IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

ATCHAFALAYA BASINKEEPER, LOUISIANA CRAWFISH PRODUCERS ASSOCIATION-WEST, GULF RESTORATION NETWORK, WATERKEEPER ALLIANCE, and SIERRA CLUB and its DELTA CHAPTER,

Plaintiffs,

v.

U.S. ARMY CORPS OF ENGINEERS,

Defendant,

BAYOU BRIDGE PIPELINE, LLC,

Intervenor-Defendant,

and

STUPP BROS, INC. D/B/A STUPP CORPORATION,

Intervenor-Defendant.

Case No. 3:18-cv-00023-SDD-EWD

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR STAY PENDING APPEAL

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INTRODUCTION

Bayou Bridge Pipeline, LLC respectfully moves for a stay pending appeal of this Court's February 27, 2018 Order granting a preliminary injunction and enjoining Bayou Bridge from "taking any further action on the project within the Atchafalaya Basin." Rec. Doc. No. 86 at 60. A stay pending appeal is warranted because the Court's Order conflicts with both the law and the record, and has already caused and will continue to cause irreparable harm to Bayou Bridge. In view of that harm, the company requests that the Court resolve this motion no later than noon CST on Friday, March 2, 2018 so that, if necessary, Bayou Bridge can promptly seek relief the same day in the Fifth Circuit by that Court's 2:00 P.M. CST deadline for emergency motions. *See* Fed. R. App. P. 8(a)(1) (party seeking stay pending appeal must "ordinarily move first in the district court").[1] As discussed below, in addition to the significant financial loses it is incurring, the timing of the injunction prompts Bayou Bridge to seek immediate emergency relief due to unique irreparable harm it is suffering because the construction window in the Basin is rapidly closing due to the upcoming onset of the high-water season. Frey Decl. of Feb. 28, 2018 ¶ 7 (Frey II), attached hereto as **Exhibit A**. In addition, prompt relief is needed to avoid a risk of harm to the environment in the Atchafalaya Basin from abandoning work in mid-stream.

STANDARD

Under Federal Rule of Civil Procedure 62(c), this Court may "suspend … an injunction" during the pendency of an appeal from the grant of that injunction. In this regard, the Court considers "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4)

[1] Bayou Bridge is filing a notice of appeal contemporaneously with this motion.

where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009) (citation omitted). "The first two factors … are the most critical," and with the other factors they favor a stay here. *Id.*

ARGUMENT

I. Bayou Bridge Is Likely To Succeed On The Merits Of Its Appeal.

In its February 27, 2018 Order, the Court rejected much of Plaintiffs' merits-based argument, finding they satisfied the threshold identified by the Court on two discrete issues. The first involves whether "the Corps failed to sufficiently justify its reliance on mitigation in reaching the FONSI." Rec. Doc. No. 86 at 45. The second is whether "the Corps failed to sufficiently consider and address past noncompliance and cumulative effects in relation to this proposed project." Rec. Doc. No. 86 at 49. The Court then applied a "sliding scale" when balancing the preliminary injunction factors, Rec. Doc. No. 86 at 9-10, 17-18, and concluded that preliminary injunctive relief was warranted, Rec. Doc. No. 86 at 60. The Court based its irreparable harm conclusion on the cutting down of an unspecified number of trees and a "possible threat" to the hydrology of the Basin. The Court's findings on the remaining two factors depend on its conclusions as to the first two, and Bayou Bridge is likely to succeed on appeal as to each factor as explained below.

A. The Corps Adequately Analyzed and Explained the Mitigation for This Project.

The Court found that "the Corps failed to sufficiently justify its reliance on mitigation in reaching the FONSI," and reasoned that "[t]here is simply no assurance in the EAs that the mitigation plan will be successful in accomplishing the restorative goals of the CWA." Rec. Doc. No. 86 at 45. Similarly, the Court found that the Corps's reliance on the mitigation hierarchy specified in its regulations was "arbitrary and capricious" because the Corps did not

provide "any rational explanation as to how the mitigation choices serves [sic] the stated goal of 'replac[ing] lost functions and service.'" *Id*. at 37-38.

This is not so. The Corps provided more than enough support for its exercise of judgment in authorizing mitigation measures, especially where it relied on its own long-standing regulations and an interagency tool designed to assess compensatory mitigation requirements. First, the Corps expressly stated in the Section 404 EA that "all impacts were offset utilizing either in-kind / in-basin credits or a combination of in-kind / in-basin credits and out-of-kind / in-basin credits," Rec. Doc. No. 36-5 at 65, and that "[t]he order of mitigation pursued for the project followed the preferred hierarchy set forth by the [Corps]," *id.* at 70 (emphasis omitted) (citing 33 C.F.R. § 332.3). The Corps's regulations include additional explanation for why mitigation-bank credits are generally favorable to other kinds of mitigation. 33 C.F.R. § 332.3(b)(2). Moreover, the Corps was clear in the Section 404 EA that the regulations were the foundation of its decision with respect to Bayou Bridge. *See* Rec. Doc. No. 36-5 at 66 (finding that credits Bayou Bridge purchased in the Atchafalaya Basin were "consistent with the [Corps]'s mitigation policy"). It is not arbitrary and capricious for an agency to follow its own regulations. *See N.L.R.B. v. Sunnyland Packing Co*., 557 F.2d 1157, 1160 (5th Cir. 1977) (explaining that the focus should be on "whether the agency has departed from prior norms"); *Tex. Oil & Gas Ass'n v. E.P.A.*, 161 F.3d 923, 934 (5th Cir. 1998) (observing that agency action "is entitled to a presumption of regularity").

Second, the Corps specified in the Section 404 EA that it relied on the Louisiana Wetlands Rapid Assessment Method (LRAM) "to determine the acquisition of … suitable habitat credits, from approved mitigation banks within the watershed of impact." Rec. Doc. No. 36-5 at 65. The LRAM is a detailed methodology for calculating the amount of mitigation bank

credits necessary to offset environmental impacts.[2] The Court asserts that "there is not an iota of discussion, analysis, or explanation how [bottomland hardwood] credits mitigate the loss of function and value of the cypress/tupelo swamp impact." Rec. Doc. No. 86 at 43. But the LRAM—which the Corps cites in the Section 404 EA—does just that. Based on robust analysis, the LRAM concludes that for purposes of "in-kind habitat replacement," "[b]ottomland hardwoods" and "[b]aldcypress/tupelo swamp" "will be grouped together as in-kind[.]" LRAM at 9. It also clarifies that "[b]ottomland hardwood forest" is "a *forested*, alluvial *wetland*," *id.* at 7 (emphasis added), which replaces or compensates for the lost functions and service of other forested wetlands, including cypress-tupelo swamp. *Id.* at 9. This assessment supports the Corps's conclusion that "the total LRAM credits actually purchased by [Bayou Bridge] meets or exceeds what is required based on the project's impacts." Rec. Doc. No. 36-5 at 67.

The Corps's reliance on the LRAM, much like its reliance on the PHMSA spill model, was "appropriate." Rec. Doc. No. 86 at 27-28 (referring to spill model). Just as the Corps could rely on the expertise of PHMSA, it was proper for the Corps to rely on the LRAM to support its mitigation decision. Indeed, the Corps is entitled to deference in its choice of methodology. Rec. Doc. No. 24 at 5 ("Simply having an opposing opinion, or disagreeing with the mitigation plans imposed, is insufficient to establish a substantial likelihood of success on the merits, especially in light of the high deference that the law requires the Court to afford the Corps"); *see also Am. Trucking Ass'ns, Inc. v. Fed. Motor Carrier Safety Admin.*, 724 F.3d 243, 253 (D.C. Cir. 2013) (finding the agency "more than adequately supported its choice by referencing a[] …

[2] U.S. Army Corps of Engineers, Louisiana Wetland Rapid Assessment Method, Interim Version 1.0 at 1-2, 5, 11, 35, 40 (2016), http://www.mvn.usace.army.mil/Portals/56/docs/regulatory/Mitigation/Louisiana_Rapid_Assessment_Method_2_26_16.pdf (LRAM).

study" and that the court owes "deference to the agency in such matters"). Taken together, the Corps's explanation of and reference to its regulations and an established methodology in the Section 404 EA provide more than enough information to understand how the Corps reached its conclusion with respect to mitigation measures.

B. The Corps Did Not Improperly Disregard the Compliance Records of Separate Projects Completed by Third Parties.

The Court found that "the Corps failed to sufficiently consider and address past noncompliance and cumulative effects in relation to this proposed project." Rec. Doc. No. 86 at 49. This conclusion is belied by the record. Plaintiffs' allegations of prior noncompliance are just that—allegations. Indeed, Plaintiffs' own witness testified during the preliminary injunction hearing that he was satisfied with the recent installation of another pipeline in the Basin. Rec. Doc. No. 84 at 135:4-136:11 (expressing satisfaction and stating that "the right of way was not impacted to the point of leaving elevated spoil behind further damaging that area"). This admission nullifies Plaintiffs' argument that the Corps had no choice but to assume from experience that the permit conditions will be violated here.

Not only does the record belie a conclusion that the Corps improperly disregarded the impacts of prior noncompliance; so too does the law. As Bayou Bridge and the Corps explained at length in their oppositions to Plaintiffs' motion for preliminary injunction, the Corps has imposed mandatory permit conditions requiring Bayou Bridge to restore the area to pre-construction contours, and the Corps has full authority to enforce compliance with these conditions. *See* Rec. Doc. No. 36 at 25-28; Rec. Doc. No. 37-2 at 25-29; *see also* Rec. Doc. No. 36-5 at 51. There is no legal basis for requiring the Corps to assume that its mandatory permit conditions will be violated and unenforced, thereby creating new spoil banks. As a result, there

is no legal basis for requiring the Corps to analyze hypothetical impacts that are premised on assumed noncompliance.

Furthermore, the record clearly establishes that the Corps adequately considered the cumulative impacts of this project. For one thing, the Corps ensured no further impacts from additional spoil banks by imposing the mandatory permit conditions. And to the extent the instant project may yield other impacts that are cumulative of impacts stemming from prior pipeline activities (including alleged prior noncompliance), the Corps has properly addressed such impacts through mitigation.

C. The Court Improperly Credited Plaintiffs with a Showing of Irreparable Harm.

The Court found that Plaintiffs "established a threat of irreparable harm" and that the project "potentially threatens" the hydrology of the Basin. Rec. Doc. No. 86 at 16. This conclusion is based on the Court's finding "that the impact of the loss of legacy trees cannot be mitigated against[.]" Rec. Doc. No. 16. But this finding conflicts with a different finding—that Plaintiffs are likely to succeed on the merits of their claim that the Corps could have, but did not, identify more appropriate mitigation measures. If other, appropriate mitigation is available, then it must be the case that the impacts may be mitigated. And if the project's impacts may be mitigated, the project's impacts are not irreparable, and the project may proceed under the law. Moreover, less than 0.08% of the Basin's cypress relic trees stand to be cut during this project. Rec. Doc. No. 36-21 (Peters). Thus, the harm alleged by Plaintiffs is *de minimis*. *See Enterprise Int'l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 472-73 (5th Cir. 1985) (explaining that magnitude of harm is less important than irreparability only when "the threatened harm is more than de minimis").

Additionally, as explained in Section I.D below, Plaintiffs must establish a *likelihood* of irreparable harm, regardless of the strength of their showing of likelihood of success on the merits. Thus, the Court erred in concluding that Plaintiffs had carried their burden merely by establishing a "threat of irreparable harm." Rec. Doc. No. 86 at 16.[3]

D. The Court Erred in Applying a Sliding Scale Regarding the Preliminary Injunction Factors.

The Court applied a "sliding scale" in balancing the preliminary injunction factors and determining that injunctive relief was warranted. This approach is erroneous because the sliding scale is no longer valid.

Citing to a Fifth Circuit case decided in 1980, the Court invoked the sliding scale and explained that "[w]hen the other factors weigh strongly in favor of an injunction, 'a showing of some likelihood of success on the merits will justify temporary injunctive relief.'" Rec. Doc. No. 86 at 17 (quoting *Productos Carnic, S.A. v. Cent. Am. Beef & Seafood Trading Co.*, 621 F.2d 683, 686 (5th Cir. 1980)). Similarly, the Court quoted a 1979 decision for the proposition that "a sliding scale can be employed, balancing the hardships associated with the issuance or denial of a preliminary injunction with the degree of likelihood of success on the merits." *Fla. Med. Ass'n, Inc. v. U.S. Dep't of Health, Educ. & Welfare*, 601 F.2d 199, 203 n.2 (5th Cir. 1979).

This case law has been rendered obsolete by more recent decisions. In *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 21-22 (2008), the Supreme Court rejected the notion

[3] The Court's Order is also impermissibly vague with respect to the term "any further action," and is overbroad given that the alleged irreparable harm pertains only to the cutting of a few discrete cypress trees. *See* Fed. R. Civ. P. 65(d)(1) ("Every order granting an injunction … must: (A) state the reasons why it issued; (B) state its terms specifically; and (C) describe in reasonable detail … the act or acts restrained or required."); *John Doe #1 v. Veneman*, 380 F.3d 807, 818 (5th Cir. 2004) (A "district court must narrowly tailor an injunction to remedy the specific action which gives rise to the order" as "dictated by the extent of the violation established.") (citation omitted)).

that a strong showing on one factor (there it was likelihood of success on the merits) can compensate for a weaker showing of irreparable harm. *See also Munaf v. Geren*, 553 U.S. 674, 689-90 (2008) (reiterating that the likelihood of success is an independent factor). The Supreme Court has applied the same principles in the context of stays. *See Nken v. Holder*, 556 U.S. 418, 434 (2009) (rejecting idea that "possibility" of irreparable harm is sufficient); *id.* at 438 ("When considering success on the merits and irreparable harm, courts cannot dispense with the required showing of one simply because there is a strong likelihood of the other.") (Kennedy, J., concurring). In light of these decisions, the sliding-scale approach is "no longer controlling, or even viable." *Am. Trucking Ass'ns v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009); *see also Davis v. Pension Ben. Guar. Corp.*, 571 F.3d 1288, 1296 (D.C. Cir. 2009) ("*Munaf* made clear that a likelihood of success is an independent, free-standing requirement for a preliminary injunction. *Munaf* means that a strong showing of irreparable harm, for example, cannot make up for a failure to demonstrate a likelihood of success on the merits.") (Kavanaugh, J., concurring). Thus, the Court erred in applying the sliding scale in determining that a preliminary injunction was warranted here.

II. Bayou Bridge Is Suffering Irreparable Harm and Will Continue to Suffer Irreparable Harm if the Injunction Continues.

For the first week of this injunction alone, Bayou Bridge faces approximately $2.2 million in costs to demobilize and idle its construction crews in the Basin. *See* Frey II ¶ 15. For each additional day thereafter that this injunction remains in force, Bayou Bridge faces up to an additional $500,000 in standby labor costs for crews not able to work in the Basin. *Id.* ¶¶ 13, 15. That is because, by contract, Bayou Bridge must pay a preordained wage to construction crews

standing idle.[4] *Id.* ¶ 14. Bayou Bridge also faces a loss of approximately $12.7 million in revenue in 2018 ($75.6 million in 2019) if pipelines operations are delayed. Frey II ¶ 16; *see also* Rec. Doc. No. 36-19 ¶ 22 (Frey I) (noting further costs from delay of up to $20 million per year). In addition, the company's contractors may "need to lay off or furlough as many as 500 workers, many of whom are local Louisianans." Rec. Doc. No. 36-19 ¶ 19 (Frey I). And furthermore, when Bayou Bridge's Spread 3 contractor begins reducing its Basin workforce and expenditures, that will cause the further loss of hundreds or thousands more jobs in Louisiana. *See, e.g.*, Rec. Doc. No. 36-20 ¶¶ 11-13, 18 (Meier).

Contrary to the Court's suggestion, Bayou Bridge cannot "ameliorate the[se] costs" and other damages "through construction sequencing and management practices." Rec. Doc. No. 86 at 60. As previously explained, project construction is divided into three spreads. Rec. Doc. No. 36-19 ¶ 14 (Frey I); Frey II ¶ 5. The Basin is located wholly within Spread 3. Rec. Doc. No. 36-19 ¶ 14 (Frey I); Frey II ¶ 5. Construction is already proceeding simultaneously in all three spreads, Frey II ¶ 4, and Spread 3 has a different general contractor than Spreads 1 and 2. *Id.* All of this means that crews enjoined from working in the Basin cannot be moved to other spreads or areas where different crews and contractors are already working. *Id.* Thus, sequencing or management practices will not reduce or ameliorate Bayou Bridge's harms. *Id.*

Plaintiffs did not submit any evidence to refute the costs documented at the hearing and supplemented now. In fact, they have conceded that the injunction would cost Bayou Bridge. *See* Rec. Doc. No. 75 at 13 ("Nor do Plaintiffs believe that an injunction would be cost- or

[4] In the event of a prolonged stoppage, Bayou Bridge may be forced to de-mobilize contractors and equipment instead of paying standby wages. De-mobilization costs, combined with "follow on effects[,] could effectively cause project development to cease." Rec. Doc. No. 36-19 ¶¶ 17-19 (Frey I).

consequence-free for [Bayou Bridge] or its contractors."). Bayou Bridge stood ready to subject its witness to cross-examination on this topic at the hearing. *See* Frey II ¶ 12. Plaintiffs waived that opportunity. Rec. Doc. No. 85 at 10-14; *see also* Frey II ¶ 12 (indicating that Mr. Frey was present in the courtroom and prepared to authenticate the documents underlying the cost calculations). Plaintiffs also put in no contrary evidence.

These harms are irreparable because they almost certainly cannot be remedied. Thus, in imposing an inadequate bond of just $10,000 despite uncontroverted evidence of millions of dollars per week in harm, the Court has eliminated Bayou Bridge's exclusive remedy to recover damages if it is later found to have been wrongfully enjoined, which renders that harm irreparable. Federal Rule of Civil Procedure 65(c) states that a court "may issue a preliminary injunction … only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined." Fed. R. Civ. P. 65(c). This Rule "assures the enjoined party that it may readily collect damages from the funds posted … in the event that it was wrongfully enjoined." *Continuum Co. v. Incepts, Inc.*, 873 F.2d 801, 803 (5th Cir. 1989). An inadequate bond "produces irreparable injury, because the damages for an erroneous preliminary injunction cannot exceed the amount of the bond." *Mead Johnson & Co. v. Abbott Labs.*, 201 F.3d 883, 888 (7th Cir. 2000); *see also Nichols v. Alcatel USA, Inc.*, 532 F.3d 364, 379 (5th Cir. 2008) (inadequate bond "insufficient to compensate" the enjoined party "for any damages it has suffered" if it "ultimately prevails"); *see also Continuum*, 873 F.2d at 804 (recovery of damages "restrict[ed] … to the bond amount"). Indeed, mere"[d]ifficulty in collecting a damage judgment" down the line "may support a claim of irreparable injury"; the impossibility on display here removes any doubt. *Fed. Sav. & Loan Ins. Corp. v. Dixon*, 835 F.2d 554, 560 n.1 (5th Cir. 1987) (citation omitted). The failure to

impose a bond commensurate with the damages Bayou Bridge would incur from an erroneous preliminary injunction is itself error that warrants a stay.

Separately, the injunction also threatens the very sort of environmental harm that the Plaintiffs themselves have sought to prevent. The Order enjoins "any further action on the project in the Atchafalaya Basin." Rec. Doc. No. 86 at 60. Because Bayou Bridge has begun digging the trench within the Basin, mounds of dirt now sit alongside the right-of-way. Frey II ¶¶ 7-8. Water levels have already started to rise in the Basin. *Id.* ¶ 10. If water levels get high enough, that dirt could be washed away. *Id.* Indeed, because Bayou Bridge started its construction in the lower-lying areas of the Basin because of its expectation that water levels could begin to rise, the window for Bayou Bridge to return to the Basin and implement these erosion-control measures as part of construction is quickly closing. *Id.* ¶¶ 5, 7, 10. Plaintiffs' witness Jody Meche has recently acknowledged this. Julie Dermansky, *Federal Judge Halts Bayou Bridge Pipeline Installation, But Photos Show Damage Already Inflicted*, DESMOGBLOG (Feb. 25, 2018) (Plaintiffs' witness: "[T]hese mountains of dirt will likely be washed away[.]").[5]

Bayou Bridge is therefore suffering, and will continue to suffer, irreparable harm on account of the injunction given the Court's imposition of an inadequate bond. The plain terms of Rule 65(c) require a bond in an amount sufficient "to pay the costs and damages" of any party wrongly enjoined." *See Frank's GMC Truck Ctr., Inc. v. Gen. Motors Corp.*, 847 F.2d 100, 103 (3d Cir. 1988) (explaining that Rule 65(c) "mandates that a court … issuing an injunction must require the successful applicant to post *adequate* security") (emphasis added); *Continuum Co. v. Incepts, Inc.*, 883 F.2d 333, 334–35 (5th Cir. 1989) (holding that where a plaintiff claimed "great

[5] https://www.desmogblog.com/2018/02/25/federal-judge-halts-bayou-bridge-pipeline-installation-photos-show-damage-inflicted.

hardship" as a result of the district court's decision to increase a bond supporting an injunction from $200,000 to $2,000,000, the plaintiff could avoid the increase only by demonstrating "that it would be able to satisfy a judgment for damages that might be obtained against it as a result of the wrongful issuance of th[e] injunction"); *see also Habitat Educ. Ctr. v. U.S. Forest Serv.*, 607 F.3d 453, 459–60 (7th Cir. 2010) (rejecting notion that non-profit organizations should be exempt from bond requirements of Rule 65(c)). Despite having the opportunity, Plaintiffs submitted no evidence into the *hearing* record that would justify dispensing with a bond. They also waived their opportunity to cross-examine Bayou Bridge's witnesses. There is no basis in the record to find that "plaintiffs are mostly non-profit agencies with limited resources" and that Bayou Bridge can somehow "ameliorate the costs" of the injunction.

III. A Stay Will Not Substantially Injure Plaintiffs.

The Court found only that Plaintiffs "established a threat of irreparable harm" with respect to the potential loss of "legacy trees," and only a "potential[] threat[]" to the hydrology of the Basin. Rec. Doc. No. 86 at 16. But a threat of irreparable harm, let alone a potential threat, is not sufficient to meet the high bar needed for an injunction—a likelihood of imminent irreparable harm. *See Winter*, 555 U.S. at 21-22 (2008). And the magnitude of such harm, even if it came to pass, is unspecified.

The Court further suggests that "the loss of legacy trees cannot be mitigated." Rec. Doc. No. 86 at 16. But that is incorrect because the entire point of the Corps's mitigation program is to determine mitigation for just those types of impacts. LRAM at 5-9. And in fact the Corps did determine acceptable mitigation. Rec. Doc. No. 36-5 at 64-69. A finding of inadequate discussion of mitigation presupposes that other mitigation could offset potential impacts. Rec. Doc. No. 86 at 39-45. Accordingly, the Court's findings of irreparable harm are erroneous.

In any event, even if there were irreparable harm, it would be *de minimis*. By the admission of Plaintiffs' witness Scott Eustis at the hearing, the Basin spans 1.4 million acres, roughly two-thirds of which is covered by cypress-tupelo swamp. Rec. Doc. No. 84 at 123:6-14. Eustis further testified that construction would impact some 300 acres of cypress-tupelo swamp in the Basin—or 0.03% of that swamp in the Basin. *Id.* at 123:15-17. The harm is smaller still when limited to old-growth cypress trees. Bayou Bridge has identified five such trees within the permanent or temporary right-of-way. Rec. Doc. No. 36-21 ¶ 10 (Peters). Plaintiffs asserted at the hearing that there are 17—or 0.003% of old-growth cypress trees in the Basin (using Plaintiffs' numbers). Either way, the harm is remarkably small in context of the Basin as a whole and even then is minimized by the comprehensive mitigation the Corps ordered to offset the loss of wetland functions owing to construction. Whatever numbers the Court uses, the impact is too small to substantially injure Plaintiffs. Once again, Bayou Bridge does not question the sincerity of Plaintiffs' assertions of harm, only the magnitude of that harm when placed in context.

IV. The Public Interest Favors A Stay.

As previously explained, construction of the pipeline serves the public interest in terms of energy development, jobs, tax revenue, and so forth. Moreover, a stay pending appeal will not injure the public, because any harm is *de minimis* and is subject to mediation. And there is also a "publi[c] interest in ensuring compliance with the rules of procedure." *Fleming & Assocs. v. Newby & Tittle*, 529 F.3d 631, 641 (5th Cir. 2008) (citation omitted). The Federal Rules of Civil Procedure promote "the just, speedy, and inexpensive determination of every action and proceeding," Fed. R. Civ. P. 1, and the principles underlying Rule 65(d) ensure "basic fairness" given the "threat of judicial punishment," and are necessary for "informed and intelligent

appellate review." *Schmidt v. Lessard*, 414 U.S. 473, 476-77 (1974). The public interest would therefore be served by the stay of an injunction that violates the Rules.

CONCLUSION

The Court should stay the preliminary injunction pending appeal.

Dated: March 1, 2018

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing memorandum of law has been served upon all counsel of record by filing the same in this Court's CM/ECF system this 1st day of March, 2018.

/s/ Justin J. Marocco