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, AND SIERRA CLUB AND ITS DELTA CHAPTER,

Plaintiffs–Appellees,

v.

U.S. ARMY CORPS OF ENGINEERS,

Defendant,

BAYOU BRIDGE PIPELINE, LLC,

Intervenor–Defendant–Appellant,

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

Intervenor–Defendant.

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

REPLY IN SUPPORT OF EMERGENCY MOTION FOR STAY PENDING APPEAL

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No. 18-30257

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Intervenor–Defendant.

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. Intervenor-Defendant-Appellant

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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INTRODUCTION

Plaintiffs' Opposition fails at every step. A showing of "some" likelihood of success on plaintiffs' claims, Opp. 7, no longer suffices, and plaintiffs lack even that much. Their attack on mitigation bank credits misreads the plain words of the Corps's own regulations and asks the Court to ignore materials and analysis upon which the Corps reasonably based its permit. Plaintiffs then misquote the environmental assessment, falsely accusing the Corps of dismissing prior non-compliance as "irrelevant," when the Corps instead determined it could create enforceable conditions here.

Plaintiffs no longer even mention the harm that prompted the injunction—the loss of between 5 and 17 trees out of 880,000 acres of wetlands—instead grossly inflating (to a still minimal level) an affected area of just 1/3,000th of the Basin's cypress-tupelo swamp and whose loss will be *entirely* offset through mitigation. Conversely, plaintiffs do not dispute that the millions per month in economic harm to Bayou Bridge from *this* injunction is irreparable because a paltry $10,000 bond is the only available remedy.

Finally, plaintiffs invoke the wrong permit in telling this Court—incorrectly—that it's *already* too late for a stay to help Bayou Bridge. Opp. 2, 19 (noting water level already exceeds *Section 408* permit threshold—"a Carrolton gage reading of 11.0 feet"). As plaintiffs themselves pointed out in the district court, Ex. 27 at 24, Section 408 (and its permit)

only applies to the crossing of discrete federal projects and easements. For the Basin that means only the levees at either end. Aubele Decl. ¶ 3. Thus, although rising water levels are likely to disrupt work in the Basin in the near future—and will require special steps under the Section 404 permit to prevent erosion where trenching has begun (*id*. ¶ 4)—a stay would give Bayou Bridge at least a few weeks (perhaps more) to make significant uninterrupted construction progress, avoiding further irreparable harm. *Id.* ¶ 7; Ex. 24 ¶¶ 6-7.[1]

ARGUMENT

I. Bayou Bridge Is Likely To Prevail In This Appeal.

Even under the abuse-of-discretion standard, legal errors are "reviewed *de novo*." *Texas v. United States*, 787 F.3d 733, 747 (5th Cir. 2015) (citation omitted). And each district court error here—applying a sliding-scale, finding agency action arbitrary and capricious, and finding harm irreparable—is an error of law.

A. The District Court Erroneously Applied A Sliding-Scale.

Plaintiffs conceded in their preliminary-injunction motion that they must establish a "*substantial* likelihood" of success on the merits. Ex. 4

[1] These rising water levels, *see* Mot. 2, will interfere with construction in two ways: a requirement to halt construction at the levees, where Section 408's Carrolton gage condition applies; and an inability to work safely in the rest of the Basin, thus triggering a Section 404 permit condition for erosion and siltation controls during construction. Aubele Decl. ¶¶ 3-5.

at 10 (emphasis added). But they have retreated to the sliding-scale ever since the district court denied a TRO for failure to meet the substantial-likelihood threshold. Ex. 6 at 3, 5-6 (finding the "required" proof that plaintiffs "are substantially likely to succeed on the merits" was lacking).

Plaintiffs continue to rely on stale pre-*Winter* cases. Opp. 7-8. Even in the more recent cases they cite, "a movant must establish … a substantial likelihood of success on the merits." *Jefferson Cmty Healthcare Ctrs., Inc. v. Jefferson Parish Gov't*, 849 F.3d 615, 624 (5th Cir. 2017). Plaintiffs also cannot point to a single case where this Court has expressly ruled that the sliding-scale survives *Winter v. NRDC*, 555 U.S. 7 (2008).

More relevant than a dissenter's "belie[f]" about *Winter's* scope, 555 U.S. at 51 (Ginsburg, J., dissenting), is *Munaf v. Geren*, 553 U.S. 674, 690 (2008) (citation omitted), holding that the movant "must demonstrate … 'a likelihood of success on the merits.'" Members of *Winter's* majority agreed that "[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, joined by Scalia, J.).

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

1. The Corps Adequately Considered Mitigation.

Plaintiffs parrot the district court's conclusion that the Corps's mitigation regulations do not "establish[] a 'mechanical and rigid hierarchy.'" But such a "hierarchy" is precisely how the Corps explained the regulation it adopted: "We have therefore established a hierarchy in § 332.3(b) … for selecting the type and location of compensatory mitigation with *an explicit preference for mitigation bank credits*." Compensatory Mitigation for Losses of Aquatic Resources, 73 Fed. Reg. 19,594, 19,600 (Apr. 10, 2008) (emphasis added).

An "explicit preference" means, *e.g.*, the Corps cannot choose plaintiffs' preference of permittee-responsible mitigation unless based on "rigorous scientific and technical analysis." 33 C.F.R. § 332.3(b)(2). From the Corps's understanding of its own regulations, which itself requires deference, *Knapp v. U.S. Dep't of Agric.*, 796 F.3d 445, 454 (5th Cir. 2015), the agency rationally applied LRAM, requiring Bayou Bridge to purchase mitigation-bank credits in accordance with the regulations.

The district court completely ignored LRAM, and Plaintiffs misstate what it does. The three regulation subsections that plaintiffs cite show the error in their assertion that this methodology "cannot override the plain language" of the Corps's mitigation regulations. Opp. 10-11.

First, 33 C.F.R. § 332.3(f)(1) says that mitigation "must be, to the extent practicable, sufficient to replace lost aquatic resource functions."

LRAM does just that—ensuring that mitigation-bank credits restore lost aquatic resource functions. LRAM considers the nature of the impact to determine the aquatic functions lost, and then considers the nature of the mitigation bank being used to determine the aquatic functions gained and the number of credits required to offset the impact. Mot. 12-13. Plaintiffs simply do not come to grips with how the particulars of LRAM *implement* the regulations.

Second, 33 C.F.R. § 332.3(e) says that the Corps may order out-of-kind mitigation based on a "watershed approach." Not only are plaintiffs wrong in calling the mitigation here out-of-kind—LRAM "group[s] together as in-kind" bottomland-hardwood and cypress-tupelo swamp, Ex. 26 at 9—the Corps *did* conduct a watershed approach. A watershed is "a land area that drains to a common waterway" (*e.g.*, the Basin), and a watershed approach is "an analytical process for making compensatory mitigation decisions that support the sustainability or improvement of aquatic resources in a watershed." 33 C.F.R. § 332.2. The Corps properly conducted that approach by looking at the impacts across the Basin as a whole and across many aquatic resources. Ex. 19 at 45-50, 53-69 (addressing water circulation, aquatic ecosystem and organisms, water supply and conservation, and more).

Third, plaintiffs say that out-of-kind mitigation "is expressly prohibited unless other approaches have proven impracticable." Opp. 9. That assertion relies on 33 C.F.R. § 332.3(b)(6) ("[p]ermittee-responsible

mitigation through off-site and/or out-of-kind mitigation" may only be used if other options "are not practicable") (emphasis omitted), but by its plain terms that provision applies when using the lowest priority of permittee-responsible mitigation, not mitigation-bank credits. It is irrelevant to the higher-priority mitigation imposed here.

Plaintiffs' complaint that this methodology was not part of the record misses a key inconsistency within the district court's opinion: The court properly approved the Corps's reliance on a spill model that was not included within the EA in addressing oil-spill risks and impacts, but didn't mention a comparable mitigation methodology that (unlike the spill model) was even publicly available. Nor does LRAM need to be "a regulation" to garner deference for implementing and interpreting the Corps's regulations. *Knapp*, 796 F.3d at 454.

Plaintiffs also misconceive the nature of an EA, which should be "brief" and "normally should not exceed 15 pages." 33 C.F.R. § 230.10(a), (c). "NEPA's purpose is not to generate paperwork." 40 C.F.R. § 1500.1(c). That explains why the Corps's analyses *underlying* the EA must be considered alongside the final analysis itself and why the current incompleteness of the administrative record—a direct result of plaintiffs' delay in seeking injunctive relief long enough to manufacture an emergency—counts *against* plaintiffs' ultimate chance of success on the merits.

Although the district court faults the Corps for offering "not an iota of discussion" about how bottomland-hardwood credits "mitigate the loss of function and value of the cypress/tupelo swamp impact," Ex. 27 at 43, it is the court's lack of any discussion about the Corps's reliance on LRAM that dooms plaintiffs' argument.

2. The Corps Adequately Considered Historic Noncompliance And Cumulative Effects.

Plaintiffs mischaracterize the EA, repeatedly asserting that the Corps found historic noncompliance "irrelevant." Opp. 12. That portion of the EA instead states that backfilling activities "*predating current regulations* are irrelevant to the proposed permit application." Ex. 19 at 26 (emphasis added). The Corps here was also summarizing *Bayou Bridge's* accurate response to plaintiffs' comments, followed by the Corps's conclusion that permit conditions were sufficient to address plaintiffs' concerns. *See* Mot. 15-16.

The *only* way the district court could label the Corps's explanation insufficient was by improperly substituting its views for the Corps's to assume ing that Bayou Bridge was likely not to comply with the permit conditions and the Corps was likely not to enforce them. Whether plaintiffs ever *asked* the district court to make that improper assumption is irrelevant, *see* Opp. 13-14.

Plaintiffs finally assert there was "extensive evidence" of noncompliance and that this Court should defer to the district court's findings in

that regard. Opp. 12, 14. But it is *the Corps* that is entitled to deference in the first instance because the comments created a factual dispute about noncompliance. A good example of that dispute is the Florida Gas Pipeline. Plaintiffs cited it to argue past permit noncompliance in the Basin by Bayou Bridge's parent company. Ex. 4 at 7. But the relevant permit conditions there required action only in the event of dredging, Ex. 11 at 10, and just last year this Court affirmed a district court's grant of summary judgment to Florida Gas Pipeline because the record was undisputed that the company had *not* engaged in dredging. *In re Louisiana Crawfish Producers*, 852 F.3d 456, 463-65 (5th Cir. 2017).

In the end, the question of historic noncompliance "is a classic example of a factual dispute the resolution of which implicates substantial agency expertise." *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 376 (1989). And the Corps was perfectly positioned to resolve the dispute—not only in view of its expertise, but also its visit to the Basin, where it "followed existing pipeline right of ways," and made "[s]everal stops" to "discuss the route, construction methods and issues with crossing the" Basin. Ex. 19 at 21.

C. The District Court Erred In Finding Plaintiffs Had Established Irreparable Harm.

Plaintiffs may prefer to ignore the finding below of only a "potential" threat to the Basin's hydrology, Opp. 14-15, but that word makes all

the difference between the mere "possibility" of irreparable harm and the required "likelihood." *See Winter*, 555 U.S. at 21-22.

With respect to the other alleged harm—clearing of trees—plaintiffs cannot dismiss the de minimis nature of the harm as irrelevant when this Court plainly recognizes that 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).

And de minimis is the right label here. The uncontroverted testimony and evidence at the hearing was that (as plaintiffs' own witness testified) "around 300 acres" of cypress-tupelo swamp would be impacted, Ex. 9 at 123, and between 5 and 17 old-growth trees. Plaintiffs give up denying that only that small number of old-growth trees is at issue. Instead, they inexplicably exaggerate the overall impact to cypress-tupelo wetlands by now calling it 600 acres, Opp. 16, which cannot be reconciled with the EA's number (142 acres permanently impacted, Ex. 19 at 2, 31), to say nothing of *their own* witness's number. Ex. 9 at 123 (300 acres).

Plaintiffs then make a concession that independently defeats their assertion of irreparable harm—they say the harm is the "impacts to the ecology" of the Basin. Opp. 16. As Bayou Bridge has explained, compensatory mitigation serves to offset precisely these impacts. Plaintiffs say that Bayou Bridge "muddle[s] the issue on the legal merits" with irreparable harm, Opp. 16, but the merits are never separate from irreparable

harm, because "[t]he possibility that adequate compensatory or other corrective relief will be available at a later date, *in the ordinary course of litigation* [weighs] heavily against a claim of irreparable harm." *Dennis Melancon, Inc. v. City of New Orleans*, 703 F.3d 262, 279 (5th Cir. 2012) (citation omitted). Plaintiffs do not dispute that *even if* a court disagreed with the mode of mitigation implemented here, in the ordinary course of litigation the Corps would be able to consider other mitigation (including that preferred by plaintiffs) on remand, thus ensuring mitigation sufficient to offset these ecological impacts.

As further proof of the ability to repair any harm later through mitigation, the district court told Bayou Bridge that *its* harm (from the injunction) "can be ameliorated" by building "along the other 90 percent of the [right-of-way] not affected by the Court's injunction." Ex. 27 at 57. If it is lawful for the pipeline to eventually be built across the Basin, plaintiffs' asserted harms cannot satisfy the irreparable harm prong.

II. Bayou Bridge Will Suffer Irreparable Harm Absent A Stay.

As for the substantial harm to Bayou Bridge, Plaintiffs say that economic harm is not irreparable. Opp. 17. But that is only true when there exists "[t]he possibility"—missing here on account of the paltry bond—"that adequate compensatory or other corrective relief will be available at a later date." *Dennis Melancon*, 703 F.3d at 279.

Although plaintiffs dispute the magnitude of harm, they do not contend that the minimal bond here suffices to cover the damages Bayou

Bridge will suffer. Hence that harm is irreparable whether the amount is $20 million per month or something less, and indeed regardless of whether (as plaintiffs contend at Opp. 21) the district court could lawfully set the bond at $10,000.

And the district court erred on the bond amount too. Plaintiffs' routine argument about district court discretion in setting that amount gives no consideration to the plain language of Rule 65(c), which cabins that discretion. Moreover, plaintiffs waived their right to introduce evidence into the hearing regarding their ability to pay a bond. Ex. 10 at 14. Yet they now improperly seek to introduce a *new* declaration to overcome their waiver. *See* Wilson Decl. The Court should reject it.

Either way, Bayou Bridge's assertions of harm are consistent and sufficiently detailed. *See* Opp. 18. The costs for the first week of the injunction are $2.2 million, which is what its contractor seeks for demobilization and standing idle in the Basin. Ex. 24 ¶ 15. After the first week of the injunction, under the terms of the contract, the contractor could charge up to $482,986 per day for all of the crews standing idle within the Basin. *Id.* (Lost revenue from a delay in starting the pipeline is approximately *another* $6 million per month. *Id.* ¶ 16.) Plaintiffs' alleged inconsistency misses how costs can vary after the first week of the injunction. Plaintiffs' assertions that these economic damages are "speculative" are belied by their own recognition that Bayou Bridge *will* suffer

harm. *See* Ex. 12 at 13 ("Nor do Plaintiffs believe that an injunction would be cost- or consequence-free for [Bayou Bridge] or its contractors.").

CONCLUSION

This Court should grant a stay pending appeal.

March 6, 2018

Respectfully submitted,

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I hereby certify that on this 6th day of March, 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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