinson & Elkins

    c. Beth Petronio, K&L Gates LLP

6. Respondent

    United States Army Corps of Engineers

7. Counsel for Respondent

    a. Jeffrey Bossert Clark, U.S. Department of Justice

    b. Eric Grant, U.S. Department of Justice

    c. Jennifer Neumann, U.S. Department of Justice

    d. Justin Heminger, U.S. Department of Justice

    e. David Gunter, U.S. Department of Justice

    f. Daniel Halainen, U.S. Department of Justice

g. Rebecca Jaffe, U.S. Department of Justice

h. Milton Boyd, U.S. Army Corps of Engineers

i. James Van DeBergh, U.S. Army Corps of Engineers

j. Mark Lumen, U.S. Army Corps of Engineers

s/ *Rebecca Jaffe*
REBECCA JAFFE

Attorney of Record for Respondent

STATEMENT REGARDING ORAL ARGUMENT

Respondent U.S. Army Corps of Engineers does not request oral argument, as the facts and legal arguments are adequately presented in the briefs and record. The Corps stands ready to participate, however, in the event the Court determines that the decisional process would be aided by oral argument.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

GLOSSARY

Corps	U.S. Army Corps of Engineers
Corps' Assessment	Supplemental Environmental Assessment prepared by the U.S. Army Corps of Engineers
EIS	Environmental Impact Statement
FERC	Federal Energy Regulatory Commission
LEDPA	Least Environmentally Damaging Practicable Alternative
LNG	Liquefied Natural Gas
MTPA	Million Tons Per Annum
NEPA	National Environmental Policy Act
Permit	U.S. Army Corps of Engineers permit SWG-2015-00114
Petitioners	Petitioners Shrimpers and Fishermen of the RGV, Sierra Club, and Save RGV from LNG
Rio Bravo	Rio Bravo Pipeline Company, LLC
Rio Grande	Rio Grande Liquefied Natural Gas, LLC

INTRODUCTION

Petitioners ask the Court to review a Clean Water Act permit that the U.S. Army Corps of Engineers ("Corps") issued to Rio Grande Liquefied Natural Gas, LLC ("Rio Grande") and to Rio Bravo Pipeline Company, LLC ("Rio Bravo") (collectively, the "Energy Companies"). This "Permit" authorized Rio Grande and Rio Bravo to discharge fill material into waters of the United States as part of the construction of a natural gas pipeline and liquefied natural gas ("LNG") terminal. But events have overtaken this case. As a result of recent design changes to both the terminal and the pipeline, the Corps suspended the Permit to reconsider its decision. After completing the reconsideration process, the Corps may reinstate, revoke, or modify the Permit, and its decision may moot the issues in this action. Moreover, the Energy Companies have not commenced construction, and while the Permit is suspended, they are not authorized to disturb any waters of the United States. Because the Corps' decision has not yet caused any impacts and because the Corps is reconsidering its decision, this petition is not ripe for judicial review.

If the Court does reach the merits, it should uphold the Corps' decision. On the basis of the then-available information, the Corps reasonably analyzed alternatives to the proposed project and determined the least environmentally damaging practicable alternative, as the Clean Water Act requires. The Corps also reasonably relied on the technological and engineering expertise of the Federal

Energy Regulatory Commission ("FERC"). Finally, the Corps properly analyzed and minimized temporary impacts to waterbodies from pipeline construction.

The petition should be held in abeyance as unripe or denied on the merits.

STATEMENT OF JURISDICTION

Petitioners' cause of action arises under the Clean Water Act, 33 U.S.C. §§ 1311, 1344(a), and the Administrative Procedure Act, 5 U.S.C. § 706(2). This Court has jurisdiction to review the Permit under the Natural Gas Act, 15 U.S.C. § 717r(d)(1), because the pipeline is subject to 15 U.S.C. § 717f, the LNG terminal is subject to 15 U.S.C. § 717b(e), and both the pipeline and the terminal are located in Texas, within this Circuit, AR000077. Petitioners timely filed their petition on March 30, 2020, or 38 days after the Corps issued the Permit. *See Sierra Club v. U.S. Department of Interior*, 899 F.3d 260, 268 (4th Cir. 2018).

As discussed in Part I, however, this case is not ripe for review because the Corps suspended the Permit and is reconsidering its decision.

STATEMENT OF THE ISSUES

1. Whether the petition for review is unripe because the Corps has suspended the Permit and is reconsidering its decision.

2. Whether the Corps reasonably analyzed alternatives when it considered the information available at the time and relied on FERC's analysis of alternatives when FERC was the lead, expert agency evaluating the project.

3. Whether the Corps reasonably analyzed and minimized temporary impacts to aquatic resources when it imposed Permit conditions and procedures restricting the duration of temporary impacts and requiring complete restoration.

STATEMENT OF THE CASE

A. Statutory and regulatory background

1. The Natural Gas Act

The "principal purpose" of the Natural Gas Act is to "encourage the orderly development of plentiful supplies of . . . natural gas at reasonable prices." *NAACP v. FPC*, 425 U.S. 662, 669–70 (1976). Under the Act, FERC has primary authority to approve construction of natural gas pipelines and LNG terminals. 15 U.S.C. §§ 717b(e)(1), 717f(c). FERC does so by issuing a certificate of public convenience and necessity for pipelines and approving applications to construct LNG terminals. *Id.* §§ 717b(e)(1), 717f(e). FERC also serves as "the lead agency for the purposes of coordinating all applicable Federal authorizations" and "for the purposes of complying with the National Environmental Policy Act of 1969" ("NEPA"). *Id.* § 717n(b)(1). Other agencies, such as the Corps, examine specific issues under the statutes that they administer and grant any additional, necessary authorizations for projects to proceed.

2. The National Environmental Policy Act

NEPA is a procedural statute that does not mandate substantive results but rather requires agencies to consider environmental impacts. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349–50 (1989). NEPA "does not prohibit the undertaking of federal projects patently destructive of the environment; it simply mandates that the agency gather, study, and disseminate information concerning the projects' environmental consequences." *Sabine River Authority v. U.S. Department of Interior*, 951 F.2d 669, 676 (5th Cir. 1992).

Under NEPA, if the project involves a "major Federal action" that would "significantly affect[] the quality of the human environment," an agency must prepare a relatively detailed Environmental Impact Statement ("EIS"). 42 U.S.C. § 4332(2)(C). An agency may also prepare an Environmental Assessment, which is a "concise" document that serves to "[b]riefly provide sufficient evidence and analysis for determining whether to prepare an [EIS]" and to "[a]id an agency's compliance with [NEPA] when no [EIS] is necessary." 40 C.F.R. § 1508.9(a)(1), (2). Current NEPA regulations encourage agencies to "tier their environmental impact statements to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review." *Id*. § 1502.20.

3. The Clean Water Act

The Clean Water Act prohibits "the discharge of any pollutant"—including spoil, dirt, and rock—without a permit into "navigable waters," which are defined as "the waters of the United States." 33 U.S.C. §§ 1311(a), 1362(6), 1362(7), 1362(12). Waters of the United States include "special aquatic sites," such as certain wetlands and mud flats. 40 C.F.R. §§ 230.3(m), 230.41, 230.42. Section 404 of the Clean Water Act authorizes the Corps to issue permits for discharges of "dredged or fill material" into waters of the United States. 33 U.S.C. § 1344(a). The Corps reviews permit applications to ensure compliance with statutorily mandated regulations known as the "Section 404(b)(1) Guidelines," codified at 40 C.F.R. Part 230, and with its permit regulations at 33 C.F.R. Parts 320–332. *See* 33 U.S.C. § 1344(b)(1).

The Guidelines specify that no discharge will be permitted if it will cause significant degradation of waters of the United States. 40 C.F.R. § 230.10(c). The Corps has a goal of "no overall net loss to wetlands," and it achieves that goal through a three-step mitigation framework by (1) avoiding impacts, (2) minimizing impacts, and (3) compensating for impacts that cannot be avoided or minimized. *Memorandums of Agreement; Clean Water Act Section 404(b)(1) Guidelines; Correction*, 55 Fed. Reg. 9210, 9211–12 (Mar. 12, 1990). Each step is described in more detail below.

First, under the Section 404(b)(1) Guidelines, "no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences." 40 C.F.R. § 230.10(a). This requirement is often referred to as identifying the "LEDPA," that is, the least environmentally damaging practicable alternative. To be "practicable," an alternative must be "available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes." *Id.* § 230.10(a)(2). Therefore, the avoidance component of mitigation means choosing the LEDPA. *Ohio Valley Environmental Coalition v. Aracoma Coal Co.*, 556 F.3d 177, 202 (4th Cir. 2009).

Second, minimization means using "practicable project modifications and permit conditions that minimize adverse impacts." *Id.*; *see also* 40 C.F.R. § 230.10(d) (mandating that the Corps require "appropriate and practicable steps" to "minimize potential adverse impacts of the discharge on the aquatic ecosystem").

Third, "compensatory mitigation is used where appropriate to compensate for unavoidable adverse impacts after all avoidance and minimization measures have been taken." *Aracoma Coal*, 556 F.3d at 202; *accord* 33 C.F.R. § 332.3(a)(1). The purpose of compensatory mitigation is to replace "aquatic resource functions that will be lost as a result of the permitted activity." *Id*. Compensatory mitigation

can include restoring, enhancing, establishing, or preserving special aquatic sites. *Id*. § 332.3(a)(2). The Corps may require compensatory mitigation as a permit condition. *Id*. § 325.4(a)(3).

B. Factual background

1. FERC's authorization

In 2016, the Energy Companies sought FERC authorization to construct and operate a natural gas pipeline and LNG terminal in Texas. AR003159. The project's purpose is to produce and export 27 million tons per annum ("MTPA") of LNG and to produce approximately 0.4 MTPA of LNG that can be loaded onto trucks for distribution to fueling stations in south Texas. AR003182, AR003196.

The LNG terminal will be on 750.4 acres of land along the Brownsville Ship Channel in south Texas. AR003160. As originally planned, the terminal would have included six liquefaction "trains" (equipment systems that remove impurities from natural gas and cool it to liquid form), each with a capacity of 4.5 MTPA. AR003160. The terminal facility will also contain storage tanks, docking facilities for LNG-carrying ships, and (under the original plan) a compressor station known as Compressor Station 3. AR003160.

The pipeline includes a 2.4-mile header system that will gather natural gas from existing pipelines and 135.5 miles of new dual 42-inch diameter pipelines. AR003160, AR000077. Some 66% of the pipeline route is within or adjacent to

other, previously disturbed right-of-way corridors. AR003177. Construction of each pipeline will take one year. AR003168. About three years after terminal construction begins, Rio Bravo will begin constructing Pipeline 1, and it will start Pipeline 2 eighteen months after completing Pipeline 1. AR003161, AR003237.

FERC solicited public comment several times and prepared an EIS that exhaustively documented and considered the potential environmental impacts of the project. AR003161. In the EIS, FERC considered alternatives to the proposed project to determine whether any of them would be reasonable and environmentally advantageous. AR003267. These alternatives included no project at all, expanding other LNG facilities, building the terminal at a different location, and various pipeline configurations. AR003268, AR003269–77, AR003281–88, AR003291.

In addition, FERC evaluated—and then reduced—impacts from the project's construction and operations. AR003162. It imposed specific procedures that the Energy Companies must implement to minimize and mitigate construction impacts on wetlands and waterbodies by implementing specific procedures. AR003164, AR003178. It also reduced project impacts by rejecting as unjustified a temporary road that the Energy Companies planned to use to transport fill material through wetlands. AR003164. The Companies abandoned that road, which prevented 9.4 acres of impacts to wetlands and mudflats. AR003164, AR003288–90. Moreover, Rio Bravo must avoid impacts to all major perennial streams and other waterbodies

and wetlands by using horizontal directional drilling to bury the pipeline in order to avoid constructing trenches through wetlands or streams. AR003177.

FERC issued an order authorizing the project in November 2019, AR001140, and denied requests for rehearing in January 2020. Several persons, including Petitioners Sierra Club and Save RGV from LNG, challenged FERC's orders in the D.C. Circuit. *Vecinos para el Bienestar de la Comunidad Costera v. FERC*, No. 20-1045 (docketed Feb. 20, 2020). That case is pending.

2. The Permit

The Energy Companies applied for a Clean Water Act permit in 2016. AR000012. The Corps participated as a cooperating agency when FERC prepared the EIS. AR003159.[1] After FERC finished that analysis, the Corps prepared a supplemental environmental assessment ("Corps' Assessment") that incorporated the FERC EIS and considered additional information. AR000006. The Corps solicited public comment twice and, in response to comments questioning the adequacy of the mitigation plan, required the Energy Companies to revise their plan. AR000016.

The Corps observed that, while FERC's EIS analyzed alternatives under NEPA, the Corps must analyze alternatives under the Section 404(b)(1) Guidelines.

[1] Cooperating agencies are agencies that have legal jurisdiction over a portion of the project or that provide special expertise to the lead agency. 40 C.F.R. § 1501.6. They assist the lead agency as requested. *Id.*

AR000006. The Corps reviewed FERC's alternatives analysis in light of the Guidelines and concluded that the proposed project was the LEDPA (the least environmentally damaging practicable alternative). AR000028–33. When the Energy Companies applied for the Permit, they confirmed that the proposed terminal layout compressed the proposed facility as much as possible. AR000011.

The Corps issued the Permit in February 2020, authorizing the Energy Companies to dredge or fill special aquatic areas under Section 404 of the Clean Water Act. AR000082. The Permit requires the Energy Companies to comply with special conditions, such as using specific procedures to minimize damage to aquatic resources and restoring temporary impacts from pipeline construction within 30 days of completing work. AR000079 ¶¶ 6, 8.

To construct the terminal, the Permit authorizes Rio Grande to permanently fill 80.5 acres of open water, dredge 94.3 acres of open water, and dredge or fill 182.8 acres of special aquatic sites, including wetlands and mudflats. AR000077. Pipeline construction will temporarily affect 122.7 additional acres of special aquatic sites (and permanently convert 2.9 of those acres from shrub and forested wetlands to emergent, herbaceous wetlands) and cross streams and waterbodies. AR000010, AR000077. The total impact—both permanent and temporary—from the terminal and the pipeline to waters of the United States is approximately 480.3 acres. AR000008, AR000010.

To mitigate unavoidable, permanent wetland impacts, the Permit requires the Energy Companies to provide extensive compensatory mitigation at two different sites, a total of 3,059 acres—much more than the Companies originally proposed. AR000080, AR000363, AR000027. At the Miradores mitigation site, the Energy Companies must establish 350 acres of wetlands, enhance 21.9 acres of wetlands, preserve 3.15 acres of ponds, and restore 1,184 acres of other habitat. AR000080. The Energy Companies must begin construction at the Miradores site within three months after initiating work in waters of the United States and must complete construction within 1.5 years. AR000081. At the Loma Ecological Preserve, the Energy Companies will preserve 1,500 acres, including 1,241.1 acres of mudflats and 84.1 acres of wetlands. AR000080. The Energy Companies must preserve this site before disturbing any waters of the United States. AR000080.

The Corps acknowledged that the Project will impact waters of the United States. *E.g.*, AR000008, AR000010. But it concluded that the Energy Companies would mitigate those detrimental impacts through avoidance and minimization—particularly, through compliance with the Permit's conditions—and through the compensatory mitigation plan. AR000042.

3. Developments after the Corps issued the Permit

After the Corps issued the Permit in February 2020, and before any construction began, Rio Grande and Rio Bravo modified their project plans as elaborated below.

In June 2020, Rio Bravo requested FERC's authorization to modify its plans for the pipeline, proposing to eliminate Compressor Stations 2 and 3 and to increase Pipeline 1's size from 42 to 48 inches. *Rio Bravo Pipeline Company, LLC, Amendment Application*, Cover Letter at 1, FERC Docket No. CP20-481 (June 15, 2020), http://elibrary.ferc.gov:0/idmws/doc_info.asp?document_id=14869305.[2] These changes would not alter the pipeline's overall capacity, but they would reduce the pipeline's footprint and, consequently, would likely reduce impacts on wetlands. *Id.* Rio Bravo asked FERC to approve its amended plans by December 17, 2020. *Id*., Abbreviated Application at 3. On July 28, 2020, FERC announced that it would prepare an environmental assessment on Rio Bravo's amended plans and requested public comments by August 27, 2020 on the scope of issues to address in the environmental assessment. *Notice of Intent, Etc.* at 1, FERC Docket No. CP20-481 (July 28, 2020), http://elibrary.ferc.gov:0/idmws/file_list.asp?document_id=14879508.

---

[2] The Court may "take judicial notice of the . . . underlying FERC proceedings." *Town of Norwood v. New England Power Co.*, 202 F.3d 408, 412 n.1 (1st Cir. 2000).

In July 2020, Rio Grande notified FERC that it was planning to use five liquefaction trains, each with a capacity of 5.4 MTPA, instead of its original plan for six trains with 4.5 MTPA capacity each. *Rio Grande LNG, LLC, Response to July 10, 2020, Request for Supplemental Public Information* at 2-1, FERC Docket No. CP16-454 (July 14, 2020), http://elibrary.ferc.gov:0/idmws/file_list.asp?document_id=14876902. FERC approved the modified proposal. *Approval of Design Change Proposals*, FERC Docket No. CP16-454 (Aug. 13, 2020), http://elibrary.ferc.gov:0/idmws/doc_info.asp?document_id=14883243.

On August 5, 2020, the Energy Companies asked the Corps to suspend the Permit so that the Corps can consider modifying the Permit to reflect these design changes. Respondent's Motion for Abeyance, Exhibit 1 at 1 (Aug. 6, 2020).[3] The Energy Companies explained that these design changes—namely, eliminating two compressor stations and using five liquefaction trains instead of six—would reduce impacts to aquatic resources. *Id.* On August 6, 2020, the Corps suspended the Permit. Respondent's Motion for Abeyance, Exhibit 2. The Corps observed that construction had not begun and explained that it needed to consider the recent design changes. *Id.* at 2. It noted that "commencement of work prior to the Corps'

[3] The Court may consider materials outside of the administrative record that are relevant to subject matter jurisdiction. *Manguriu v. Lynch*, 794 F.3d 119, 120 (1st Cir. 2015). The Energy Companies' letter and the Corps' subsequent suspension notice speak to whether this action is presently justiciable.

evaluation of the proposed project changes may result in impacts to waters of the U.S. that might otherwise be avoided or minimized." *Id.*

4. Procedural background

After suspending the Permit, the Corps moved this Court to hold this action in abeyance until the agency completes its administrative proceedings to reconsider the Permit. The Court denied that motion on August 7, 2020.

SUMMARY OF ARGUMENT

1. This action is not ripe because the Corps has suspended the Permit and is reconsidering it in light of the Energy Companies' recent design changes. The Corps will reinstate, modify, or revoke the Permit after concluding its new decision-making process. The issues raised by Petitioners are presently unfit for judicial review because the decision before this Court is no longer a final decision that represents the consummation of the agency's decision-making process. Any new decision that the Corps reaches may moot some or all of the issues before this Court. Moreover, Petitioners will experience no hardship because no construction has occurred in any waters of the United States and no construction is authorized while the Permit is suspended. Judicial review should await the conclusion of the Corps' pending reconsideration proceeding.

2. If the Court considers the merits of the Permit, it should uphold the Corps' decision. The Corps rationally evaluated the then-available information

to determine that the proposed project design was the LEDPA. In its LEDPA analysis, the Corps reasonably relied on FERC's EIS, which explored the project's environmental impacts and alternatives, as well as on FERC's engineering and technological expertise in LNG and natural gas projects.

3. For the pipeline, the Permit mandates conditions and procedures that limit the duration of impacts to any particular waterbody. The Energy Companies must complete in-stream construction work for minor waterbodies within 24 hours and intermediate waterbodies within 48 hours. They will avoid impacts to major waterbodies through horizontal drilling. The Corps rationally determined that these pipeline construction impacts are temporary, although it did not explicitly state this conclusion. Because the Permit conditions and procedures minimized temporary impacts, the Corps reasonably concluded that compensatory mitigation for temporary impacts was unnecessary, although it likewise did not explicitly state this conclusion or explain its analysis.

STANDARD OF REVIEW

The Court reviews the Corps' decision to issue a permit under Section 404 of the Clean Water Act under the standard in the Administrative Procedure Act. *See Buttrey v. United States*, 690 F.2d 1170, 1183 (5th Cir. 1982). Under that standard, courts may set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2). But in

applying that deferential standard, "a court is not to substitute its judgment for that of the agency." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009). Instead, it "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989). Even when the agency's decision is "of less than ideal clarity," the Court should uphold it "if the agency's path may reasonably be discerned." *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983).

ARGUMENT

I. This action is not ripe because the Corps is reconsidering the Permit.

This action is not ripe for judicial review because the Corps has suspended and is reconsidering the Permit in light of the recent design changes. Article III of the Constitution confines federal courts to resolution of "cases" and "controversies." A case or controversy must be ripe for decision, meaning that it must not be premature or speculative. *Shields v. Norton*, 289 F.3d 832, 835 (5th Cir. 2002). "Ripeness is a component of subject matter jurisdiction, because a court has no power to decide disputes that are not yet justiciable." *Lopez v. City of Houston*, 617 F.3d 336, 341 (5th Cir. 2010). Ripeness doctrine is "designed to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the

agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *National Park Hospitality Ass'n v. Department of Interior*, 538 U.S. 803, 807–08 (2003). To determine whether claims are ripe, the Court evaluates "(1) the fitness of the issues for judicial resolution, and (2) the potential hardship to the parties caused by declining court consideration." *Lopez*, 617 F.3d at 341. This action is unripe because the issues are not fit for judicial consideration and because there will be no hardship to Petitioners.

First, this action is not fit for judicial resolution because the Corps has suspended the Permit. Respondent's Motion for Abeyance, Exhibit 2; *see also* 33 C.F.R. § 325.6(a) (providing that a suspended permit is not "in effect"). Once the Corps suspends a permit, it will conduct further proceedings and then either reinstate, modify, or revoke the permit. *Id.* § 325.7(c). "A vital aspect of the requirement that issues be fit for review is that the suit challenge 'final agency action.'" *Park Lake Resources Limited Liability Co. v. U.S. Department of Agriculture*, 197 F.3d 448, 450 (10th Cir. 1999).

Here, the Corps' decision is no longer final because the Corps has suspended the Permit, is reevaluating it, and may "reinstate, modify, or revoke" it. 33 C.F.R. § 325.7(c). Therefore, the Permit is no longer the "consummation of the agency's decisionmaking process," but is now an interim step in a process that may lead to a

different final decision. *U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807, 1813 (2016); *cf. Berkshire Environmental Action Team, Inc. v. Tennessee Gas Pipeline Co., LLC*, 851 F.3d 105, 107, 109–10 (1st Cir. 2017) (holding that "final agency action" is necessary to invoke jurisdiction under the Natural Gas Act). It is premature for the Court to review an agency decision that the agency itself is reconsidering and that may change. *Louisiana Power & Light Co. v. Federal Power Commission*, 526 F.2d 898, 910 (5th Cir. 1976) (holding that matters "still pending before the Commission . . . [are] not yet ripe for judicial review").

This action is particularly unfit for judicial review because the Energy Companies have asked the Corps to consider proposed design changes that may moot at least two of Petitioners' arguments. In particular, Petitioners contend that the Corps did not choose the LEDPA because Compressor Station 3 was unnecessary and because five (rather than six) liquefaction trains would have achieved the project purpose of exporting 27 MTPA of LNG. Initial Brief 32–55. The Energy Companies are now proposing to eliminate Compressor Station 3 and will use only five trains instead of six. *See supra* pp. 12–14.

In light of these design changes, it is "too speculative whether the validity of the" Permit for the original design "is a problem that will ever need solving." *Devia v. U.S. Nuclear Regulatory Commission*, 492 F.3d 421, 426 (D.C. Cir. 2007)

(internal quotation marks omitted). Petitioners contend that Rio Grande intends to maintain the six-train layout and leave an empty space for train 6, Initial Brief 54, and FERC's letter approving the five-train design states that "the site boundaries would remain unchanged," *Approval of Design Change Proposals*, FERC Docket No. CP16-454, at 2. But as the Corps reconsiders the Permit, it might require Rio Grande to reduce the footprint, which would moot this issue. It would "hardly be sound stewardship of judicial resources to decide this case on the basis of the" original project design given that the Corps' reconsideration based on the Energy Companies' design changes may "dispense with the need for such an opinion." *American Petroleum Institute v. EPA*, 683 F.3d 382, 388 (D.C. Cir. 2012).

Even the third issue raised by Petitioners—whether the Corps adequately considered and mitigated temporary impacts, Initial Brief 55–62—may change shape as the Corps reconsiders its decision. The regulation that authorized the Corps to suspend the Permit does not limit the scope of the Corps' reconsideration. 33 C.F.R. § 325.7. For example, the Corps may modify the Permit "as a result of reevaluation of the circumstances and conditions." *Id.* § 325.7(b). Any such modification would be a new final agency action, reviewable on its own record, which would moot the earlier Permit and this challenge. Although the petition is not yet moot because the Permit only has been suspended (and not modified or revoked), the possibility of further and different action by the Corps after it

completes its reconsideration renders the issues presently unfit for judicial review. *See Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 430 (5th Cir. 1999) (concluding that challenges to agency rules and procedures were "not yet ripe for judicial review" when the agency had made a "tentative decision" and had pending before it "petitions for reconsideration").

Finally, Petitioners will experience no hardship if the Corps finishes its reconsideration process before judicial review occurs. No construction has occurred yet, and no construction will be authorized until the Corps issues its decision. 33 C.F.R. § 325.7(c) (Suspension requires the permittee to "stop those activities previously authorized by the suspended permit."). This is not a situation in which the permittees have already "taken some *concrete action* that threatened to impair—or had already impaired—the plaintiffs' interests." *Utah v. U.S. Department of Interior*, 535 F.3d 1184, 1198 (10th Cir. 2008) (enumerating circumstances in which the court might find the hardship component of ripeness satisfied). To the contrary, no aquatic sites have been disturbed, and no sites may be disturbed during the suspension. The Corps may reinstate, modify, or revoke the Permit, and so any potential future injury to Petitioners is speculative. "If the purported injury is contingent [on] future events that may not occur as anticipated, or indeed may not occur at all, the claim is not ripe for adjudication." *Lopez*, 617 F.3d at 342 (internal quotation marks omitted).

The Court should not adjudicate the merits until the Corps reaches a final decision on its reconsideration of the suspended Permit. *See Devia*, 492 F.3d at 428 (placing unripe petitions for review in abeyance). Although this Court denied the Corps' motion for an abeyance, that ruling is not binding on the merits panel. *Black v. Davis*, 902 F.3d 541, 544 (5th Cir. 2018). The Court should await the conclusion of the Corps' reconsideration process before addressing the merits.

II. The Corps chose the least environmentally damaging practicable alternative that was available at the time of its decision.

If the Court reaches the merits, it should uphold the Permit. The Corps ensured that the project plan was the LEDPA. The Energy Companies' plans have evolved since both FERC and the Corps made their original decisions, but the Corps made a reasonable judgment about the LEDPA by relying on FERC's careful analysis in the EIS and by considering the information available to it at the time. The Corps satisfied the "deferential" standard of review for Clean Water Act permits. *City of Shoreacres v. Waterworth*, 420 F.3d 440, 445 (5th Cir. 2005).

The Section 404(b)(1) Guidelines mandate that the Corps choose the LEDPA, but they also provide that the Corps may usually make that choice based on the analysis of alternatives required under NEPA. 40 C.F.R. § 230.10(a)(4). Indeed, the preamble to the rulemaking establishing the Guidelines explains that "where an adequate alternatives analysis has already been developed, it would be wasteful not to incorporate it into the 404 process." *Guidelines for Specification*

of Disposal Sites for Dredged or Fill Material, 45 Fed. Reg. 85,336, 85,340 (Dec. 24, 1980).

In Natural Gas Act cases like this one, the Corps relies on the FERC record to the maximum extent practicable and gives "deference, to the maximum extent allowed by law, to the project purpose, project need, and project alternatives that FERC determines to be appropriate for the project." *Delaware Riverkeeper Network v. U.S. Army Corps of Engineers*, 869 F.3d 148, 152–53 (3d Cir. 2017) (quoting 2005 Memorandum of Understanding between the Corps and FERC). That is because FERC, as the lead agency with responsibility for approval of the project as a whole, takes a more comprehensive look at the project's impacts—as it did here in the EIS. The Guidelines thus contemplate that the Corps will balance reliance on FERC's environmental analysis with the exercise of its independent judgment, not that the Corps will begin anew on every issue: "Although the Corps has an independent responsibility to enforce the Clean Water Act and so cannot just rubberstamp another agency's assurances concerning practicability and environmental harm, it isn't required to reinvent the wheel. If another agency has conducted a responsible analysis the Corps can rely on it in making its own decision." *Hoosier Environmental Council v. U.S. Army Corps of Engineers*, 722 F.3d 1053, 1061 (7th Cir. 2013); *see also Save Our Wetlands, Inc. v. Sands*, 711 F.2d 634, 642–43 (5th Cir. 1983) (holding that the Corps "properly performed its

regulatory function" because it "independently and carefully reviewed" a report prepared by a consultant).

In its LEDPA analysis here, the Corps properly relied on FERC's robust analysis of alternatives in the EIS, but it also independently reviewed that analysis in the Corps' Assessment. AR000028. The Corps concluded that the "no action" alternative was unreasonable because it would not achieve the project's purpose of exporting 27 MTPA of LNG. AR000030. The Corps examined Rio Grande's criteria for the terminal location, including road access, sufficient property size, access to deep-draft shipping channels, and proximity to industrial yards to support logistics and assembly. AR000029. The Corps concluded that other potential terminal locations did not meet those criteria and therefore were not practicable. AR000030–32. For example, the other locations were too small, were unavailable to buy or lease, or lacked road access. *Id*. The Corps thus confirmed the project proposal was, in fact, the LEDPA based on Rio Grande's criteria.

In this regard, it is crucial to observe that the Corps' role is to evaluate the Energy Companies' proposal for a project, not to design the project itself, and that the Corps "is entitled to accept a project applicant's criteria" when conducting the LEDPA analysis. *Hillsdale Environmental Loss Prevention, Inc. v. U.S. Army Corps of Engineers*, 702 F.3d 1156, 1170 (10th Cir. 2012) (upholding the Corps' rejection of alternatives that did not satisfy applicant's stated criteria); *cf. City of*

Shoreacres, 420 F.3d at 450–51 ("NEPA requires only that the Corps consider alternatives relevant to the applicant's goals and the Corps is not to define what those goals should be.").

When the Corps was evaluating alternatives, it also rationally relied on FERC's engineering and technological expertise, although it did not explicitly state that it was doing so. *See Handley v. Chapman*, 587 F.3d 273, 282 (5th Cir. 2009) (upholding agency decision where the agency's path may be "readily discerned"). FERC believed that the project required six liquefaction trains and Compressor Station 3. FERC explained that the station was necessary to increase the gas pressure to the level needed at the pipeline's delivery point. AR003294. FERC considered whether it could require the Energy Companies to move Compressor Station 3 to a location that would not impact wetlands and concluded that it would not be feasible; a location that would not impact wetlands was at least ten miles away and, for engineering reasons, the station should be as close to the terminal as possible. AR003294. Locating Compressor Station 3 ten miles away from the terminal was "outside of the operational design of the system." AR021679. In matters involving complex engineering based on an agency's special expertise, "a reviewing court must generally be at its most deferential." *Baltimore Gas & Electric Co. v. NRDC*, 462 U.S. 87, 103 (1983).

In the same vein, when the Corps and FERC were evaluating liquefaction trains, it appeared that the project required six trains. Petitioners commented to the Corps that five trains appeared practicable. Initial Brief 47–48. But the Corps reasonably relied on FERC's expertise in this arena (although it did not state that it was relying on FERC's analysis). The Energy Companies' original plan called for six trains, each with a capacity of 4.5 MTPA. AR003181. That plan for six trains was still in place when the Corps evaluated the original Permit application even though the Energy Companies had signed contracts for trains with more capacity, as Sierra Club noted in its comments. AR001374. The Corps issued the Permit in February 2020, and Rio Grande did not notify FERC that it was planning a five-train design until July 2020. *See supra* p. 13.

Even after Rio Grande signed construction contracts for trains with more capacity, FERC still believed that six trains were necessary to provide a "design margin[]." *Rio Grande LNG, LLC; Rio Bravo Pipeline Co., LLC*, 170 F.E.R.C. ¶ 61,046, 61,340 (2020). This rehearing order is not in the Corps' record, and the Corps did not consider it, but it illuminates FERC's analysis of the six-train design. *See Medina County Environmental Action Ass'n v. STB*, 602 F.3d 687, 706 (5th Cir. 2010) (explaining that the Court may consider extra-record evidence when "the agency failed to explain administrative action so as to frustrate judicial review"). FERC explained that liquefaction train outputs can vary based on

ambient temperatures and gas conditions and that trains may operate at reduced capacity because of maintenance or weather-related disruptions. 170 F.E.R.C. at 61,440–41. FERC also noted that Rio Grande planned to provide LNG for trucking stations, which would "necessitate liquefaction rates to be higher than export rates." *Id.* at 61,341. FERC concluded that six liquefaction trains "are an environmentally acceptable means of meeting a liquefaction and export target of 27 MTPA." *Id.*

To be sure, the Corps is now aware that Rio Grande plans to use only five liquefaction trains; that FERC approved the five-train design; that Rio Bravo has eliminated Compressor Station 3; and that FERC is considering the pipeline design changes. The Corps is reconsidering its permit decision in order to take account of this new information, and so it is not necessary for the Court to rule on the Corps' consideration of the now-superseded proposals for Compressor Station 3 and for six trains. *See supra* Part I (pp. 16–21). But if the Court reaches this issue, it should not fault the Corps for making a rational judgment based on the information it had at the time. There is "always . . . a gap between the time the record is closed and the time the administrative decision is promulgated [and . . . the time the decision is judicially reviewed]." *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 554 (1978) (brackets in original). If litigants could challenge every agency decision "because some new circumstance has arisen, some new trend has

been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening." *Id*. at 555; *cf. Hillsdale Environmental Loss Prevention*, 702 F.3d at 1169 ("There will always be more data that could be gathered; agencies must have some discretion to decide when to draw the line and move forward with decisionmaking.").

Just as the Corps should not be faulted for not knowing how the project plans would evolve after it reached its decision, the Corps should not be faulted for relying on FERC's expertise and analysis regarding natural gas compression and liquefaction, even if it did not explicitly state that it was doing so. "The selection of" feasible engineering alternatives "is a task in the first instance" for FERC. *Hoosier Environmental Council v. U.S. Army Corps of Engineers*, 722 F.3d 1053, 1059 (7th Cir. 2013) (explaining that the Federal Highway Administration and Indiana Department of Transportation were responsible for selecting the corridor for a new highway because the Corps "is not responsible for the interstate highway system"). Here, the Corps reasonably relied on FERC's analysis of alternatives, and its analysis satisfies the highly deferential applicable standard of review.

III. The Corps appropriately analyzed and minimized temporary impacts.

The Corps appropriately analyzed and minimized temporary impacts to aquatic resources from pipeline construction, and there was no necessity for it to require compensatory mitigation.

First, Petitioners contend that the Corps failed to analyze the duration of temporary impacts and that these impacts will, in fact, last for 4.0 to 6.5 years. Initial Brief 55. The record does not support this interpretation. Construction of each pipeline will take one year. AR003168. Rio Bravo will construct the dual pipelines consecutively, beginning construction of Pipeline 2 eighteen months after completing Pipeline 1. AR003161. Moreover, that timespan of one year for constructing each of the dual pipelines applies to the entire 137.9-mile long pipeline. Impacts on any particular waterbody or wetland will be more limited because of the requirements that the Permit imposed on the Energy Companies. *E.g.*, AR000079–80.

Specifically, the Permit requires the Companies to comply with Project-Specific Wetland & Waterbody Construction and Mitigation Procedures, which provide a more accurate view of the duration of impacts. AR000275–323 (the procedures); AR000079, ¶ 6 (the Permit condition requiring compliance with the procedures). These procedures mandate limited construction timeframes. For example, Rio Bravo may cut a trench through wetlands only after the pipeline is

assembled and ready for lowering into the trench. AR000297. In-stream work, except that which is required to install or remove equipment bridges, may occur only between June 1 and November 30. AR000285. For minor waterbodies, in-stream construction activities—including trenching, pipe installation, backfill, and restoration of the streambed contours—must (to the extent practicable) be completed within 24 hours. AR000290. For intermediate waterbodies, in-stream construction activities (not including rock-breaking measures) must be completed within 48 hours, unless site-specific conditions make that time frame infeasible. AR000290. For major waterbodies, the Energy Companies must use horizontal directional drilling to avoid impacts altogether, unless the major waterbodies are perennial and dry during construction. AR000290.

The Permit itself contains several conditions that limit temporary impacts. For example, material resulting from trench excavation for pipeline construction may be temporarily placed in waters of the United States "for no more than 3 months, and must be placed and stabilized in such a manner that it will not be dispersed by currents or other forces." AR000079, ¶ 7. In addition, Rio Bravo "shall restore temporary impacts resulting from construction of the Pipeline System at each water/wetland crossing within 30 days of completing work within the individual water/wetland crossing to ensure timely restoration of temporary impacts." AR000079, ¶ 8. Rio Bravo must submit post-construction monitoring

reports to the Corps within 60 days of completing each waterbody or wetland crossing. AR000080, ¶ 9. These reports must include the specific crossing, the date construction at the crossing began, the date construction concluded, surveys to show restoration, and time-stamped pre- and post-construction photographs. *Id.* Finally, the Corps will evaluate the restoration at each crossing "to ensure timely restoration of temporary impacts." AR000080, ¶ 10. These conditions show that temporary impacts are, in fact, temporary, even though the Corps never explicitly stated that conclusion.

The Corps determined which procedures and conditions are necessary to mitigate impacts. *See* AR000042 ("Based on the applicants' incorporation of the avoidance and minimization measures . . . , implementation of wetland and waterbody construction and mitigation procedures . . . , and compliance with the special conditions related to wetlands . . . , the Corps determined that detrimental impacts to wetlands will be mitigated."). That determination warrants deference: just as FERC is the best agency to make judgments about engineering design and feasibility, assessments of "stream functions and losses. . . . are within the [Corps'] special expertise and were based on Corps staff's 'best professional judgment.'" *Aracoma Coal*, 556 F.3d at 201. The Court "must look at the [agency] decision not as a chemist, biologist, or statistician that [it is] qualified neither by training nor experience to be, but as a reviewing court exercising [its] narrowly

defined duty of holding agencies to certain minimal standards of rationality." *Gulf Restoration Network v. U.S. Department of Transportation*, 452 F.3d 362, 368 (5th Cir. 2006).

Petitioners contend that the Corps failed to explain its analysis of temporary impacts. Initial Brief 59. But the Corps' Assessment does explain that temporary impacts will be limited and that Permit conditions and procedures will ensure that Rio Bravo properly restores wetlands that have been temporarily impacted. *E.g.*, AR000035 ("All discharges of fill material during construction of the Pipeline System will be required to be removed in its entirety to ensure impacts to aquatic resources are temporary, and the resources will be restored to pre-construction conditions."); AR000024 (Rio Bravo "will restore all affected wetlands within the Pipeline System, postconstruction, by returning the pre-construction contours in compliance with the conditions in . . . [the] EIS, the Project-Specific Plan and Procedures . . . , and specified conditions in the Corps permit."). To be sure, the Corps' "explanation might have been more complete," but the Court should nonetheless uphold the decision because the Corps' reasoning can be discerned from the record. *Missouri-Kansas-Texas Railroad Co. v. United States*, 632 F.2d 392, 409 (5th Cir. 1980).

Under the mitigation hierarchy, avoidance and minimization precede compensatory mitigation. *Aracoma Coal*, 556 F.3d at 202. If permit conditions

minimize impacts so that they are only temporary, then compensatory mitigation may not be required. The Guidelines give the Corps discretion to reach this conclusion: "The district engineer shall require, to the extent appropriate and practicable, additional compensatory mitigation to offset temporal losses of aquatic functions that will result from the permitted activity." 33 C.F.R. § 332.3(m). Those words "to the extent appropriate and practicable" show that the Corps has discretion to conclude that compensatory mitigation for temporal losses is not required. *Accord Compensatory Mitigation for Losses of Aquatic Resources*, 73 Fed. Reg. 19,594, 19,607 (Apr. 10, 2008) ("What constitutes a temporary impact, and the need for compensatory mitigation, is determined on a case-by-case basis, depending on the specific circumstances of the project.").

Moreover, if the Energy Companies fail to promptly or completely restore any wetlands or waterbodies after causing temporary impacts, then the Corps may require additional compensatory mitigation. AR000080, ¶ 10 (permit condition that "[i]f it is determined that impacts to waters/wetlands are not demonstrating successful restoration to pre-construction conditions, the permittee shall be required to provide an alternative restoration strategy or may be required to provide additional compensatory mitigation")

No doubt the Corps could have further explained its conclusions about the duration of temporary impacts and why it was exercising its discretion not to

require compensatory mitigation for temporary impacts. But its decision should still be upheld because its reasoning can be discerned from the record. *Missouri-Kansas-Texas Railroad*, 632 F.2d at 413 (upholding agency's decision despite "lapses in clarity"); *see also State Farm*, 463 U.S. at 43. Under this standard, the Corps' analysis of temporary impacts was reasonable and should be upheld.

* * * * *

The Court should decline to review the suspended Permit because the matter is not ripe for judicial review. But if the Court does review the Permit and does conclude that the Corps' decision is deficient in some respect, the Court should decline Petitioners' request to vacate the Permit. *See Central & South West Services, Inc. v. EPA*, 220 F.3d 683, 692 (5th Cir. 2000) (explaining that remand is "generally appropriate" when vacatur would be "disruptive"). The Corps has already suspended the Permit during its reconsideration proceedings. Vacating the Permit would disrupt the Corps' ongoing administrative process. Instead, the Court should simply direct the Corps to consider the issue as part of its ongoing reconsideration of the now-suspended Permit.

CONCLUSION

For the foregoing reasons, the petition should be held in abeyance as unripe or denied on the merits.

Respectfully submitted,

s/ *Rebecca Jaffe*
JEFFREY BOSSERT CLARK
Assistant Attorney General
ERIC GRANT
Deputy Assistant Attorney General
DAVID GUNTER
REBECCA JAFFE
Attorneys
Environment and Natural Resources Division
U.S. Department of Justice

Of Counsel:

JAMES DEBERGH
MARK LUMEN
Attorneys
U.S. Army Corps of Engineers

August 13, 2020
90-13-9-16015

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of August, 2020, I electronically filed the foregoing Respondent's Brief with the Clerk of the Court using the CM/ECF system, which will send notice of such filing to all registered CM/ECF users.

s/ *Rebecca Jaffe*
REBECCA JAFFE

Counsel for Respondent

CERTIFICATE OF COMPLIANCE

I hereby certify:

1. This document complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because, excluding the parts of the document exempted by Rule 32(f), this document contains 7,451 words.

2. This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

s/ *Rebecca Jaffe*
REBECCA JAFFE

Counsel for Respondent