ORAL ARGUMENT HELD ON APRIL 18, 2017
DECISION ISSUED ON AUGUST 22, 2017

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

SIERRA CLUB, *et al.*, *Petitioners,* v. FEDERAL ENERGY REGULATORY COMMISSION, *Respondent,* DUKE ENERGY FLORIDA, LLC, *et al.*, *Intervenors-Respondents.*	No. 16-1329 (consolidated with 16-1387)

REPLY IN SUPPORT OF MOTION OF INTERVENOR-RESPONDENTS FOR 90-DAY STAY OF ISSUANCE OF MANDATE

In accordance with this Court's decision, FERC has issued a final supplemental environmental impact statement quantifying end-user greenhouse gas emissions and explaining FERC's policy on the use of the Social Cost of Carbon tool for project-level NEPA analysis. *See* Op. 24, 26-27. FERC has also committed to complete its response to this Court's decision by issuing a new substantive order by March 23. *See* FERC Mot. to Stay Issuance of Mandate 3 ("FERC Stay Mot."). Petitioners (collectively, "Sierra Club") assert that FERC is likely "to issue a new Certificate" reauthorizing the Southeast Market Pipelines Project ("Project"). Sierra Club Resp. to Mots. to Stay Issuance of Mandate 13 ("Sierra Club Resp.").

Nevertheless, in an apparent attempt to inflict financial pain and deter investments in future natural gas infrastructure, Sierra Club urges the Court to force the Project's shutdown by issuing the mandate immediately, before FERC has acted. Sierra Club provides no good reason for taking that step, which not only would risk significant disruption, but would compel Industry Intervenors to present an emergency stay application to the Supreme Court, placing substantial burdens on the parties and the courts.

On the other hand, ample "good cause" exists for staying the mandate. D.C. Cir. R. 41(a)(2). Doing so would allow Project facilities to continue serving their critical role of transporting natural gas to Florida power plants. Sierra Club does not (and cannot) dispute that the Sabal Trail pipeline transported hundreds of thousands

of dekatherms of gas on several days in January when the other two pipelines serving peninsular Florida were nearly (or completely) fully subscribed, meaning they could not have substituted for Sabal Trail if the Project had been shut down. *See* Intervenors Mot. for 90-Day Stay of Issuance of Mandate 3-4 ("Intervenors Mot."). And the cherry-picked data attached to Sierra Club's opposition, *see* Sierra Club Resp. Ex. 1, excludes more recent data showing significant Sabal Trail usage. *See* Addendum, 4th Suppl. Shammo Decl. ¶ 2. Sierra Club essentially asks this Court to roll the dice, betting that during any vacatur-forced shutdown, Florida will not experience conditions (e.g., cold or hot weather) that force utilities to resort to more costly and higher-emitting fuels to satisfy electricity demand.

That is a no-win bet. The record shows the Project provides critical reliability benefits, especially during peak-electricity-demand periods.[1] But under Sierra Club's approach, the Project's pipelines would be unavailable to serve demand if peaks in electricity usage occur. In short, Sierra Club would force Florida utilities to face the coming weeks without the additional natural gas capacity the Project provides, with no corresponding benefits for ratepayers or the environment. In contrast, staying the mandate for a short period to allow FERC to complete an

[1] *See* JA11; Op. 4; Intervenors Reh'g Pet., Exs. E, G-H; Intervenors Reply Supporting Reh'g Pet., Exs. 2-3; Intervenors Suppl. Reply Supporting Reh'g Pet., Exs. 1-2; Intervenors Mot., Exs. B-C.

orderly process—already well underway—will advance the public interest without causing any material harm.

FERC has committed to issuing an order by March 23—i.e., a mere 18 days after the mandate would issue under Federal Rule of Appellate Procedure 41(b) if this Court were to deny the pending motions on Monday, February 26. Allowing FERC that short additional time to act, when the mandate has been withheld since August 22, 2017, would cause no material harms to anyone, and conversely would avert substantial harms to the pipelines, their customers, Florida electric utilities, and the environment.

I. This Court May Stay Its Mandate For Good Cause Shown.

Sierra Club's effort to constrain this Court's discretion to stay its mandate, *see* Sierra Club Resp. 2-8, ignores Circuit Rule 41(a)(2)'s plain language. That rule authorizes the Court to stay its mandate based on a simple showing of "good cause." D.C. Cir. R. 41(a)(2). Rule 41(a)(2) contrasts starkly with Circuit Rules 8(a)(1) and 18(a)(1), which require motions for stays pending appeal to address the four traditional factors governing such stays "with specificity." Although those four factors are satisfied here in any event, *see* Intervenors Mot. 19-21, the absence of

any reference to the factors in Rule 41(a)(2) must be given effect. *Cf. Russello v. United States*, 464 U.S. 16, 23 (1983).[2]

The decisions Sierra Club cites do not support a contrary interpretation of Rule 41(a)(2). Cases addressing the standard for the *Supreme Court* to issue a stay pending disposition of a certiorari petition have no bearing on this Court's interpretation and application of Circuit Rule 41(a)(2).[3] *See, e.g., Packwood v. Senate Select Comm. on Ethics*, 510 U.S. 1319 (1994) (Rehnquist, C.J., in chambers). *United States v. Microsoft Corp.*, No. 00-5212, 2001 WL 931170, at *1 (D.C. Cir. Aug. 17, 2001) (en banc) (per curiam),[4] did not purport to articulate additional, atextual prerequisites for stay motions, and in any event, failing to stay the Court's mandate here would inflict "substantial harm." *See* Intervenors Mot. 10-15.

[2] Although in some cases staying the mandate is unopposed, *see* Sierra Club Resp. 4, 7-9, this Court has not hesitated to stay its mandate without all parties' consent. *See, e.g.*, *Waterkeeper Alliance v. EPA*, No. 09-1017 (D.C. Cir. Aug. 16, 2017) (per curiam); *Chamber of Commerce v. SEC*, 443 F.3d 890, 909 (D.C. Cir. 2006); *Independent U.S. Tanker Owners Comm. v. Dole*, 809 F.2d 847, 854-55 (D.C. Cir. 1987).

[3] Intervenors have also sought to stay the mandate pending a potential certiorari petition. *See* Intervenors Mot. 17-19. Under Federal Rule of Appellate Procedure 41(d)(2)(A), the Court should grant that request if it finds "that the certiorari petition would present a substantial question and that there is good cause for a stay."

[4] *See* D.C. Cir. R. 32.1(b)(1)(A) (unpublished orders predating January 2002 "are not to be cited as precedent").

II. Staying The Mandate Would Avoid Unnecessary Disruption While Imposing A Firm Deadline For FERC Action.

Sierra Club's principal contention is that staying the mandate would undermine the Court's vacatur order and "the purposes of NEPA." Sierra Club Resp. 8-10. A stay, however, would merely afford FERC a time-limited opportunity to respond before the judgment takes effect. Unlike an "open-ended remand without vacatur," briefly staying the mandate would present no cause for concern about "invit[ing] agency indifference." *In re Core Commc'ns, Inc.*, 531 F.3d 849, 862 (D.C. Cir. 2008) (Griffith, J., concurring).

Nor would a stay conflict with "the purposes of NEPA." Sierra Club Resp. 9; *cf. Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 157 (2010) (courts should not "presume that an injunction is the proper remedy for a NEPA violation"); *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 31-33 (2008) (permitting naval training to continue despite alleged NEPA violation). NEPA ensures that agencies consider potential environmental consequences and disclose those potential consequences to the public. *See* Op. 11. FERC has already furthered the disclosure objective by issuing its final supplemental environmental impact statement. *See* Intervenors Mot., Ex. A ("Final SEIS"). Furthermore, consistent with NEPA's remaining objective—informing agency action—FERC has committed to issuing a new order in light of its supplemental environmental analysis by March 23. *See* FERC Stay

Mot. 3. Forcing a shutdown of the Project after FERC has already bolstered its NEPA analysis would not advance NEPA's purposes.

Because FERC's supplemental analysis demonstrates that the Project end-users' contribution to national greenhouse gas emissions will be minimal, and because NEPA merely requires disclosure of environmental effects, without compelling any substantive outcomes regardless of the effects' magnitude, there is no obstacle to FERC reaffirming the Project's authorization. *See* Intervenors Reh'g Pet. 9-11; Intervenors Mot. 9. FERC merely requires a reasonable opportunity to prepare an order making a new decision and explaining its rationale.

III. Sierra Club's Expectation That FERC Is Likely To Reaffirm The Project's Authorization Supports Staying The Mandate, And The Court Should Reject Sierra Club's Attempt To Pre-Litigate FERC's Anticipated Order.

In accordance with this Court's decision, FERC's final supplemental environmental impact statement provides "a quantitative estimate of the downstream greenhouse emissions that will result from burning the natural gas that the pipelines will transport," Op. 24; *see also* Final SEIS 5-6; gives context by comparing the emissions to "total emissions from the state" and nation, Op. 24; *see also* Final SEIS 6; and explains the Commission's policy on the use of the Social Cost of Carbon tool for project-level NEPA analysis, *see* Op. 26-27; *see also* Final SEIS 8-9. On February 21, 2018, EPA formally acknowledged FERC's preparation of the final SEIS "to address issues raised in [this Court's] August 22, 2017, opinion," and

"not[ed] that it responds to comments received on the Draft" SEIS. 2/21/18 EPA Letter, https://goo.gl/uM6i1v. Notwithstanding Sierra Club's reliance on earlier EPA letters to support its NEPA arguments, *see generally* Sierra Club Br., EPA's February 21 letter offers no criticisms of the final SEIS.

Sierra Club objects to FERC's analysis, largely repeating criticisms of the *draft* (not final) analysis. *See* Sierra Club Resp. 10-13. Intervenors have responses to those objections. *See, e.g.*, Sabal Trail Transmission, LLC, Response to Comments on Draft Supplemental Environmental Impact Statement, FERC Docket Nos. CP15-17 et al. (Dec. 4, 2017). But this is not the forum to litigate those issues. Sierra Club will have ample opportunity to raise objections under 15 U.S.C. § 717r after FERC issues a new substantive order.

Sierra Club evidently believes FERC is likely "to issue a new Certificate" reaffirming its authorization of the Project. Sierra Club Resp. 13. Issuing a mandate that would force the shutdown of the Project when FERC may reaffirm the Project's authorization within the next few weeks makes little sense and, as explained below, would cause significant disruption for no material benefit.

IV. Denying A Stay Would Risk Significant Economic And Environmental Harm For No Material Benefit.

In arguing that "FERC and Intervenors cannot show irreparable harm from issuing the mandate," Sierra Club Resp. 13, Sierra Club ignores the Project's critical role in ensuring Florida power plants have reliable access to natural gas, especially

during peak-electricity-demand periods, *see supra* note 1. Indeed, on several days last month, Sabal Trail transported hundreds of thousands of dekatherms of natural gas that the other two pipelines serving peninsular Florida could not have transported because they were already operating near capacity. *See* Intervenors Mot. 3-4. Furthermore, Sierra Club's selective data presentation ignores more recent significant utilization of Sabal Trail. *See* 4th Suppl. Shammo Decl. ¶ 2. If Florida utilities lack access to adequate natural gas to satisfy electricity demand, they will likely turn to more expensive and higher-emitting fuels, such as coal and fuel oil, which would result in greater costs to ratepayers and increased greenhouse gas emissions.[5] *See* Intervenors Reh'g Pet., Ex. F, Sideris Aff. ¶¶ 5-6; Intervenors Reh'g Pet., Ex. G, Stubblefield Decl. ¶¶ 6-7.

Sierra Club's assertion that "Duke Energy Florida is no longer listed as a customer" of Sabal Trail is misleading at best. Sierra Club Resp. 15. Sabal Trail has a fully executed firm transportation service agreement with Duke Energy Florida. JA1081. Duke Energy Florida will be listed as a customer of Sabal Trail when service under that executed firm transportation service agreement commences, which will occur when FERC authorizes Sabal Trail to place into service the fully constructed Citrus County Line that connects with Duke's Citrus County Combined

[5] Sierra Club appears to acknowledge that passing on alternative-fuel costs to ratepayers would be appropriate if alternative-fuel use is reasonable given natural-gas-supply constraints. *See* Sierra Club Resp. 17-18.

Cycle Project. *See* R. 748, Precedent Agreement §§ 5(A)(i), 8(A)(v) (July 8, 2013), Ex. I to Sabal Trail Transmission, LLC's Section 7(c) Application, FERC Docket No. CP15-17 (Nov. 21, 2014). Sierra Club has opposed Sabal Trail's request to put the Citrus County Line into service, which has been pending with FERC since October 12, 2017. *See* Sabal Trail Transmission, LLC, Request to Place Into Service Additional Phase I Project Facilities, FERC Docket No. 15-17 (Oct. 12, 2017); Sierra Club Response to Sabal Trail Request, FERC Docket No. 15-17 (Oct. 13, 2017).

In essence, Sierra Club asks this Court to gamble on the proposition—supported exclusively by a deeply flawed declaration from a Sierra Club employee, *see* Intervenors Reply Supporting Reh'g Pet. 5-8 (discussing Daniel Declaration)—that "there is more than enough gas capacity to serve [Florida] power plants while FERC prepares a new Certificate." Sierra Club Resp. 15. Peak usage days in January, when Sabal Trail transported hundreds of thousands of dekatherms of natural gas that the other two pipelines serving peninsular Florida could not have carried, show otherwise. *See* Intervenors Mot. 3-4. But even if Sierra Club were correct, that would at most suggest the Project's pipelines might transport little or no gas during the interim period. Under Sierra Club's preferred approach, however, the Project's pipelines would be unavailable if they are needed to serve demand.

Moreover, Sierra Club does not dispute that if the Project were shut down even temporarily, the pipelines' investors and operators would lose substantial

revenue. *See* Intervenors Mot. 13. Instead, it repeats its contention that Intervenors "assumed the risk of a lapse in Certificates." Sierra Club Resp. 16-17; *cf.* Sierra Club's Resp. to Reh'g Pets. 11-12. Sierra Club does not acknowledge, much less respond to, Intervenors' demonstration that the cited out-of-circuit precedents are distinguishable and do not support its baseless arguments. *See* Intervenors Mot. 14-15.

V. Sierra Club's Opposition Supports A Stay Pending A Certiorari Petition.

As Intervenors explained, this case presents an important federal question that this Court resolved in conflict with Supreme Court precedent: whether, under the principles articulated in *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), NEPA requires an agency to consider downstream greenhouse gas emissions in authorizing a federal action (here, an interstate natural gas pipeline project), despite having no authority over the activity that generates those emissions (here, a state's choice about how to meet its electric generation needs and orders authorizing the construction and operation of power plants). *See* Intervenors Mot. 17-19.

Sierra Club's expansive reading of this Court's decision and absolutist view of the appropriate remedy for NEPA violations only highlights why this case merits further review. Sierra Club suggests FERC must adopt "additional mitigation measures or reject[] … the project entirely" based on end-user greenhouse gas

emissions, even though FERC has no jurisdiction over electric-generation decisions by the state of Florida that determine those emissions. Sierra Club Resp. 11; *see also* Final SEIS 7 (FERC "lacks the jurisdiction to impose mitigation on downstream end-use consumers"). Furthermore, the contention (Sierra Club Resp. 19-20) that correctable NEPA violations require near-automatic vacatur of project approvals emphasizes the practical importance of obtaining clear Supreme Court guidance on the scope of agencies' NEPA obligations.

VI. The Court Should Reject Sierra Club's Request For Immediate Mandate Issuance.

The Court should reject Sierra Club's passing request for the mandate to issue "immediately," presumably without waiting even the seven days contemplated by Federal Rule of Appellate Procedure 41(b). Sierra Club Resp. 2. That request constitutes a cross-motion for affirmative relief, yet Sierra Club did not alert the Court and respondents of the request in its response's title, as required by Federal Rule of Appellate Procedure 27(a)(3)(B). Sierra Club also failed to present argument or authorities to support the request. *See United States v. Jones*, 744 F.3d 1362, 1370 n.2 (D.C. Cir. 2014). Finally, Sierra Club has not established "good cause" for expedited mandate issuance, which would deprive Intervenors of the opportunity to seek an emergency stay from the Supreme Court before the mandate issues. D.C. Cir. R. 41(a)(1).

CONCLUSION

The Court should grant Intervenors' stay motion. At minimum, the Court should ensure the mandate is withheld until seven days after entry of the Court's order.

Date: February 23, 2018

Respectfully submitted,

/s/ Jeremy C. Marwell

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CERTIFICATE OF COMPLIANCE

1. This reply complies with the word limit of Fed. R. App. P. 27(d)(2) because it contains 2,594 words, excluding the parts exempted by Fed. R. App. P. 32(f) and 27(d)(2).

2. This reply 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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14-point font.

DATED: February 23, 2018

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CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure, I hereby certify that, on February 23, 2018, I electronically filed the foregoing reply with the Clerk of the Court for the U.S. Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system, and served copies of the foregoing via the Court's CM/ECF system on all ECF-registered counsel.

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FOURTH SUPPLEMENTAL DECLARATION OF DAVID A. SHAMMO

I, David A. Shammo, am over the age of 18 and am competent and qualified to make this Declaration. All facts stated are within my personal knowledge.

1. I am the Vice President, Business Development Southeast, of Sabal Trail Management, LLC. Sabal Trail Management, LLC, is the operator of Sabal Trail Transmission, LLC ("Sabal Trail"). I have more than 36 years of experience overseeing various accounting, project performance, marketing, and business development components of transmission projects, including the Sabal Trail Project. In my capacity as Vice President, Business Development, I have access to and am familiar with Sabal Trail's records regarding delivery volumes.

2. The below table provides daily data on scheduled volumes for the Sabal Trail pipeline from February 1, 2018, to February 22, 2018:

Gas Date	**Scheduled Quantity (Dekatherms)**
2/1/2018	26,176
2/2/2018	51,373
2/3/2018	0
2/4/2018	0
2/5/2018	0
2/6/2018	0
2/7/2018	19,386
2/8/2018	0
2/9/2018	67,851
2/10/2018	174,474
2/11/2018	174,474
2/12/2018	174,474
2/13/2018	174,474
2/14/2018	199,967
2/15/2018	219,353
2/16/2018	171,469
2/17/2018	131,009
2/18/2018	131,009
2/19/2018	218,246
2/20/2018	218,246
2/21/2018	284,541
2/22/2018	261,711

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated: February 23, 2018

David A. Shammo