IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Allegheny Defense Project, *et al.*, Petitioners, v. Federal Energy Regulatory Commission, Respondent, and Anadarko Energy Services Company, *et al.*, Intervenors.	)	No. 17-1098 (consolidated with with 17-1127 and 17-1128)

On Petition for Review of Order of the Federal Energy Regulatory Commission, 158 FERC ¶ 61,125 (Feb. 3, 2017)

[ORAL ARGUMENT NOT SCHEDULED]

ALLEGHENY DEFENSE PROJECT, *ET AL.*'S EMERGENCY MOTION FOR STAY

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INTRODUCTION AND TIME EXIGENCIES INVOLVED

Pursuant to Fed. R. App. P. 18(a) and D.C. Cir. R. 18, the Petitioners in original action 17-1098, Accokeek, Mattawoman, Piscataway Creeks Communities Council, Inc., Allegheny Defense Project, Clean Air Council, Concerned Citizens of Lebanon County, Heartwood, Lancaster Against Pipelines, Lebanon Pipeline Awareness, and Sierra Club ("Petitioners"), seek an emergency stay of the Federal Energy Regulatory Commission ("Commission" or "FERC") Order issued February 3, 2017, for the Atlantic Sunrise Project (the "Project") pending this Court's ruling on the merits. Through the Project, Transcontinental Gas Pipe Line Company, LLC ("Transco") plans to reconfigure its mainline, which has historically shipped gas from the Gulf Coast to the Northeast, so that it can transport shale gas from the Marcellus and Utica formations in northern Pennsylvania to the Southeast and Gulf Coast regions. As part of the Project, Transco plans to construct nearly 200 miles of large-diameter pipeline across Pennsylvania to carry gas from production areas to the mainline. FERC has granted multiple of Transco's requests to proceed with construction of the Project.[1]

[1] *See* Authorization to Construct Compressor Stations 605 and 610, Contractor Yard and Permanent Access Road (Sept. 7, 2017), attached as Exhibit P; Authorization to Construct Central Penn Lines North and South Pipelines, Meter Stations, and Use of Contractor Yards (Sept. 15, 2017), attached as Exhibit Q. Petitioners sought rehearing of those Orders pursuant to 15 U.S.C. § 717r and requested that FERC not allow construction while the finality of FERC's Certificate Order remains in dispute, and pending judicial review. *See* Amended

Pipeline construction has already begun and is causing irreparable harm to the environment and private property along the route. Pipeline construction now imminently threatens Petitioners' members' property and other areas that they use and enjoy.[2] Accordingly, Petitioners request a stay within seven days of this filing.[3]

This motion meets this Circuit's standards for a stay pending review. The Commission has authorized the Project in violation of the National Environmental

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Response and Objection to Requests for Notice to Proceed, Request for Rehearing and Rescission of Authorization Granting Request to Proceed (Sept. 22, 2017), attached as Exhibit R; Amended Request for Rehearing and Rescission of Letter Order Granting Requests to Proceed (Sept. 22, 2017), attached as Exhibit S. Instead of ruling on those requests in a timely manner, FERC has issued "tolling orders" that purport to grant additional time to act and avoid the denial of those requests by operation of law pursuant to 15 U.S.C. § 717r(a), which states that "[u]nless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied." *See* Order Granting Rehearing for Further Consideration (Oct. 12, 2017), attached as Exhibit U; Order Granting Rehearing for Further Consideration (Oct. 17, 2017), attached as Exhibit V.

[2] Petitioners acknowledge that this Motion is filed after the April 27, 2017 deadline for "procedural motions" set in the Court's March 28, 2017 order. However, the exigencies that warrant this motion were not present at that time. Namely, construction had yet to begin and irreparable harm to Petitioners' members was not as imminent as it is now that FERC has issued notices to proceed with construction and that construction is rapidly approaching the areas used by Petitioners' members. Additionally, FERC's decision to delay this case by refusing to comply with the Court's order to file the index to the record by October 6, 2017 further threatens Petitioners' members with irreparable harm.

[3] As required by Fed. R. App. P. 18(a)(1), Petitioners moved for a stay of the Order on February 10, 2017, *see* Exhibit M, which the Commission denied on August 31, 2017, on the grounds that justice did not require a stay and Petitioners would not suffer irreparable harm. Order Denying Stay, attached as Exhibit O.

Policy Act (NEPA). Without a stay, construction could render moot full and complete relief that this Court could grant. Petitioners' members would suffer irreparable injuries to their property and to their aesthetic and environmental interests without being afforded their day in court. A stay must be granted to protect Petitioners' members' interests and preserve meaningful judicial review of FERC's Order.

RELIEF REQUESTED

Petitioners ask this Court to stay the Commission's Certificate of Public Necessity and Convenience authorizing the Project, attached hereto as Exhibit L, and enjoin the continuing construction of the Project pending resolution of this appeal.[4]

STANDARD OF REVIEW

A party seeking a stay pending review must show that it is likely to prevail on the merits; the prospect of irreparable injury to the moving party if relief is withheld; the possibility of harm to other parties if relief is granted; and the public interest. D.C. Cir. Rule 18(a)(1); *Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958). A moving party need not show a "mathematical probability" of success on the merits, and relief may be granted if

[4] Counsel for Petitioners provided notice of their intention to file this Emergency Motion to the Court and counsel for other parties as required by Fed. R. App. P. 18(a) and D.C. Cir. R. 18.

the movant has made a "substantial case" on the merits. *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc*., 559 F.2d 841, 843 (D.C. Cir. 1977).

ARGUMENT

I. PETITIONERS ARE LIKELY TO SUCCEED ON THE MERITS

This appeal raises at least two important merits issues on which Petitioners have a high likelihood of success. First, FERC failed to adequately analyze the climate change impacts of the end use of the gas to be transported by the Project, as required by this Court's recent decision in *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017). Second, FERC failed to consider the indirect impacts of the shale gas drilling that would be induced by construction of the Project, despite the causal relationship and reasonable foreseeability of those impacts.

A. FERC's EIS Fails to Adequately Assess the Project's Climate Change Impacts

1. FERC's Cursory "Offset" Analysis Renders the EIS Arbitrary and Capricious

In *Sierra Club v. FERC*, the Court rejected FERC's arguments regarding "partial[] offset" of downstream greenhouse gas emissions, holding that FERC's approach meant that the Environmental Impact Statement (EIS) "fails to fulfill its primary purpose." 867 F.3d at 1375. The Atlantic Sunrise EIS contains the same error.

Here, as in *Sierra Club v. FERC*, FERC wrongly downplayed the Project's downstream greenhouse gas (GHG) emissions and avoided a meaningful analysis by claiming, without any support, that

> Because fuel oil and coal have been and remain widely used as an alternative to natural gas in the region, increased production and distribution of natural gas would *likely* displace some use of higher carbon emitting fuels. This would result in a *potential* reduction is [sic] regional GHG emissions.

EIS at 4-318 (Addendum ("Add.") 547) (emphasis added).[5] On this basis, FERC "conclude[d] that neither construction nor operation of the Project would significantly contribute to GHG cumulative effects or climate change." *Id.*

This Court squarely rejected this approach in *Sierra Club v. FERC*. There, FERC similarly claimed that the pipeline would not significantly contribute to climate impacts because portions of the gas would displace coal, thereby potentially offsetting some regional greenhouse gas emissions. After noting that an EIS must address impacts "resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial," the Court explained:

> An agency decisionmaker reviewing this EIS would thus have no way of knowing whether total emissions, on net, will be reduced or increased by this project, or what the degree of reduction or increase will be. In this respect, then, the EIS fails to fulfill its primary purpose.

[5] Relevant excerpts of FERC's Final EIS are attached as Exhibit W.

867 F.3d at 1375. Here, the EIS suffers from the same fundamental defect. As with the EIS in *Sierra Club v. FERC*, FERC's EIS here makes no attempt to assess whether total emissions would be reduced or increased, what the degree of reduction or increase would be, and what the impacts that reduction or increase would have on the environment. Thus, the EIS for the Project similarly fails to fulfill its primary purpose and does not satisfy NEPA.

2. FERC Failed to Evaluate Significance or Cumulative Impacts

FERC's failure to adequately address the impacts of downstream natural gas usage from the Project extend beyond that (fatal) flaw. Though FERC roughly quantified the greenhouse gas emissions from burning the gas to be carried by the pipeline, it did not seriously evaluate their significance or cumulative impact. Nor did FERC assess the effect of those emissions on the environment or explain why it cannot meaningfully analyze those impacts. FERC's analysis thus does not meet the standard set by this Court in *Sierra Club v. FERC*.

"An agency conducting a NEPA review must consider not only the direct effects, but also the *indirect* environmental effects, of the project under consideration." *Sierra Club*, 867 F.3d at 1371 (citing § 1502.16(b)) (emphasis in original). Greenhouse gas emissions from end use of natural gas are causally related and reasonably foreseeable indirect effects of permitting a pipeline intended to deliver that natural gas. *Id.* at 1371–74 (explaining that burning gas transported

by a pipeline "is not just 'reasonably foreseeable,' it is the project's entire purpose"). The court explained that not only could FERC foresee the likely emissions from combustion of gas carried on the pipeline, it also had authority to mitigate those emissions. *Id.* Accordingly, the "EIS … needed to include a discussion of the significance of this indirect effect … as well as the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions." *Id.* The Court found that FERC's EIS did not satisfy NEPA because it failed to adequately assess downstream greenhouse-gas effects.

Here, FERC failed to discuss the significance of downstream greenhouse gas emissions or their cumulative impact, assess how those emissions could be mitigated, or compare the Project's emissions with those of other reasonable alternatives. *See* EIS (Exhibit W) at 4-213–31 (Add. 526–44). Rather, in discussing the project's direct and indirect emissions, FERC simply stated that "[a]ssuming that all of the natural gas being transported is used for combustion, downstream end-use would result in about 32.9 million metric tons of CO_2 per year," with no further analysis. *Id.* at 4-223 (Add. 536). In assessing the Project's cumulative impacts,[6] FERC merely restated its determination that combustion of the gas

[6] NEPA requires agencies to assess a proposed action's cumulative impacts, which are "impact[s] on the environment which result[] from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions." 40 C.F.R. § 1508.7. A pipeline EIS must assess the cumulative impacts of

carried on the pipeline would contribute 32.9 million metric tons of CO_2 per year and noted the total annual greenhouse gas emissions in Pennsylvania. *Id.* at 4-317–18 (Add. 546–47). FERC did not meaningfully discuss the significance or cumulative impact, nor did it employ or even discuss any available methodology for evaluating the impact of greenhouse gas emissions, such as the Social Cost of Carbon tool that the *Sierra Club* court directed FERC to address in its NEPA analysis on remand. 867 F.3d at 1375. Nor did it discuss the climate impacts of reasonable alternatives to the proposed project.

FERC's failure to provide meaningful analysis of the Project's greenhouse gas emissions undermines the ability of both the public and decision-makers to fully consider and analyze these impacts. FERC unlawfully failed to analyze information regarding downstream emissions and climate impacts that it was required to use to meaningfully inform its decision-making. *Id.* at 1373. As a consequence of its failure to fully consider these impacts, FERC also failed to consider possible mitigation measures and failed to provide useful information for a reasoned choice among alternatives. *Id.* at 1374.

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greenhouse gas emissions associated with downstream gas combustion. *Sierra Club*, 867 F.3d at 1374.

B. FERC's EIS Fails to Adequately Assess Impacts Associated With Shale Gas Drilling Induced by the Project

FERC violated NEPA by failing to take a hard look at the indirect effects of the gas drilling in the Marcellus and Utica shale formations in northern Pennsylvania that is predicated upon and induced by construction of the Project. The drilling companies that have contracted to ship gas on the Atlantic Sunrise pipeline have made clear statements that certain of their continued drilling operations depend on completion of the Project. Those impacts are thus causally related to the Project and are reasonably foreseeable such that FERC should have addressed them in its EIS.

As explained above, NEPA requires agencies to assess the indirect effects of a proposed action. Indirect effects are those "which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. § 1508.8(b). These impacts include "growth inducing effects and other effects related to induced changes in the pattern of land use." *Id.* NEPA requires analysis of all such impacts as long as they have a "reasonably close causal relationship" to the proposed action. *Sierra Club*, 867 F.3d at 1373 ("Because FERC could deny a pipeline certification on the ground that the pipeline would be too harmful to the environment, the agency is a 'legally relevant cause' of the direct and indirect environmental effects of pipelines it approves."). In other words, an agency must consider something as an indirect effect if the agency

action and the effect are "two links of a single chain." *Sylvester v. U.S. Army Corps of Engineers*, 884 F.2d 394, 400 (9th Cir. 1989).

There is a sufficient causal relationship between the Atlantic Sunrise Project and induced gas drilling in the Marcellus and Utica shale formations that FERC should have evaluated those impacts in its EIS. FERC acknowledges "[t]he fact that natural gas … transportation facilities are … required to bring domestic natural gas to market[.]" Certificate Order (Exhibit L) ¶133 (Add. 115). Moreover, FERC recently stated that "the availability of pipeline and storage capacity *determines which supply basins are used and the amount of gas that can be transported from producers* to consumers."[7] The Energy Information Administration has likewise recognized that pipeline projects facilitate an increase in gas production, stating in the context of natural gas liquids that "production is increasing as midstream infrastructure projects become operational." Comments of Allegheny Defense Project *et al*. on FERC's Draft Environmental Impact Statement ("DEIS Comments") at 27, attached as Exhibit X (Add. 578). Gas industry representatives have been even more explicit. According to the owner of Mineral Management of Appalachia, "more pipelines will lead to more drilling[.]" *Id.* at 28 (Add. 579).

[7] FERC, Energy Primer, p. 6 (Nov. 2015) (emphasis added), *available at* https://www.ferc.gov/market-oversight/guide/energy-primer.pdf.

Four of the shippers financing the Atlantic Sunrise Project, representing over 87% of the Project's subscribed capacity, are gas production companies. *See* Certificate Order (Exhibit L) ¶11 (Add. 066-67). These producers have made clear that much of their ongoing drilling operations are dependent on the Project. For example, Seneca Resources expressly stated that any further shale gas development in its Eastern Development Area in Pennsylvania will be "[l]imited … until firm transportation on Atlantic Sunrise (190 Mdth/d) is available." DEIS Comments (Exhibit X) at 25 (Add. 576). In an August 2016 presentation, Seneca's parent company, National Fuel Gas Company, explained that one of Seneca's drilling rigs will be returning to a particular lease in the third quarter of fiscal year 2017 "to drill 13 wells on 3 pads" as it "prepare[s] for Atlantic Sunrise capacity[.]" *See* Comments of Allegheny Defense Project *et al*. Requesting a Revised or Supplemental Draft Environmental Impact Statement at 13 ("Request for Revised or Supplemental EIS"), attached as Exhibit Y (Add. 704).

Likewise, shipper Cabot Oil & Gas Corp. has stated that the Project "represents another major step in Cabot's long-term plan for monetizing its Marcellus reserves as this pipeline *secures new takeaway capacity* from the basin on a new large diameter pipeline that *connects our operating area directly to multiple new markets* including new pricing opportunities." DEIS Comments (Exhibit X) at 26 (Add. 577). In a September 2016 presentation, Cabot revealed

that it "has the ability to double its Marcellus production over time based on its previously announced firm transport and firm sales additions." *See* Request for Revised or Supplemental EIS (Exhibit Y) at 13(Add. 704). One of those "previously announced firm transport" additions is Atlantic Sunrise, which accounts for nearly 42% of Cabot's capacity subscriptions. *Id.* The Atlantic Sunrise Project, if approved, will thus be a driving force in Cabot's "ability to double its Marcellus production." *Id.* The Project and gas drilling in the Marcellus and Utica shale formations are thus "two links of a single chain." *Sylvester*, 884 F.2d at 400.

Not only are the impacts of induced shale gas drilling causally connected, they are also reasonably foreseeable impacts of construction of the Project. An indirect effect is "reasonably foreseeable" if it is "sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision." *Sierra Club v. Marsh*, 976 F.2d 763, 767 (1st Cir. 1992). Reasonable forecasting and speculation "is … implicit in NEPA." *Delaware Riverkeeper v. FERC*, 753 F.3d 1304, 1310 (D.C. Cir. 2014).

Here, a person of ordinary prudence would take Marcellus and Utica shale gas drilling into account before reaching a decision about whether to approve the Atlantic Sunrise Project. There is ample information about existing and projected shale gas development for FERC to engage in reasonable forecasting. FERC

knows the identity of many of the shippers that will supply the gas to fill the capacity created by the Project, how much gas those suppliers will ship, the location of many of those companies' gas holdings, and the nature of the environmental impacts that would be caused by developing those holdings. FERC has all of the information required to assess the impacts of the shale gas drilling that would be induced by its approval of the Project. FERC thus may not shirk its responsibilities under NEPA by dismissing the environmental impacts of that future shale gas extraction in the Marcellus and Utica shale formations as too speculative.

II. PETITIONERS WILL SUFFER IRREPARABLE HARM WITHOUT A STAY

"Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable." *Amoco Prod. v. Village of Gambell*, 480 U.S. 531, 545 (1987). "When a procedural violation of NEPA is combined with a showing of environmental or aesthetic injury, courts have not hesitated to find a likelihood of irreparable injury." *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 25 (D.D.C. 2009) (citing *Fund for Animals v. Norton*, 281 F. Supp. 2d 209, 221 (D.D.C. 2003)).

Petitioners' members will suffer irreparable environmental harm from the construction and operation of the pipeline. Petitioners' members own land,

recreate, and live near the path of the pipeline.[8] Construction of the pipeline will disturb over 3,700 acres of land, 1,100 of those acres perpetually. EIS (Exhibit W) at 2-8 (Add. 493). During construction Transco will create a 90-foot-wide to 100-foot-wide right-of-way and will maintain a 50-foot-wide right-of-way permanently. *Id.* at 2-15 (Add. 500). Creating the right-of-way will require clear-cutting forest, grading slopes, digging trenches, and removing topsoil. *Id.* The permanent right-of-way will indefinitely disturb and denude 1,100 acres—the equivalent of 1.7 square miles—leaving an indelible scar across central Pennsylvania farms, forests, and streams. *Id.* at 2-8 (Add. 493). "If such injury is sufficiently likely…, the balance of harms will usually favor the issuance of an injunction to protect the environment." *Amoco*, 480 U.S. at 545. The harms that will result from clear-

[8] Petitioners have attached Declarations from nine of their members who are threatened with imminent irreparable harm from further construction of the Project. *See* Exhibits A–K. For example, Sierra Club and Clean Air Council member Susan Pantalone has already had her property in Northumberland County, PA condemned pursuant to Transco's eminent domain action, and Transco contractors have flagged her property for construction. Exhibits A and B. She has witnessed clearing and construction occurring in adjacent Columbia County. Exhibit B. Further, Sierra Club and Lancaster Against Pipelines member Malinda Clatterbuck has witnessed construction across the Chapel, a sacred site on the property of the Adorers of the Blood of Christ, a Catholic Order of nuns, with whom she has been involved in opposing the Project. Exhibit C. This construction uprooted an arbor and dismantled the altar that was a central part of the Chapel site. Petitioners' other members live near the path of the Project and use and enjoy environmental resources that are imminently threatened by pipeline construction and operation. *See* Exhibits E–K.

cutting trees, digging trenches, and removing topsoil are certain results of pipeline construction. These harms cannot be reversed in a human lifetime, if ever.

The EIS also finds that "[a]ir quality would be affected by construction and operation of the Project." EIS (Exhibit W) at 4-203 (Add. 516). Construction of the pipeline is expected to produce, among other pollutants, 103.4 tons per year of volatile organic compounds (VOCs), 781.2 tons of nitrogen oxides (NO_x), and 188.2 tons of particulate matter 2.5 micrometers and smaller.[9] *Id.* at Table 4.11.1-7 (Add. 533). Operation of compressor stations and meter regulator stations is expected to emit additional tons of pollutants annually for the life of the project. *Id.* at 4-221–24 (Add. 534–37). These emissions would have long-term and therefore irreparable impacts on air quality in areas where Petitioners' members live and recreate. *See, e.g.*, Exhibit E at ¶¶7–9 (Add. 022–23).

The EIS goes on to note that the pipeline will cross 388 bodies of water. EIS (Exhibit W) at 4-52 (Add. 501). The EIS warns that construction activities such as "in-stream trenching, blasting, [and] trench dewatering" will have significant effects on the subject body of water. *Id.* at 4-65–66 (Add. 514–15). The EIS also

[9] NO_x and VOCs harm respiratory, cardiological, neurological, and kidney functions, causing nosebleeds, burning spasms, nausea, fluid in the lungs, lung damage, fatigue, cancer, and premature death. *See, e.g.*, EPA, Volatile Organic Compounds: Health Effects, https://www.epa.gov/indoor-air-quality-iaq/volatile-organic-compounds-impact-indoor-air-quality#Health_Effects; EPA, Nitrogen Dioxide Pollution, https://www.epa.gov/no2-pollution/basic-information-about-no2#Effects.

warns that construction activities may result in "returns from HDD [horizontal directional drilling] operations, and potential spills or leaks of hazardous materials. *Id.* As a result, effects on surface waters include "modification of aquatic habitat, increased runoff, turbidity, release of chemical and nutrient pollutants from sediments, and introduction of chemical contaminants such as fuel and lubricants." *Id.* Petitioners' members use and enjoy a number of bodies of water that will be crossed by the pipeline that are subject to the impacts expected from trenching, blasting, drilling, and dewatering. *See, e.g.*, Exhibit G at ¶¶4–5 (Add. 029–30); Exhibit H ¶¶7–9 (Add. 039–40). Many of these harms cannot be remedied in the span of a human life or possibly ever. Where riparian habitat is disturbed or chemicals released into the water, the character of the body of water may be transformed forever.

III. OTHER PARTIES WILL NOT BE SUBSTANTIALLY HARMED IF THE COURT STAYS CONSTRUCTION

FERC will not be harmed by a stay. According to FERC, its Order is not final and the Commission continues to assess whether its Order should be modified to further the public interest. In its recent Motion to Defer the Filing of the Certified Index to the Record (Doc. #1696987), FERC maintains that "filing the certified index to the record while requests for agency rehearing are pending may jeopardize the Commission's ability to 'correct' its order if it determines that doing so is in the public interest upon reviewing those rehearing requests." Motion to

Defer at 4–5.[10] FERC does not (and cannot) explain why it is proper to grant Transco eminent domain power and to allow construction to proceed while, in FERC's view, rehearing requests are pending and FERC may need to modify the Certificate Order to comport with the public interest. If FERC, as it claims, "may be willing to alter" its decision such that it "would profitably remain under active reconsideration by the agency" – *i.e.*, if FERC may decide to modify or deny the project, or place different conditions upon it – then FERC cannot reasonably claim to be injured by halting construction at this time. *See California Co. v. Fed. Power Comm'n*, 411 F.2d 720, 721, 722 (D.C. Cir. 1969).

Any harm claimed by Intervenors is purely economic and thus not irreparable. Transco will likely claim substantial monetary costs and penalties under terms of their construction and supply contracts. This argument ignores the fundamental fact that Transco entered into contracts and acquired land along their proposed route *in anticipation* of a certificate. FERC cautioned Transco that if it proceeded with construction, it ran the risk that "the Commission could revise or reverse [its] initial decision or that our orders will be overturned on appeal." Order Denying Stay, attached as Exhibit O. Transco thus assumed the risk to its outlays in time and capital. *See also Sierra Club v. U.S. Army Corps of Eng'rs*, 645 F.3d

[10] As of the date of this filing, FERC has still not filed the index to the record as directed by the Court's September 22, 2017 order, despite the Court not granting its Motion to Defer.

978, 997 (8th Cir. 2011) (finding where permittees "jump the gun or anticipate a pro forma result in permitting applications they become largely responsible for their own harm" even where company spent $800 million on plant construction before a permit was issued). Any harm that may befall Transco as a result of a stay is self-inflicted.

More importantly, petitioners face certain and irreparable environmental harm if FERC's Order is not stayed. Where environmental injury is "sufficiently likely," the Supreme Court has held, "the balance of harms will usually favor the issuance of an injunction to protect the environment." *Amoco*, 480 U.S. at 545. "[T]he balance of equities tips toward [plaintiffs] because the harms they face are permanent while [a developer] face[s] temporary delay." *League of Wilderness Defs. v. Connaughton*, 752 F.3d 755, 765 (9th Cir. 2014) (citing *The Land Council v. McNair*, 537 F.3d 981, 1004–05 (9th Cir. 2008)).[11]

IV. GRANTING THE STAY IS IN THE PUBLIC INTEREST

Congress instructed agencies to comply with NEPA "to the fullest extent possible." 42 U.S.C. § 4332. Congressional intent and statutory purpose is a statement of public interest. *Johnson v. USDA*, 734 F.2d 774, 788 (11th Cir. 1984). There "is no question that the public has an interest in having Congress' mandates

[11] Petitioners request that the Court waive the bond requirement or impose a nominal bond under the public interest exception to Fed. R. Civ. P. 65(c). *See, e.g.*, *Kansas v. Adams*, 705 F.2d 1267, 1269 (10th Cir. 1983); *California ex rel. Van De Kamp v. Tahoe Reg'l Planning Agency*, 766 F.2d 1319, 1325-26 (9th Cir. 1985).

in NEPA carried out accurately and completely." *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 26 (D.D.C. 2009); *see also Nat'l Wildlife Fed'n v. Burford*, 676 F. Supp. 271, 279 (D.D.C. 1985) ("a preliminary injunction would serve the public by protecting the environment from any threat of permanent damage.").

The alternatives analysis is "the heart of the environmental impact statement." 40 C.F.R. § 1502.14. Allowing construction to continue dilutes the potency of a "no-action" alternative and other potential alternatives to the Project if this Court ultimately remands the matter back to FERC. In that event, the pipeline company would be able to acquire its preferred route through construction without NEPA compliance, by maintaining that neither the "no action" alternative nor other alternatives are viable once the pipeline is finished. Such an outcome is most certainly not in the public's interest. *See Davis v. Mineta*, 302 F.3d 1104, 1115, n.7 (10th Cir. 2002) (once part of a project proceeds "before environmental analysis is complete a serious risk arises that the analyses of alternatives required by NEPA will be skewed toward completion of the entire [p]roject"). If construction is allowed to continue it would defeat the purpose and intent of NEPA, in contravention of the public's congressionally recognized interest in fully informed environmental decision-making.

Further, granting a stay furthers the public interest in meaningful judicial review of FERC's orders under the Natural Gas Act. The statutory intent on the face of the Act is that petitioners are entitled to appeal to this Court from any final order. 15 U.S.C. §717r(b). FERC's notice to proceed is a final order. *See Bradwood Landing LLC Northernstar Energy LLC*, 128 FERC ¶ 61216, 62017 (Sept. 1, 2009) ("It is the Notice to Proceed which represents the Commission's 'final decision' in the context of the ESA and MSA."); *Atlanta Gas Light Co. v. Federal Power Commission*, 476 F2d 142, 147 (5th Cir. 1973) (holding "interim suspension order" is reviewable because it is "definitive in its impact upon the rights of the parties and threatens irreparable harm"); *Transcontinental v. FERC*, 589 F2d 186 (5th Cir. 1979) (it is not necessary for 717r(b) review to be "final" action; reviewability question limited to whether or not plaintiff sustained "injury in fact"). By issuing the notices to proceed before a final order on Petitioners' pending Request for Rehearing,[12] FERC is denying Petitioners due process, particularly because they are asserting violations of NEPA.[13]

[12] As Petitioners explained in their responses to Respondent's and Intervenors' Motions to Dismiss in the instant case, Petitioners do not believe that their Request for Rehearing remains pending before FERC.

[13] This case satisfies the elements for administrative denial of due process in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). *Compare Kokajko v. F.E.R.C.*, 837 F2d 524 (1st Cir. 1988), finding FERC's tolling order did not violate due process in a fee case, based on pre-NEPA tolling cases; but noting cases involving "irreparable injury" are different and potentially subject to a writ of mandamus.

At a minimum, FERC's notices to proceed constitute a *de facto* denial of Petitioners' Request for Rehearing. Nevertheless, in a brazen attempt to block this Court's jurisdiction over the notices to proceed, FERC issued *more* tolling orders on Petitioners' requests for rehearing on them. *See* Exhibits U–V. This compounds the due process violations.[14] This also evidences bad faith by FERC in attempting to allow construction to be completed before this Court can exercise its jurisdiction. *See In re Cal. Power Exch. Corp.*, 245 F.3d 1110, 1125 (9th Cir. 2001) ("[A]gencies cannot insulate their decisions from Congressionally mandated judicial review simply by failing to take 'final action'…."). If there is agency bad faith, the agency delay appears *per se* unreasonable. *Cutler v. Hayes*, 818 F.2d 879, 898 (D.C. Cir. 1987). Granting a stay will thus ameliorate the impact of FERC's dilatory tactics and allow for the meaningful judicial review that Congress provided for in the Natural Gas Act to further the public interest.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court grant their motion for stay.

Dated: October 30, 2017.

[14] The tolling orders on the notices to proceed also constitute "orders" on the petitions for rehearing, making them appealable under §717r(b).

Respectfully submitted,

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Certificate of Compliance

Pursuant to Fed. R. App. P. 32(g) and Circuit Rule 32(e), I certify that this motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) and Circuit Rule 27(d)(2)(A) because this motion contains 5,198 words.

I further certify that this motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared in Times New Roman 14-point font using Microsoft Word.

/s/ Benjamin A. Luckett

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Certificate of Service

I hereby certify that on October 30, 2017, I caused to be served the foregoing Allegheny Defense Project, *et al.*'s Emergency Motion for Stay upon all ECF-registered counsel via the Court's CM/ECF system.

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