No. 18-30257

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ATCHAFALAYA BASINKEEPER; LOUISIANA CRAWFISH PRODUCERS ASSOCIATION-WEST; GULF RESTORATION NETWORK; WATERKEEPER ALLIANCE; SIERRA CLUB, AND ITS DELTA CHAPTER,

Plaintiffs–Appellees,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,

Defendant–Appellant,

BAYOU BRIDGE PIPELINE, LLC; STUPP BROTHERS, INCORPORATED, DOING BUSINESS AS STUPP CORPORATION,

Intervenor Defendants–Appellants,

On Appeal from the United States District Court for the Middle District of Louisiana, Case No. 3:18-cv-23-SDD-EWD

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No. 18-30257

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Plaintiffs–Appellees,

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Defendant–Appellant,

BAYOU BRIDGE PIPELINE, LLC; STUPP BROTHERS, INCORPORATED, DOING BUSINESS AS STUPP CORPORATION,

Intervenor Defendants–Appellants,

The undersigned counsel of record certifies that the following interested persons and entities 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.

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E. Appellant Bayou Bridge Pipeline, LLC

Bayou Bridge Pipeline, LLC, which is a Delaware limited liability corporation with its principal place of business in Texas, is 40% owned by Phillips 66 Partners Holdings, LLC, 30% owned by Sunoco Pipeline, L.P., and 30% owned by ETC Bayou Bridge Holdings, LLC. ETC Bayou

Bridge Holdings, LLC and Sunoco Pipeline, L.P., are wholly owned, indirect subsidiaries of Energy Transfer Partners, L.P., a publicly traded limited partnership, which is in turn owned indirectly in part by Energy Transfer Equity, L.P., a publicly traded limited partnership, and in part by various public unitholders. Phillips 66 Partners Holdings, LLC is a wholly owned subsidiary of Phillips 66 Partners, LP, a publicly traded limited partnership, which is in turn owned in part by Phillips 66 Partners GP LLC, an indirect wholly owned subsidiary of Phillips 66, a publicly traded corporation, in part by Phillips 66 Project Development Inc., an indirect wholly owned subsidiary of Phillips 66, and in part by various public unitholders.

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G. Appellant Stupp Brothers, Inc.

Stupp Brothers, Inc. d/b/a Stupp Corporation is a Missouri corporation. It does not have a parent corporation and no publicly held corporation owns 10% or more of its stock. Stupp Coatings, LLC is a Louisiana limited liability company; 85% is owned by Stupp Brothers, Inc. (42% by SBI Acquisition Sub I, LLC, a wholly owned subsidiary of Stupp Brothers, Inc., and 43% by Stupp Brothers, Inc.), and 15% is owned by Touché Ventures, LLC, a Louisiana limited liability company. Touché Ventures, LLC is the managing member of Stupp Coatings, LLC and is owned by Jerry E. Shea, Jr. and Patrick T. Shea.

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STATEMENT REQUESTING ORAL ARGUMENT

Given the important legal questions and public interests at stake in this appeal, Bayou Bridge Pipeline, LLC and Stupp Brothers, Inc., respectfully request oral argument, which the Court has scheduled for April 30, 2018.

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INTRODUCTION

Appellants, Bayou Bridge Pipeline, LLC, and one of its contractors, Stupp Brothers, Inc., appeal the grant of a preliminary injunction halting construction of an oil pipeline in Louisiana—an injunction that would cost appellants and local communities hundreds of thousands of dollars per day, and which has already been stayed by a panel of this Court.

The plaintiffs, environmental groups and a trade association, obtained the injunction pending litigation of their claims that the U.S. Army Corps of Engineers arbitrarily and capriciously failed to address certain environmental issues when it authorized the pipeline's route through the Atchafalaya Basin, a large Louisiana river swamp. The Corps granted Bayou Bridge that permission after a year-long process resulting in two extensive environmental assessments. The agency recognized that the project would result in permanent clearing of fewer than 150 acres of forested wetlands within the Basin and, after properly applying its own regulations, ordered Bayou Bridge to fund the reestablishment of forested wetlands elsewhere in the Basin as compensatory mitigation for that aquatic-function loss.

The district court first denied plaintiffs' request for a temporary-restraining order, explaining that plaintiffs had not established a "substantial likelihood" of success on the merits of their claims given that the Corps had "clearly addresse[d]" their concerns. Weeks later, however, after a two-day hearing on plaintiffs' request for a preliminary injunction,

the court reversed course by granting a preliminary injunction with "reasons to be assigned at a later date." After Bayou Bridge pointed out that the Federal Rules of Civil Procedure require the reasons supporting a preliminary injunction to be stated *before* the injunction can issue, the court quickly issued another order in which it determined that perceived irreparable harm—principally the loss of fewer than two dozen older trees—could make up for the lack of a substantial likelihood of success on the merits.

The district court piled error on top of error to issue a fatally flawed preliminary injunction that should be reversed. Because a preliminary injunction is an extraordinary remedy, the movant must establish at a minimum a substantial likelihood of success on the merits and irreparable harm. Yet the district court applied an obsolete sliding scale, inconsistent with recent Supreme Court precedent, under which something more than "no chance" of success on the merits sufficed.

In assessing the merits, the district court also violated textbook principles of administrative law. The court believed that the Corps had not sufficiently explained why the mitigation it ordered was adequate, and how it assessed the cumulative effect of the new pipeline on the environment in light of previously completed projects: In the main, the court was unable to ascertain how the Corps's chosen mode of mitigation could offset the project's impact on aquatic functions. But the Corps's

choice of mitigation as discussed in its environmental assessment expressly rested on a technical methodology—contemplated by regulation, publicly available, reviewed by other agencies, and within the Corps's expertise—that is designed precisely to address such aquatic impacts in the particular area of Louisiana in question. That methodology was expressly relied on in the Corps's environmental assessment but mentioned nowhere in the court's order. The court then substituted its judgment for the agency's in rejecting the Corps's explanation that permit conditions—including a requirement that Bayou Bridge restore work areas to their pre-construction condition—would prevent certain other potential environmental impacts from coming to pass. The court's holding that an administrative agency must justify its assumptions that permit conditions within *its own* enforcement purview will be complied with and will be enforced is unfounded.

When the court turned to irreparable harm it did not even require the greater showing that was required under the out-of-date sliding scale the court applied. Instead, the court found irreparable harm based on the clearing of fewer than 150 acres of forested wetlands—out of nearly a million acres of forested wetlands within the Basin—and fewer than two dozen older trees. When the court deemed even this relatively minor impact irreparable, it failed to recognize that the core purpose of compensatory mitigation under the Corps's regulations is to compensate for (that is, to remedy) such unavoidable impacts. Nor did the court hold plaintiffs

to their concession that the most they could expect under the law was some *other* mitigation that they preferred and that would remain available even without an injunction. That there exists by plaintiffs' own accord the possibility of lawful mitigation under the regulations demonstrates that the putative harm here is not irreparable.

Not only that, the district court enjoined construction in the Basin even though a victory on the merits at the end of this case would not entitle plaintiffs to a halt of construction. That is because the correct remedy for the shortcomings that the district court posited here is to remand *without* vacatur of the underlying agency action so that the agency can provide any missing explanation.

Faced with these errors by the district court, a panel of this Court has already stayed the injunction pending appeal based on the likelihood that appellants will succeed in this appeal. Since then, the Corps has also appealed. This Court should now conclude that there was no lawful basis for the injunction and reverse.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331 over plaintiffs' claims arising under the Administrative Procedure Act, 5 U.S.C. § 702. The district court issued orders granting a preliminary injunction on February 23, 2018 (ROA.3976) and February 27, 2018 (ROA.3998). Bayou Bridge timely filed notices of appeal on February 26, 2018 (ROA.3978) and March 1, 2018 (ROA.4058), respectively. This

Court has jurisdiction under 28 U.S.C. § 1292(a)(1)'s grant of appellate jurisdiction over "[i]nterlocutory orders … granting, continuing, modifying, refusing or dissolving injunctions."

STATEMENT OF THE ISSUES PRESENTED

1. Whether the district court erred in applying a "sliding scale," under which plaintiffs did not have to establish a substantial likelihood of success on the merits.

2. Whether the district court erred in concluding that plaintiffs had established the requisite likelihood of success on the merits.

3. Whether the district court erred in finding irreparable harm.

4. Whether the balance of harms and public interest weighed against a preliminary injunction.

STATEMENT OF THE CASE

The Bayou Bridge Pipeline will carry oil 162 miles from Lake Charles to St. James, Louisiana, with about 25 of those miles crossing the Atchafalaya Basin—a large river swamp in Louisiana. ROA.22; ROA.6778. Many other pipelines already cross the Basin. ROA.6490-91. In order to minimize environmental impacts to the Basin, the Bayou Bridge Pipeline's route parallels (and in some places slightly widens) existing rights-of-way. ROA.6775. Because the pipeline will also cross federal projects and easements, and cause discharges of fill material into the waters of the United States, Bayou Bridge had to obtain federal permits.

A. Regulatory Background

1. Three statutes are relevant here. First, the National Environmental Policy Act (NEPA) requires agencies to assess the environmental impacts of major Federal actions such as the permits here. 42 U.S.C. § 4332(C). Agencies must prepare a lengthy environmental-impact statement (or EIS) for actions that "significantly affec[t]" the environment, *id.*, but only a "shorter environmental assessment (EA)" if not, *Winter v. NRDC*, 555 U.S. 7, 16 (2008). EAs are "rough-cut, low-budget" documents, *Spiller v. White*, 352 F.3d 235, 237 (5th Cir. 2003) (citation omitted), which "normally should not exceed 15 pages," 33 C.F.R. § 230.10(c).

Second, under what is known as Section 408 of the Rivers and Harbors Act, any alteration of a work "built by the United States" (including certain federal easements) requires an Army permit based on the Corps's recommendation that the alteration "will not be injurious to the public interest." 33 U.S.C. § 408(a).

Third, the Clean Water Act (CWA) generally bars the discharge of pollutants (defined broadly) into the waters of the United States without a permit. 33 U.S.C. § 1311(a). Section 404 of the Act allows permits "for the discharge of dredged or fill material," *id.* § 1344(a), which the Corps will grant unless "contrary to the public interest" or EPA guidelines, 33 C.F.R. § 320.4(a)(1). Congress has also established a goal of "no overall

net loss" of wetlands. 33 U.S.C. § 2317(a)(1). And so when permits involve unavoidable wetland impacts, the Corps and EPA have required compensatory mitigation—for example, restoration of wetlands elsewhere.

2. Before 2008, the Corps and EPA had stitched together only a patchwork of "guidance documents" on mitigation, raising "concerns … regarding the consistent, predictable and equitable" application of mitigation requirements. Compensatory Mitigation for Losses of Aquatic Resources, 73 Fed. Reg. 19,594, 19,595 (Apr. 10, 2008). The "majority" of mitigation under this approach was conducted by permittees themselves and proved "less likely to be [ ] successful," given their general lack of expertise in mitigation, among other problems. *Id.* at 19,594, 19,606.

Congress thus ordered the Corps to "issue regulations establishing performance standards and criteria for the use" of "mitigation bank[s]." National Defense Authorization Act for Fiscal Year 2004, § 314(b), 117 Stat. 1392, 1431 (Nov. 24, 2003). These banks undertake mitigation projects, such as rehabilitating a degraded wetland or preserving an existing wetland, and sell "credits" in the project to permittees. Mitigation banks "typically involve larger, more ecologically valuable parcels, and more rigorous scientific and technical analysis." 33 C.F.R. § 332.3(b)(2). They also "reduce risk and uncertainty associated with compensatory mitigation projects," since credits are sold after the project is complete. 73 Fed.

Reg. at 19,628. Congress accordingly directed the Corps to "maximize available credits" in mitigation banks. 117 Stat. at 1431.

The Corps and EPA responded jointly with regulations in 2008. To begin, the agencies specified a process for creating and approving mitigation banks. A proposed bank must first submit a prospectus, subject to review and comment by the public and an "Interagency Review Team" composed of the Corps, EPA, and Fish and Wildlife Service, along with relevant state, local, and tribal agencies (and others). 33 C.F.R. § 332.8(b)(1) & (d)(2). The bank must then submit a draft instrument subject to further interagency review. *Id.* § 332.8(d)(6)-(8). The instrument must include, for example, a "mitigation plan" that describes "the number of credits to be provided," "[d]etailed written specifications" for the bank, and "[e]cologically-based standards" to determine whether the bank "is achieving its objectives." *Id.* § 332.4(c)(2)-(14). The instrument must also propose a service area "appropriately sized to ensure that the aquatic resources provided will effectively compensate for adverse environmental impacts across the entire service area." *Id.* § 332.8(d)(6)(ii)(4). Only after the applicant addresses any agency concerns with the instrument, and with a special dispute-resolution process in place for disagreements among the agencies, may the Corps approve the bank. *Id.* § 332.8(d)(7)-(8), (e).

Next, the Corps and EPA "established a hierarchy … for selecting the type and location of compensatory mitigation" for permitted activity

"with an explicit preference for mitigation bank credits." 73 Fed. Reg. at 19,600. This preference stems from the rigorous requirements for establishing a mitigation bank, which "reduce risk and uncertainty" because "before credits can be sold or transferred to permittees the sponsor must have an approved instrument, as well as an approved mitigation plan and other assurances in place." *Id.* at 19,628. The regulations thus require the Corps to consider mitigation options "in the order presented"—with mitigation-bank credits first, followed by in-lieu fee programs (similar to banks, but run by government and nonprofit entities), and with so-called "permittee-responsible" options occupying the bottom rungs. 33 C.F.R. § 332.3(b)(1); *see also id.* § 332.3(b)(2)-(6).

In applying the hierarchy, the Corps is to take a "watershed approach" centered on the "quality and quantity of aquatic resources" within an entire watershed (*e.g.*, a river basin). 33 C.F.R. § 332.3(c)(1). Under this watershed approach, the focus is not "on specific functions," for example on the loss and replacement of a "certain species," but on "the suite of functions typically provided by the affected aquatic resource." *Id.* § 332.3(c)(2)(i). To that end, the options in the hierarchy for restoring the "suite of functions" affected by a project can be "[i]n-kind" ("of a similar structural and functional type to the impacted resource") or "[o]ut-of-kind" ("different"). *Id.* § 332.2. These options may also be "[o]n-site" (where the impact occurs) or "[o]ff-site" (elsewhere). *Id.* Whichever mitigation the Corps orders "must be, to the extent practicable, sufficient to

replace lost aquatic resource functions." *Id.* § 332.3(f)(1). The regulations envisage that local districts will adopt "functional assessments" to "quantify impacts" and determine the amount of compensatory mitigation (*e.g.*, the number of mitigation-bank credits) necessary to offset a given impact. 73 Fed. Reg. at 19,633; *see also* 33 C.F.R. §§ 332.3(f)(1) & 332.8(o)(2). In the absence of a functional assessment, the Corps may less precisely determine the amount of mitigation by means of a ratio (one-to-one or greater) of acres impacted to acres of mitigation. 33 C.F.R. § 332.3(f)(1).

B. Authorization Of The Bayou Bridge Pipeline

In October 2016 the Corps gave public notice that Bayou Bridge had applied for a Section 404 permit. ROA.6512. The agency explained that construction would "include clearing the right-of-way" of trees and that Bayou Bridge proposed "to offset unavoidable wetland impacts by purchasing mitigation credits from Corps-approved mitigation banks." ROA.6512-13. The agency requested public comment. ROA.6515. A few months later, the Corps gave notice and requested comment on Bayou Bridge's Section 408 application too. ROA.6618.

Federal and state agencies as well as private parties commented. ROA.6530-46. Plaintiffs asserted that, "[r]ather than paying into a mitigation bank," Bayou Bridge should "remov[e]" spoil banks (piles of dirt) along the existing right-of-way "while [its] equipment is on site" to build the pipeline. ROA.6539. Plaintiffs complained that these spoil banks

were left by other pipeline companies, and alleged that the Corps had "fail[ed] to enforce Section 404 permit conditions" prohibiting them. ROA.6538. Bayou Bridge responded that many of these pipelines "pre-date the Clean Water Act and Section 404 permitting, thus they are not out of compliance." ROA.6547.

1. In October 2017, the Corps finalized a 135-page EA (with almost 200 pages of appendices) for the Section 408 permit—the one under the Rivers and Harbors Act—which focused on the federal project and easement crossings. ROA.6376. The Corps considered the cumulative impacts of adding a pipeline to other infrastructure projects already crossing the Basin. ROA.6490. The Corps acknowledged that piles of dirt (berms) alongside rights-of-way had been documented, but explained that "historic pipeline installations [ ] pre-date the CWA." ROA.6494-95. More recent pipelines, the Corps continued, "are subject to regulation" under the Act along with "[v]arious regulations and permit conditions … to ensure the avoidance and minimization of cumulative impacts on wetlands and waterbodies." ROA.6495. The Corps also noted that this pipeline would be installed at "a sufficient depth so as to not limit any future hydrologic restoration activities in the area aimed at removing portions of the berms to improve water quality." ROA.6494. The Corps then explained that "the overall impacts to wetlands within the watershed" by this pipeline "would be negligible," and, in any event, those effects would be mitigated. ROA.6495. The agency further noted that the "[r]equired

mitigation" was "being evaluated" as part of the Section 404 review process. ROA.6495.

The Corps also analyzed the risks and impacts of an oil spill.[1] It did so using a model that showed "how far an unabated plume could propagate in 6 hours from a release located generally every 200 feet along the entire pipeline route." ROA.6393. The Corps applied this model to the specific easements and crossings to conclude that, "[a]lthough the consequences of a large spill may be high, the probability … is low." ROA.6482. The Section 408 EA addressed a host of other topics: the impacts on wildlife, groundwater resources, cultural resources, endangered species, socioeconomics, noise, and air quality, to name a few. ROA.6369.

2. On December 14, 2017, the Corps completed the second environmental assessment: a 92-page EA for the Section 404 permit. This EA under the Clean Water Act, addressing the entire pipeline route, also found no significant impact on the environment. ROA.6525; *see also* ROA.6615. The district commander who made the finding—the same district commander for the Section 408 EA—affirmed that he had "reviewed … the environmental assessment prepared as part of the Section 408 review." ROA.6615.

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[1] Plaintiffs challenged this part of the Corps's analysis in their preliminary injunction motion too, but their brief completely ignored the Section 408 EA. The district court found no likelihood of success on the merits of plaintiffs' claim regarding oil spill and leak assessment, and this brief therefore does not address the issue. ROA.4025-26.

The Corps recognized that maintenance of a permanently cleared 30-foot-wide corridor along the right-of-way (to facilitate maintenance and safety inspections) would permanently impact 142.03 acres of forested wetlands across the entire project. ROA.6587; *see also* ROA.6560. The Corps then explained that "suitable habitat credits" were available "from approved mitigation banks" to mitigate for these impacts. ROA.6589.

To determine the required amount and type of mitigation-bank credits, the Corps applied the Louisiana Wetland Rapid Assessment Method (LRAM). ROA.6589. LRAM is the sort of functional assessment that by regulation "should be used … to determine how much compensatory mitigation is required." 33 C.F.R. § 332.3(f)(1). The Corps has published LRAM and requested public input on it. U.S. Army Corps of Engineers, Release No. 15-051, Compensatory wetland mitigation method available for public comment (Oct. 21, 2015).[2] The methodology has also been reviewed by the EPA, the Fish and Wildlife Service, the National Marine Fisheries Service, the Louisiana Department of Wildlife and Fisheries, and the Louisiana Department of Natural Resources. U.S. Army Corps of Engineers, Louisiana Wetland Rapid Assessment Method,

[2] http://www.mvn.usace.army.mil/Media/News-Releases/Article/625144/compensatory-wetland-mitigation-method-available-for-public-comment/.

Final Interim Version 1.0 (2016).[3] And the Corps has revised the methodology in light of these inputs.[4]

Under the method applied here (*i.e.*, LRAM), the Corps first quantifies the aquatic functions lost per acre of the permitted activity (the "impact value") by assigning numerical values to factors such as the habitat condition of the impacted wetland (high, medium, or low based on the number and type of trees present). LRAM at 10-34. The method then quantifies the aquatic functions gained per acre of a mitigation bank (the "mitigation potential") by assigning numerical values to factors such as the type of mitigation project (for example, whether the project rehabilitates a degraded wetland that has lost its aquatic functions, or merely preserves an existing wetland with all of its functions). *Id.* at 34-40. The method then compares these numbers to determine the amount of mitigation-bank credits necessary to offset the lost aquatic functions of a given impact. *E.g.*, *id.* at 5.

Two types of forested wetlands would be impacted in the Basin—bottomland-hardwood swamp and cypress-tupelo swamp (a swamp that

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[3] http://www.mvn.usace.army.mil/Portals/56/docs/regulatory/Mitigation/Louisiana_Rapid_Assessment_Method_2_26_16.pdf (hereinafter, LRAM).

[4] Final Interim Version 1.0 was applied in this case. The Corps has since issued Version 2.0, available at https://ribits.usace.army.mil/ribits_apex/f?p=107:150:5359658937049::NO::P150_DOCUMENT_ID:49612.

contains both cypress and tupelo trees). ROA.6590. The Corps ordered Bayou Bridge to purchase in-kind bottomland-hardwood credits from the Corps-approved Bayou Fisher Mitigation Bank, with a service area covering the Basin, to offset the impacts to that type of wetland. ROA.6592. To offset the impacts to cypress-tupelo swamp, the Corps ordered Bayou Bridge to purchase all the available in-kind cypress-tupelo credits from Bayou Fisher (and a small amount of in-kind credits from another bank). ROA.6590. When Bayou Fisher released additional cypress-tupelo credits, the Corps required the company to "purchas[e] additional in-kind" credits. ROA.6590. Still, "there were not enough in-kind credits to offset the project's impacts" to cypress-tupelo swamp, so the Corps applied its regulations by ordering Bayou Bridge to purchase out-of-kind bottomland-hardwood credits from Bayou Fisher. ROA.6589. All the credits purchased to offset impacts within the Basin were from "in-basin" banks. ROA.6593. The Corps explained that this mitigation was "in accordance with the preferred mitigation hierarchy as set forth by" regulation. ROA.6589.

3. Also on December 14, the Corps issued the Section 404 and 408 permits themselves. ROA.6687; ROA.6658. The Section 404 permit includes dozens of special conditions. ROA.6690-95. Among them, Bayou Bridge must "restore all temporary work areas, construction [rights-of-way], and access paths by … reestablishing pre-existing wetland contours and conditions immediately following project completion."

ROA.6691. Not only that, the company must "monitor these areas on a regular basis" and provide "[c]lear descriptive photographic evidence" of reestablishment for at least three years. ROA.6691. If the Corps is not satisfied with the results of these efforts to reestablish pre-existing wetland contours, it may order "additional compensatory mitigation" and "further remediation actions," including "[r]e-planting of desirable native tree species." ROA.6691.

C. This Litigation

1. Plaintiffs waited until January 11, 2018, almost a month, to challenge the permits. ROA.22. They claimed generally that the Corps's environmental analysis for the Section 404 and 408 permits was arbitrary and capricious and thus in violation of NEPA and the Administrative Procedure Act (APA). ROA.43-67. Bayou Bridge intervened in defense of its permits. ROA.106. Stupp Brothers, which manufactures the pipe, intervened too. ROA.1440-41.

Plaintiffs waited another two weeks to move for a temporary-restraining order and preliminary injunction to enjoin construction within the Atchafalaya Basin. ROA.121; ROA.1390. Plaintiffs based their request only on their Section 404 arguments—to wit, that the Corps inadequately assessed three issues: the risks and impacts of an oil spill, alleged noncompliance of other pipelines with permit conditions, and compensatory mitigation. ROA.148-66. As irreparable harm, plaintiffs asserted the loss of "unique and valuable" cypress-tupelo swamp, including

"many" old-growth cypress trees, and potential "alter[ation]" of the Basin's hydrology. ROA.167-68. They requested a purportedly "limited" injunction "preventing construction in the Atchafalaya Basin." ROA.133; ROA.172.

The next day (after a telephone conference) the district court denied a TRO in a six-page order holding that plaintiffs had not established "a substantial likelihood of success on the merits." ROA.1415. The Court determined that the Section 404 EA "clearly addresses the specific complaints" of plaintiffs, "albeit obviously not to [their] satisfaction." ROA.1415. For example, "[s]imply … disagreeing with the mitigation plans imposed, is insufficient to establish a substantial likelihood of success on the merits." ROA.1415.

2. The district court held a hearing on the preliminary-injunction motion on February 8 and 9. Recognizing that judicial review of the Corps's permits was confined to the administrative record before the agency, plaintiffs assured the court that "all of the testimony … offer[ed] … is for the purpose of establishing irreparable harm" alone. ROA.4161. But plaintiffs' counsel then proceeded principally to contest the Corps's decisions on the merits through these witnesses, asking them, for example, about their thoughts on the mitigation regulations. ROA.4248 (asking witness about mitigation bank credits). One witness opined that the Corps's preferred form of "mitigation is kind of like balancing your checkbook without including your grocery bill." ROA.4249. Another witness

disputed the merits of the Corps's conclusion, relevant to the adequacy of the mitigation chosen, that some trees along the right-of-way would grow back. ROA.4165 ("Do you agree with the Army Corps that a significant amount of the right of way will regenerate?"). Other witnesses purported to contradict the Corps's finding that only 142 acres of forested wetlands would be permanently affected by the project. ROA.4255.

As to irreparable harm, plaintiffs' witnesses conceded that some two-thirds of the Basin's 1.4 million acres is cypress-tupelo swamp, and that construction of the pipeline would impact (in their view, contrary to the EA) just 300 acres of that swamp in the Basin—0.03%. ROA.4255. As for old-growth trees, their witnesses believed 17 would be destroyed. ROA.4212. Bayou Bridge submitted evidence that only five would be. ROA.6787.

After the parties presented oral argument on the merits of plaintiffs' claims, the court expressed its "ardent desire to have a ruling out next week" and allowed the parties to file post-hearing briefs. ROA.4406.

3. Two weeks passed without word from the court. Then on the evening of February 23, the court issued a two-page order, which after reciting the procedural history, stated in full that:

> For written reasons to be assigned at a later date, the Court hereby GRANTS the preliminary injunction, and Defendant and Intervenors are hereby ENJOINED from taking any further action on this project in order to prevent further irreparable harm until this matter can be tried on the merits. The

> Court will issue detailed reasons supporting this Ruling as soon as possible.

ROA.3977.

Bayou Bridge immediately appealed from the order and moved for a stay in the district court. ROA.3978; ROA.3981. The company pointed out that the order was a textbook violation of Federal Rule of Civil Procedure 65(d), which requires that "[e]very order granting an injunction … state the reasons why it issued," "state its terms specifically," "and describe in reasonable detail … the act or acts restrained," to say nothing of Rule 52(a), which requires that in granting "an interlocutory injunction, the court must similarly state the findings and conclusions that support its action." The court's reference to no "further action on this project" also left the parties to guess whether the injunction went beyond plaintiffs' request, which was limited to construction of the project within the Basin. Steve Hardy & David J. Mitchell, *Company building Bayou Bridge pipeline seeks halt of work stoppage, says cost is almost $1M per day*, The Advocate (Feb. 26, 2018) (Plaintiffs' counsel: "I think it extends outside the basin. Now we'll see if [the judge] clarifies that as well. We're all waiting to see what she has to say about it.").[5]

On February 27, the court gave its reasons. The court opined that plaintiffs did not have to establish a substantial likelihood of success on the merits—the standard it had applied in denying a TRO—but only a

[5] http://www.theadvocate.com/baton_rouge/news/article_65bb6758-1b1a-11e8-af95-57702aa1300f.html.

possibility greater than "no chance" of success. ROA.4014. Plaintiffs had asked the court to use such a sliding scale after the court had found no substantial likelihood of success on the merits in denying a temporary-restraining order, so that they could argue for an injunction, consistent with that ruling, by emphasizing their purportedly irreparable harm. ROA.2839.

Applying that standard, the court held that the Corps adequately addressed the risks and impacts of an oil spill by relying on a spill model (not publicly available, but referenced in the EA) that covered the entire pipeline. ROA.4025-26. But the court held that plaintiffs had established some likelihood of success based on the Corps's supposed failure to adequately explain two issues: how bottomland-hardwood credits could mitigate the impacts to cypress-tupelo swamp, and prior noncompliance of other pipelines along with associated cumulative effects. ROA.4040; ROA.4048. For irreparable harm, the Court identified "the loss of legacy trees," the "potentia[l] threa[t]" to the Basin's hydrology, and the destruction of wetlands. ROA.4012-13. The court also found that the public interest and balance of equities favored an injunction. ROA.4052-53. And the court clarified that its injunction prohibited only "further action on the project within the Atchafalaya Basin." ROA.4057.

Despite Federal Rule of Civil Procedure 65(c)'s requirement that the 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," and despite undisputed evidence that Bayou Bridge would suffer hundreds of thousands of dollars in damages each day while enjoined, the court ordered plaintiffs to pay a $10,000 bond. ROA.4057.

Two days later, Bayou Bridge appealed again from the new order and again moved for a stay pending appeal, requesting the district court rule by noon on March 2nd, given the significant financial losses and rapidly diminishing construction window at hand. ROA.4058; ROA.4069.[6] (Both Stupp and the Corps later filed notices of appeal as well. ROA.6865; ROA.7004.)

That time having passed without word from the court, Bayou Bridge asked this Court for a stay pending appeal. Briefing on the stay motion completed on March 6. Then on March 8, after this Court had scheduled oral argument on the motion, the district court denied Bayou Bridge's stay request in that court. ROA.6584.

This Court held oral argument on March 13 and stayed the injunction pending appeal two days later. Doc. 00514388428. Judge Clement explained that Bayou Bridge "is likely to succeed on the merits of its

[6] Bayou Bridge filed a protective notice of appeal from the second order to avoid any doubt over this Court's ability to review the injunction. The first order was facially invalid under Rules 52 and 65 and applicable precedent. Yet the second order did not mention, much less purport to vacate or modify, the first. Hence it is unclear which order remains operative. This Court consolidated the two appeals on its own.

claim that the district court abused its discretion in granting a preliminary injunction. Rather than granting a preliminary injunction, the district court should have allowed the case to proceed on the merits and sought additional briefing from the Corps on the limited deficiencies noted in its opinion." *Id.* at 2. Judge Owen concurred to explain that the district court should have given the Corps "the opportunity to provide any missing rationale … without setting aside the order granting the permit" to Bayou Bridge. *Id.* at 4. Judge Davis dissented. *Id.* at 5.

SUMMARY OF ARGUMENT

I. The district court erred at the threshold in applying a sliding scale under which a preliminary injunction could issue based on anything more than "no chance" of success on the merits. The court relied on cases from the 1970s. But the Supreme Court has recently reaffirmed that a preliminary injunction is an "extraordinary remedy" and that a plaintiff must therefore make a "clear showing" that it has satisfied each factor. *Winter v. NRDC*, 555 U.S. 7, 22 (2008). That means, "[w]hen 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." *Nken v. Holder*, 556 U.S. 418, 438 (2009) (Kennedy, J., concurring). Simply put, the sliding scale does not survive the Supreme Court's more recent cases, as illustrated by this Court's repeated insistence since on a *substantial* likelihood of success on the merits.

II. Besides, plaintiffs did not establish a likelihood of success even under the outdated sliding scale. Plaintiffs' claims are reviewed under the APA's highly deferential standard of review, under which the court may not substitute its judgment for the agency's, and under which there need only appear somewhere in the administrative record a rational connection between the facts found and the agency's conclusion. *Hayward v. DOL*, 536 F.3d 376, 379-80 (5th Cir. 2008). The district court violated these principles of administrative law.

A. The district court first determined that the Corps did not provide any explanation for how out-of-kind bottomland hardwood mitigation-bank credits could offset the impacts to cypress-tupelo swamp. Yet the court did not even mention LRAM, which the Corps explicitly relied on, and which supplies exactly that explanation. LRAM's entire purpose is to "quantif[y] adverse impacts associated with permit applications and environmental benefits associated with compensatory mitigation" to determine the amount and type of credits necessary to offset a given impact. LRAM at 5. In an exercise of agency expertise entitled to deference, the Corps relied on LRAM to determine the number of bottomland-hardwood credits necessary to offset the impact to cypress-tupelo swamp. Based on that calculation, the Corps concluded that appropriate mitigation-bank credits were available within the Basin to offset the impact, and therefore ordered Bayou Bridge to purchase those credits in accordance with the

hierarchy set forth by regulation with its explicit preference for mitigation bank credits. In these respects, the Corps's mitigation decision was an unremarkably routine exercise of agency expertise and discretion.

B. The district court also held that the Corps failed to address the resulting cumulative impacts when this pipeline is combined with prior pipelines that allegedly failed to comply with certain permit conditions prohibiting spoil banks. But the Corps explained that many of these pipelines predated Clean Water Act requirements, and the ones that did not—such as the Bayou Bridge Pipeline—were subject to mandatory permit conditions and Corps regulation under the Act. The Corps also noted that construction of this pipeline would not hinder any future efforts to remove debris left over by those older projects. The Corps further explained that permit conditions were an answer to plaintiffs' precise concerns about any additional spoil banks left by *this* pipeline, and then included permit conditions requiring Bayou Bridge to remove any spoil banks created during construction. The district court could only reject this explanation if it disagreed with the Corps's conclusion that mandatory permit conditions were sufficient to counteract any cumulative impact. Which is exactly what the court was *not* allowed to do under the deferential standard of review that applies here.

C. The preliminary injunction violated another principle of administrative law. It is well-settled that when it is reasonably likely that an agency's error can be cured with a better explanation on remand, the

correct remedy upon final adjudication is remand to the agency *without* vacatur. *Allied-Signal, Inc. v. NRC*, 988 F.2d 146 (D.C. Cir. 1993). Here, every potential legal error the district court identified was one of explanation that the Corps could likely substantiate on remand, if not during this litigation itself when the complete administrative record becomes available. Because the court would not be justified in vacating the permits or otherwise enjoining construction after a final adjudication of these issues, its preliminary injunction achieving the same effect is not "narrowly tailor[ed]" to the specific violations found, as required under this Court's precedent. *John Doe #1 v. Veneman*, 380 F.3d 807, 818 (5th Cir. 2004) (citation omitted).

III. The district court also erred in finding irreparable harm. The primary harm the court identified was the clearing of forested wetlands, including a small number of so-called legacy trees. That harm was not irreparable for a number of reasons. Perhaps most to the point, the Corps's compensatory-mitigation regulations exist precisely to compensate—read, remedy—environmental harm caused by unavoidable impacts under such permits. Because it is well-settled that harm is not irreparable when there exists the possibility of an adequate remedy in the ordinary course of litigation, *Dennis Melancon, Inc. v. City of New Orleans*, 703 F.3d 262, 279 (5th Cir. 2012), the harm here is not irreparable. That is, mitigation under the applicable law—the regulations—exists precisely to address such impacts. That is especially so given

plaintiffs' admission that their proposed mitigation of removing pre-existing spoil banks—an option still available at the end of this litigation, even if an injunction is rejected—would be "appropriate," "effective," and "great." In addition, irreparable harm must be "more than de minimis." *Enterprise Int'l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 472-73 (5th Cir. 1985). Yet even using plaintiffs' likely inflated numbers, which impermissibly contradict the conclusions of the expert agency, construction here would impact at most 300 acres of forested wetlands and fewer than two dozen legacy trees amid a Basin consisting of more than 880,000 acres of forested wetlands and countless other legacy trees—so roughly 0.03% of the forested wetlands in the Basin.

IV. Finally, the district court engaged in a one-sided balancing of harms and effectively dispensed with any consideration of the public interest. With regard to the balance of harms, the court downplayed the financial harm Bayou Bridge would suffer because of an injunction despite undisputed record evidence that the company would lose hundreds of thousands of dollars a day. When it came to the putative environmental harm plaintiffs asserted, however, the court did not even try to quantify the magnitude, despite undisputed record evidence that the harm was minimal when placed in context of the Basin as a whole. As for the public interest, the court was "mindful" of the economic benefits the pipeline would produce, but identified no countervailing public interest that would justify the injunction.

STANDARD OF REVIEW

This Court reviews the grant of a preliminary injunction for an abuse of discretion, but a district court necessarily abuses its discretion when it makes legal errors, which are reviewed de novo. *Texas v. United States*, 787 F.3d 733, 747 (5th Cir. 2015).

ARGUMENT

"A preliminary injunction is an extraordinary remedy that should only issue if the movant shows: (1) a substantial likelihood of prevailing on the merits; (2) a substantial threat of irreparable injury if the injunction is not granted; (3) the threatened injury outweighs any harm that will result to the non-movant if the injunction is granted; and (4) the injunction will not disserve the public interest." *La Union Del Pueblo Entero v. FEMA*, 608 F.3d 217, 219 (5th Cir. 2010). The district court did not apply this standard. It applied a "sliding scale," under which the mere possibility of success on the merits could suffice. And the court's application of that more lenient standard was itself replete with numerous legal errors, each warranting reversal under any standard.

I. The District Court Erred In Applying A Sliding Scale That Eliminated The Need To Show A Substantial Likelihood Of Success On The Merits.

The Supreme Court has held that "a party seeking a preliminary injunction must demonstrate … 'a likelihood of success on the merits.'" *Munaf v. Geren*, 553 U.S. 674, 690 (2008) (citation omitted). In *Winter v. NRDC*, 555 U.S. 7, 22 (2008), the Court further explained that a stronger

likelihood of success on the merits could not relax a plaintiff's burden to establish a likelihood of irreparable harm by allowing a mere "possibility." The Court explained that a sliding-scale approach would be "inconsistent" with the longstanding "characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Id.* Thus, "[w]hen 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." *Nken v. Holder*, 556 U.S. 418, 438 (2009) (Kennedy, J., concurring); *see also id.* at 434 (observing in the related stay context that "[i]t is not enough that the chance of success on the merits be 'better than negligible'") (majority op.) (citation omitted).

Here, the district court applied "a sliding scale" that "takes into account the intensity of each" factor, and under which "[n]one of the four requirements has a fixed quantitative value." ROA.4006-07. Under this approach, the court held that a plaintiff need only establish "some likelihood" of success on the merits, which meant something more than "no chance." ROA.4014. Hence, under the standard invoked by the district court, the mere *possibility* of success can suffice to secure an injunction based on other factors—a party that is overwhelmingly likely to lose on the merits can still secure injunctive relief.

That standard conflicts with *Munaf*, *Winter*, and *Nken*, to say nothing of this Court's cases since holding that a preliminary injunction may

"only issue" if the plaintiff establishes "a substantial likelihood" of success on the merits. *La Union*, 608 F.3d at 219; *see also Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 584 (5th Cir. 2012) (failure to show "substantial likelihood" was "fatal"). "Under *Winter*'s rationale, any modified test which relaxes one of the prongs … and thus deviates from the standard test is impermissible." *See Diné Citizens Against Ruining Our Env't v. Jewell*, 839 F.3d 1276, 1282 (10th Cir. 2016). Tellingly, the district court relied on cases from the 1970s and 1980s, which do not survive the Supreme Court's more recent holdings. ROA.4014. For this reason alone, the district court's order should be reversed.

That remains true despite the court's unreasoned assertion, tucked away in a footnote, that "it would reach the same conclusion" under the substantial-likelihood standard. ROA.4014 n.94. The court never applied that standard; in fact, it had just denied a TRO reasoning that plaintiffs could not meet it. In granting the preliminary injunction, the court held only that plaintiffs had established some "likelihood" of success. ROA.4042; ROA.4048. Federal Rules of Civil Procedure 52(a) and 65(d) require a district court to state the "findings," "conclusions," and "reasons" that support a preliminary injunction—which the district court supplied here *only* under the sliding scale. Any putative application of the correct standard was thus procedurally deficient. There are no findings to support it.

II. Plaintiffs Did Not Establish Any Likelihood Of Success On The Merits.

Sliding scale or not, plaintiffs did not establish *any* likelihood of success on the merits of their claims. The district court held otherwise on plaintiffs' claims that the Corps acted arbitrarily and capriciously in failing to explain adequately mitigation and prior noncompliance of other pipelines along with associated cumulative effects. Under this "highly deferential" standard of review, a court may set aside agency action only on "a clear error of judgment." *Hayward v. DOL*, 536 F.3d 376, 379-80 (5th Cir. 2008). And the court may not "substitute [its] judgment for the agency's." *Id.* (citation omitted). So long as there appears in the administrative record a "rational connection between the facts found and the choice made," the agency's action must be upheld. *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation omitted). The district court defied these principles of administrative law in granting the injunction here.

A. The Corps Adequately Explained Its Choice Of Mitigation.

Under the mitigation hierarchy established by regulation, if a mitigation bank "has the appropriate number and resource type of credits available," a permittee's mitigation obligation "may be met by" obtaining those credits. 33 C.F.R. § 332.3(b)(2). This provision reflects the Corps's "explicit preference" for mitigation-bank credits, given all their advantages over permittee-responsible mitigation. 73 Fed. Reg. at 19,600.

Here, the Corps explained in the Section 404 EA that "[t]he Louisiana Wetland Rapid Assessment Method was utilized to determine the acquisition of a total of 714.5 acres of suitable habitat credits, from approved mitigation banks within the watershed of impact." ROA.6589. The Corps accordingly determined that the "appropriate number and resource type of credits" were available. ROA.6593. And thus the Corps required the purchase of those credits "in accordance with the preferred mitigation hierarchy as set forth" by the Corps's mitigation regulations. ROA.6589; *see also* ROA.6594 ("The order of mitigation pursued for the project followed the preferred hierarchy.") (emphasis omitted). In sum, the Corps applied a technical methodology within its expertise, to reach a factual finding supported by substantial evidence, and applied the plain terms of its own regulations to that factual finding to reach a conclusion. That is the opposite of arbitrary and capricious agency action.

The district court disagreed based on the Corps's supposed failure to explain how out-of-kind bottomland-hardwood credits could offset impacts to cypress-tupelo swamp. ROA.4040. Recall that the Corps required Bayou Bridge to purchase *all* the available cypress-tupelo credits within the Basin; only when those credits ran out did the Corps require Bayou Bridge to offset the remaining impacts to cypress-tupelo swamp with out-of-kind bottomland-hardwood credits. ROA.6590. *That* decision was fully explained.

1. To begin, the Corps explicitly relied on LRAM, which exists precisely to "quantif[y] adverse impacts associated with permit applications and environmental benefits associated with compensatory mitigation" so that the appropriate number and resource type of mitigation-bank credits can be determined in accordance with the regulations. LRAM at 5.

Measuring the impacts. In particular, LRAM quantifies the impacts to wetlands by assigning a value (*e.g.*, between 1 and 3) to factors that measure the aquatic functions provided per acre of the impacted wetland, such as "hydrologic conditions" (high, medium, or low). LRAM at 11. The method then adds those numbers together to determine an "impact value"—a proxy for the aquatic functions lost per acre of impact. *Id.* LRAM likewise quantifies the aquatic functions gained per acre at a mitigation bank by assigning a number to factors approximating those functions. *Id.* at 35. For example, a bank that rehabilitates a degraded wetland gets a higher value (5) because it results in a greater net gain in aquatic functions than a bank that merely preserves an existing wetland (0.4). *Id.* Those numbers are then added to determine the "mitigation potential"—a proxy for the aquatic functions gained per acre at a mitigation bank. *Id.*

Calculating credits commensurate with the impacts. To calculate credits, the impact value is "multiplied by the acreage of an impact project to determine the total number of LRAM debits generated." LRAM at

11. Then the mitigation potential is "multiplied by the acreage of a compensatory mitigation project to determine the total number of LRAM credits generated." *Id.* at 35. To offset lost aquatic functions, a permittee must purchase credits equal to the debt of impact. For any given impact, the higher the mitigation potential at a bank, the fewer acres needed at the bank; the lower the mitigation potential, the more acres needed. In either case, though, the assigned number of credits—the currency of aquatic functions under LRAM—will be the same and indeed sufficient to offset the lost aquatic functions.

That means out-of-kind mitigation-bank credits are appropriate ways to mitigate because LRAM accounts for their potentially lower mitigation potential by adjusting the acreage required at the bank to keep the credits—that is, aquatic functions gained—constant. Here, the Corps undisputedly required LRAM credits equal to LRAM debits, which necessarily includes a conclusion, under the accepted LRAM methodology, that those credits sufficed to offset lost aquatic functions *even though* some of those credits were out-of-kind.

Of course, LRAM involves proxies for aquatic functions lost. And those proxies may not necessarily capture every difference in aquatic functions between different types of wetlands. That is neither surprising nor problematic. The EPA has explained that wetland assessment methods should use "quantitative measure[s]," not because these numbers "measure absolute value or have intrinsic meaning," but because they

allow objective and consistent "comparisons between wetlands to be made." U.S. Envt'l Protection Agency, Review of Rapid Assessment Methods for Assessing Wetland Condition (Mar. 2004).[7]

Even so, LRAM tries to account for qualitative differences between different types of wetlands, and the Corps did so here. The methodology's preference for "in-kind habitat replacement" helps "assure similar functions and services that are lost at an impact site are gained at a mitigation site." LRAM at 9. As for out-of-kind mitigation, LRAM describes different wetland types, allowing the Corps to determine which are reasonably similar to others even if out-of-kind. *Id.* at 6-9. And when the Corps is comparing different types of mitigation-bank credits, it can consider those with similar mitigation-potential values as closer substitutes than those with different values. That is because types with a similar number are more likely to be similar in terms of the factors used to calculate the figure, notwithstanding that sites with two different mitigation potentials could still yield the same number of credits through a commensurate difference in acreage.

As applied here, LRAM demonstrates that bottomland-hardwood swamp and cypress-tupelo swamp are similar. Bottomland-hardwood swamp is defined as "a forested, alluvial wetland occupying broad floodplain areas that flank large river systems." LRAM at 7. Cypress-tupelo swamp is defined as "forested, alluvial swamps growing on intermittently

[7] https://nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=P1003GXN.txt.

exposed soils" that are "inundated or saturated by surface water or ground water on a nearly permanent basis throughout the growing season." *Id.* at 6. Both are forested wetlands (as compared to, say, a marsh), but cypress-tupelo swamp is generally wetter.[8] Moreover, the Section 404 EA demonstrates that the mitigation potential for each type of wetland at Bayou Fisher (a mitigation bank previously approved by the Corps for the Basin) is identical. To offset the impacts to cypress-tupelo swamp, Bayou Bridge purchased 65 acres (422.5 LRAM credits) of cypress-tupelo swamp, and 163.8 acres (1,064.7 LRAM credits) of bottomland-hardwood swamp. ROA.6592. In both instances, the mitigation-potential multiplier that translates acres into credits is 6.5, which reflects the similarity of the mitigation types at the Bayou Fisher Mitigation Bank under LRAM.

Indeed, the purpose of that bank is to "provide additional wetland functions" through "re-establishment of a bottomland hardwood and baldcypress wetland ecosystem." Prospectus of Bayou Fisher Mitigation Bank at 2-3 (Sept. 19, 2013).[9] Which is to say that those aquatic functions are the product of the *combined* ecosystem reestablished through the bank. For example, the bank proposed to improve "water quality" by

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[8] Appellants agree with plaintiffs on one point relevant here: They no longer contend that LRAM groups together bottomland-hardwood swamp and cypress-tupelo swamp as in-kind.

[9] http://www.mvn.usace.army.mil/Portals/56/docs/regulatory/publicnotices/2013_2342PNALL.pdf?ver=2013-10-18-095810-163.

replacing land previously used for agriculture with forested wetlands. *Id.* at 3. Similarly, the bank explained that it would provide a habitat for animals, such as the Louisiana black bear, by reducing "fragmentation" of forested wetlands—that is, by linking forested wetlands once separated by non-wetland tracts such as the bank site. *Id.* at 8. These functions are served even if the mix of bottomland-hardwood and cypress-tupelo swamp at the mitigation site ultimately differs from the mix at the impact site. What is more, in approving the bank, the Corps necessarily determined that "the aquatic resources provided will effectively compensate for adverse environmental impacts across the entire service area." 33 C.F.R. § 332.8(d)(6)(ii)(A).

In sum, LRAM is a complete answer to the district court, which did not even mention the method. The 2008 regulations explicitly contemplated functional assessments of the sort used in LRAM, 33 C.F.R § 332.3(f)(1), which have accordingly been upheld as a rational means of determining mitigation. For example, the Sixth Circuit has held that the use of "structural proxies that rationally predict aquatic functionality" both "satisfies" the regulations and "requires the exercise of complex scientific judgment and deference to the Corps's expertise." *Kentuckians for the Commonwealth v. U.S. Army Corps of Eng'rs*, 746 F.3d 698, 713 (6th Cir. 2014). The district court did not offer any critique of LRAM, let alone one sufficient to override this deference.

2. The reality is that, once all of the cypress-tupelo credits within the Basin ran out, the Corps was faced with a choice. Plaintiffs proposed out-of-kind permittee-responsible mitigation. They asserted that "removing [ ] spoil banks while [Bayou Bridge's] equipment is on site could be a great way to mitigate." ROA.6539. Bayou Bridge, in contrast, "propose[d]" to use out-of-kind bottomland-hardwood credits. ROA.6592.

In accepting Bayou Bridge's proposal, the Corps was entitled to rely on everything the 2008 regulations had already said about why mitigation-bank credits are preferable to permittee-responsible mitigation of the sort that plaintiffs had proposed. The Corps was also entitled to rely on its own functional assessment—contemplated by regulation, previously published and subjected to public comment, and reviewed by other agencies including the EPA—to determine that those credits were sufficient even if out-of-kind. The Corps was not obligated to copy-and-paste the 2008 release or LRAM into the EA to satisfy its obligations under NEPA. That statute's purpose "is not to generate paperwork." 40 C.F.R. § 1500.1(c). In fact, an EA "normally should not exceed 15 pages." 33 C.F.R. § 230.10(c). Here, the Section 404 EA was 92 pages, and the Section 408 EA, 135 pages.

The district court misunderstood the Corps's regulations when it reasoned that they "d[o] not use the word 'hierarchy'" and that the Corps's explanation improperly amounted to "rote reliance" on the regu-

lations "without any rational explanation." ROA.4034. The Corps recognized that its regulations *do*, in the words it used when promulgating them, "establis[h] a hierarchy" "with an explicit preference for mitigation bank credits." 73 Fed. Reg. at 19,600. In that respect, the regulations direct the Corps's discretion in individual matters, and the agency offered pages of justification for that choice in 2008. Thus, the Corps's reliance on the regulations was neither "rote" nor "without any rational explanation," but based on the rational explanation the Corps gave in 2008 and in accordance with the regulations guiding the agency's discretion.

That distinguishes *O'Reilly v. U.S. Army Corps of Engineers*, 477 F.3d 225 (5th Cir. 2007), which the district court found to be "particularly applicable." ROA.4040. *O'Reilly* was decided *before* the 2008 regulations and is thus particularly inapplicable. It did not involve the mitigation hierarchy under Section 332.3. It did not involve mitigation banks approved under Section 332.8. And it did not involve a functional assessment such as LRAM. In *O'Reilly*, the Corps offered "only cursory detail as to what" mitigation measures it ordered and "how they serve to reduce th[e] impacts." *Id.* at 234. The Corps offered far more than that here—not only through its reliance on the regulatory framework established in 2008, but also through the pages of discussion in the EA itself.

More apt is *White Oak Realty, LLC v. U.S. Army Corps of Engineers*, No. 13-cv-4761, 2016 WL 4799101 (E.D. La. Sept. 14, 2016). There, a

specialized statute required "in-kind" mitigation for impacts to bottom-land-hardwood forests (not wetlands) "to the extent possible." *Id.* at *6. Because no in-kind credits were "available to purchase," the Corps required the purchase of "credits from a *wetland* mitigation bank in the same region." *Id.* The district court held that was neither arbitrary nor capricious: "[F]or all intents and purposes, mitigation in-kind was not possible, and the Corps resorted to the next most applicable form of mitigation." The court also recognized that the Corps's "regulations reveal a preference for mitigation through mitigation bank credits" and that the reasons underlying that preference further supported the Corps's choice. *Id.* The same is true here. If anything, the Corps has a stronger explanation here given that it required some in-kind mitigation and that the next most applicable form of mitigation was more comparable (another type of wetland) than in *White Oak* (a wetland instead of a forest).

The district court made other errors that illustrate how its misunderstanding extends from the regulations to the administrative record. The court asserted that the Corps gave "no analysis or explanation" for why it was "impracticable" to mitigate further by placing the pipeline deeper. ROA.4037. Yet on the same page where the Corps recognized this point, it explained that placing the pipeline deeper "would require additional clearing and cause an *increase* in wetland impacts." ROA.6536 (emphasis added). The court also asserted that the Corps relied on "Best Management Practices" to mitigate temporary impacts, but provided

"precious little analysis" of those practices. ROA.4040. Yet the Section 408 EA analyzed those "Best Management Practices" and concluded that they would "minimiz[e]" impacts "to the greatest extent practicable." ROA.5603; *see also* ROA.5600-5603. In an appendix to that EA, moreover, the Corps described those practices in 59 pages of "Best Management Practices Figures." ROA.5733-93.

Finally, even if the EA itself were found lacking, that would not mean plaintiffs were likely to prevail. When the district court issued the injunction—on an accelerated schedule caused by plaintiffs' delay in bringing their emergency request for injunctive relief—the Corps had not yet filed the complete administrative record, which will undeniably contain additional materials concerning mitigation. For example, the EA discusses "the final Compensatory Mitigation Plan" required by 33 C.F.R. § 332.4, which has not been produced. ROA.6589. LRAM discusses "workbook" spreadsheets applying the method to a specific project, which have not been produced either. LRAM at 40. Because the Corps's explanation may properly appear anywhere in the administrative record—not necessarily the EA—these forthcoming documents (and others) make it even less likely that plaintiffs will ultimately prevail.[10]

[10] Appellants also join in the Corps's argument that NEPA did not require the agency to explain its choice of mitigation in the first place. As the Corps points out, because it did not issue a *mitigated* finding of no significant impact, the effectiveness of mitigation was unnecessary to such a finding. *See* Corps Br. 9-12.

B. The Corps Adequately Explained Alleged Prior Noncompliance And Cumulative Effects.

With regard to the alleged noncompliance by *other* companies with *their* permit conditions prohibiting spoil banks, plaintiffs contended that the Corps "must factor in its long-standing failure to enforce Section 404 permit conditions and its inability to do so because of resource constraints when it assesses" cumulative impacts and the "efficacy of permit conditions to reduce those impacts." ROA.6538. Bayou Bridge responded that these other pipelines "pre-date the Clean Water Act and Section 404 permitting" and "thus they are not out of compliance." ROA.6547.

The Corps addressed this issue. First, in the Section 408 EA, the Corps extensively analyzed many types of potential cumulative impacts, such as those on wildlife, surface water resources, and wetlands. ROA.6490-98.[11] Then, with regard to prior noncompliance, the Corps noted that many "historic pipeline installations … pre-date the CWA," and that "[w]ith the exception of the pipelines installed prior to the CWA," other projects "are subject to regulation by the [Corps] under the CWA." ROA.6495. The Corps further explained that "[v]arious regulations and permit conditions" for these projects "would require the use of" best management practices "to ensure the avoidance and minimization

[11] Although the Section 408 EA was generally limited to the federal easements and crossings at issue, cumulative impacts "were evaluated within the watershe[d]" as a whole (that is, the Basin) "to adequately identify past, present, and reasonably foreseeable projects with the potential to contribute to cumulative impacts." ROA.6490.

of cumulative impacts on wetlands and waterbodies." ROA.6495. Finally, the Corps noted that this project would not affect future remediation efforts directed at older spoil banks. ROA.6494.

Then in the Section 404 EA, the Corps recognized the dispute over prior noncompliance. It again acknowledged the effects of projects undertaken prior to the CWA, noting that, "[i]n the past, many actions were taken with little consideration given to project related impacts on the wetland ecosystems." ROA.6574. But the Corps noted "greater awareness" in more recent times has led to "environmentally sensitive project designs and construction methods," and concluded that through a combination of mitigation and permit conditions, "permit issuance will not result in substantial direct, secondary or cumulative adverse impact on the aquatic environment." ROA.6574.

In sum, the Corps incorporated its Section 408 analysis, and reaffirmed that plaintiffs' concerns "may be addressed through modifications in project design and special permit conditions." ROA.6554. And when the Corps ultimately issued the Section 404 permit, it included a condition directly responsive to plaintiffs' concerns—requiring that Bayou Bridge "reestablis[h] pre-existing wetland contours and conditions immediately following project completion." ROA.6691. Moreover, the Corps recognized the existence of spoil banks within the Basin and Bayou Bridge's response that the pipeline would be placed at such a depth as "not [to] preclude future spoil bank removal projects." ROA.6547; *see also*

ROA.6569. The Corps also included a permit condition that "modifications/adjustments to the constructed pipeline" may be required "to facilitate any future … hydrologic restoration projects." ROA.6692.

Thus, from the Section 408 EA, to the Section 404 EA, and to the permit itself, the Corps's "path" may "reasonably be discerned." *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974). The Corps concluded that many of the pipelines mentioned in plaintiffs' comments predated CWA permitting, and even assuming prior noncompliance of those pipelines, the permit conditions imposed on *this* pipeline were sufficient to minimize any cumulative impact from its construction.

The district court did not say why this explanation was inadequate; it merely asserted that, "[h]aving thoroughly read and considered the EAs and the Section 404 permit conditions … the [c]ourt finds that the Corps failed to sufficiently consider and address past noncompliance." ROA.4046. In reality, the court could find fault only if it disagreed with the Corps that the permit conditions here were sufficient to minimize any cumulative impact tied to prior noncompliance. And those permit conditions could only be insufficient if one were to assume it likely that the Corps would fail in its regulatory duties to enforce them.

Yet under the deferential standard of review applicable here the court was *not* allowed to "substitute [its] judgment for the agency's." *Hayward*, 536 F.3d at 379-80. That deferential standard applies with partic-

ular force where, as here, the court substituted its judgment as to enforcement decisions uniquely within the Corps's discretion. *See Heckler v. Chaney*, 470 U.S. 821, 831 (1985). And with still greater force where, as here, the court substituted its judgment in the face of the presumption that public officers will "properly discharg[e] their official duties." *Am. Fed'n of Gov't Emps. v. Reagan*, 870 F.2d 723, 727 (D.C. Cir. 1989).

The district court also faulted the Corps for separately recognizing a cumulative impact of "wetland alteration and loss" in the Section 404 EA and then supposedly providing "utterly no analysis of permit conditions or mitigation that address this admitted cumulative effect." ROA.4047. But the Corps provided that explanation in literally the same paragraph, referencing "the efforts taken to avoid and minimize effects on project site wetlands and the mandatory implementation of a mitigation plan that functionally compensates unavoidable remaining impacts." ROA.6574. The district court's rejection of that explanation turns on its erroneous rejection, discussed above, of the Corps's separate explanation of mitigation. In addition, the court ignored other "efforts taken" to mitigate wetland impacts, which included, for example, using "horizontal-directional drilling" at some locations, which eliminates the need to dig a trench and thus involves *no* permanent impact to forested wetlands. ROA.6430. Not just that, the Corps retains authority under the Section 404 permit to require "[r]e-planting of desirable native tree species" and "additional compensatory mitigation, further remediation actions, and/or

further monitoring" if the mitigation it has ordered proves to be inadequate after it is implemented. ROA.6691.

C. Even If The Corps's Explanations Were Inadequate, An Injunction Was Improper.

"The scope of injunctive relief is dictated by the extent of the violation established," and "[t]he district court must narrowly tailor an injunction to remedy the specific action which gives rise to the order." *John Doe #1 v. Veneman*, 380 F.3d 807, 818 (5th Cir. 2004) (citation omitted). Here, the court did not hold that any environmental impacts were so significant as to require an EIS under NEPA. Nor did the court hold that the Clean Water Act prohibited issuance of the Section 404 permit. The court merely held that plaintiffs were likely to eventually show that the Corps failed to offer sufficient *explanation* for its decisions.

Even if the district court agreed with plaintiffs after a determination of the merits, the court would not be warranted in vacating any permit or otherwise enjoining construction. "When an agency may be able readily to cure a defect in its explanation of a decision," the correct remedy is generally remand to the agency *without* vacatur. *Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 198 (D.C. Cir. 2009) (citing *Allied-Signal, Inc. v. NRC*, 988 F.2d 146 (D.C. Cir. 1993)). So long as there is a "serious possibility that" the agency "will be able to substantiate its decision" on remand, vacatur is unwarranted. *Allied-Signal*, 988 F.2d at 151; *see also Cent. & S.W. Servs., Inc. v. EPA*, 220 F.3d 683, 692 (5th Cir. 2000)

("EPA may well be able to justify its decision[.] Accordingly, we remand, without vacatur … for EPA to provide a reasoned statement.").

For instance, the plaintiffs in *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 282 F. Supp. 3d 91 (D.D.C. 2017), advanced NEPA arguments similar to those here. Even though the Corps, in finding no significant impact on the environment, had failed to adequately consider certain issues, the district court concluded that there was a "serious possibility" that the agency would "be able to substantiate its prior conclusions," and hence "that vacatur is not the appropriate remedy." *Id.* at 109. Similarly, in *Winter*, the Supreme Court recognized that the "ultimate legal claim" at issue was that the agency "must prepare an EIS, not that it must cease" the activity at issue. 555 U.S. at 32-33. Thus, the Court concluded, there was "no basis for enjoining" that activity. *Id.*

Here, Bayou Bridge maintains there was no violation because the Corps's path may be reasonably discerned. But even if this Court disagrees, the above discussion illustrates that it would not be difficult for the Corps to paint the signposts in a brighter shade. In fact, given the unavailability of the administrative record, it is entirely possible that the Corps will be able to do so during *this* litigation without need for a remand. Assuming that the Corps erred, this case would therefore be a perfect candidate for remand without vacatur—as the majority of the motions panel recognized in staying the injunction pending appeal. Judge Clement reasoned that the district court should have "sought additional

briefing from the Corps on the limited deficiencies noted in its opinion." Doc. 00514388428 at 2. And Judge Owen explained that the district court should have "give[n] the Corps the opportunity to provide any missing rationale … without setting aside" the permit. *Id.* at 4.

Because the district court would not be warranted in vacating the permits or otherwise halting construction even if plaintiffs established the legal violations foreshadowed in its order, the preliminary injunction to the same effect is not "narrowly tailor[ed]" to those violations. *John Doe*, 380 F.3d at 818. The injunction should be vacated.

III. The District Court Erred In Finding Irreparable Harm.

The district court identified two types of irreparable harm to support its preliminary injunction, neither of which sufficed.

First, the court asserted that "the project potentially threatens the hydrology of the Basin." ROA.4013. "Potentially" means "existing in possibility." Merriam-Webster's Online Dictionary.[12] And *Winter* makes clear that the "possibility" of irreparable harm is insufficient. 555 U.S. at 22. The district court made no finding that any supposed threat to hydrology was "likely," as required under *Winter*. *Id.*

Next, the court cited the "destruction of already diminishing wetlands" including so-called "legacy trees." ROA.4013-14. But harm is not irreparable when there exists "[t]he possibility that adequate compensatory or other corrective relief will be available at a later date." *Dennis*

[12] https://www.merriam-webster.com/dictionary/potential.

Melancon, Inc. v. City of New Orleans, 703 F.3d 262, 279 (5th Cir. 2012). And here the "fundamental objective of *compensatory* mitigation" is to, well, compensate, for "unavoidable impacts" to wetland functions "that will be lost as a result of the permitted activity." 33 C.F.R. § 332.3(a)(1) (emphasis added). Under the Corps's regulations, then, there is an adequate compensatory remedy for the destruction of wetlands.

Indeed, regardless of their views on the merits, neither the district court nor plaintiffs disputed that there was some possible mitigation under the regulations that could adequately offset the lost aquatic functions here. In fact, plaintiffs conceded that this mitigation was possible. They proposed that removal of existing spoil banks would "be a *great* way to mitigate inside the Atchafalaya Basin and could restore the hydrology for thousands of acres of wetlands" (which would far exceed the acres impacted). ROA.6539 (emphasis added). They maintained "the *appropriate* mitigation for the project should be to restore the existing out-of-compliance" right-of-way. ROA.142 (emphasis added). And they argued that the Corps "flatly ignored *effective* on-site … mitigation that it was required to consider." ROA.2841 (emphasis added). If the district court eventually concludes that the Corps acted unlawfully, it will have to remand to the agency, which may then consider alternative forms of mitigation. In any event, there exists "in the ordinary course of litigation" an adequate remedy for environmental harm on account of wetland impacts. *Dennis Melancon*, 703 F.3d at 279. The district court responded that the

loss of legacy trees "cannot be mitigated against." ROA.4013. But environmental harm from the loss of those trees *can* be mitigated against.

What cannot be replaced according to plaintiffs—the antiquity of these trees—is not cognizable as irreparable harm. As a matter of prudential standing, the only injuries cognizable under NEPA and the CWA are those that fall within the "zone of interests" protected by those statutes. "NEPA encompasses environmental values," and the CWA is similarly "aimed clearly and solely at preventing environmental harms." *Gunpowder Riverkeeper v. FERC*, 807 F.3d 267, 274-75 (D.C. Cir. 2015). Neither statute protects antiquity qua antiquity shorn from some sort of environmental harm. True, environmental harm is read "broadly" to protect, for example, recreational and aesthetic interests. *Id.* But those interests must still "stem from environmental harm." *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs*, 781 F.3d 1271, 1280 (11th Cir. 2015) ("[T]he pollution of those waters decreases their enjoyment of them."). Here, mitigation is an adequate remedy for any environmental harm, and whatever harm remains based on the age of the trees alone is not cognizable under NEPA or the CWA and hence is not cognizable as irreparable harm.

In addition, irreparable harm must be "more than de minimis." *Enterprise Int'l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 472-73 (5th Cir. 1985). Even using plaintiffs' own numbers for the

Basin—which exceed the Corps's expert finding for the permanent impact to forested wetlands across the *entire* pipeline—the project would impact less than one-twentieth of one percent of the forested wetlands within the Basin, ROA.25; ROA.4255, and between 5 and 17 legacy trees, ROA.4212; ROA.6788. The harm is de minimis. The district court responded that it is "not so much the magnitude but the irreparability of the threatened harm" that matters. ROA.4008. But only when the harm is "more than de minimis." *Enterprise*, 762 F.2d at 472-73.

Moreover, the "intensity" of harm was directly relevant under the sliding scale the court applied. ROA.4006. The court relaxed plaintiffs' obligation to establish a substantial likelihood of success on the merits without requiring them to make any greater showing of irreparable harm—which illustrates the fundamentally lax standard under which the court issued the allegedly "extraordinary" remedy of a preliminary injunction. *Winter*, 555 U.S. at 22.

IV. The Balance Of Harms And Public Interest Weighed Against An Injunction.

The district court skewed the balance of the harms in plaintiffs' favor despite undisputed record evidence to the contrary. First, the court downplayed the financial harm that Bayou Bridge would suffer because those losses supposedly were not "supported by specific details." ROA.4053. Yet Bayou Bridge submitted a sworn declaration showing that the company would suffer hundreds of thousands of dollars per day

if construction were halted. ROA.6779. Even plaintiffs recognized, with a degree of understatement, that an injunction would not "be cost- or consequence-free" for Bayou Bridge. ROA.3941. After the district court clarified the scope of the injunction, Bayou Bridge submitted the underlying contract, which demonstrated that the company would suffer up to $500,000 per day while work stopped in the Basin on account of standby payments to its contractors. ROA.4086; *see also* ROA.4088.

Meanwhile, the district court did not even attempt to account for the other side of the ledger—the magnitude of environmental harm that plaintiffs asserted. That magnitude was plainly relevant to the "balance" of harms. Yet the district court did not explain why an injunction should issue when the project would undisputedly impact only a minute percentage of forested wetlands and maybe two dozen legacy trees in a watershed consisting of nearly a million acres of forested wetlands and countless other legacy trees.

As for the public interest, the court was "mindful of the importance of local employment and the economic benefits this project may yield," but did not identify any countervailing public interest. ROA.4053; ROA.4055. Nor did the court offer any basis to displace the Corps's conclusion in granting the Section 404 permit that the project would serve the public interest. ROA.6616. This factor along with the balance of harms therefore weighed against a preliminary injunction.

CONCLUSION

The district court made numerous legal errors to issue a preliminary injunction based on a fundamentally weakened showing that cannot be reconciled with the extraordinary nature of the remedy. This Court should reverse and order vacatur of the injunction.

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Respectfully submitted,

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I hereby certify that on this 2nd day of April, 2018, the foregoing document was transmitted to the Clerk of the United States Court of Appeals for the Fifth Circuit through the Court's CM/ECF document filing system, https://ecf.ca5.uscourts.gov. I further certify that: (1) required privacy redactions have been made pursuant to this Court's Rule 25.2.13, (2) the electronic submission is an exact copy of the paper document pursuant to this Court's Rule 25.2.1, and (3) the document has been scanned with version 12.1.6 of Symantec Endpoint Protection and is free of viruses.

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I hereby certify that on this 2nd day of April, 2018, an electronic copy of the foregoing document was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system, and service will be accomplished on all parties by the appellate CM/ECF system and through electronic mail upon the following:

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