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

EMERGENCY MOTION FOR STAY PENDING APPEAL

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No. 18-30257

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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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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

More than two months after Appellant Bayou Bridge Pipeline, LLC, received federal permits allowing it to begin an important pipeline project in Louisiana, the district court enjoined ongoing construction. The court did so based on plaintiffs' claims that the U.S. Army Corps of Engineers inadequately considered the pipeline's environmental impacts.

That court's order, under review here, fails the basic requirements for preliminary-injunctive relief and should be stayed pending appeal. The district court applied an out-of-date sliding-scale to improperly excuse plaintiffs' inability to show a *substantial* likelihood of success on the merits; substituted its own judgment for the agency's, whose analysis it ignored; and found irreparable harm based on de minimis effects that can be remedied in the ordinary course of litigation.

Not only is Bayou Bridge likely to prevail on the merits of its appeal, the injunction has already caused and will continue to cause substantial irreparable harm of up to $500,000 per day in construction-related costs alone and $6 million per month in lost revenue. Unless the injunction is lifted, Bayou Bridge will continue to incur these costs, which it cannot recover because the district court imposed a bond of only $10,000—contrary to Federal Rule of Civil Procedure 65(c)'s requirement that a bond be sufficient to cover costs and damages from being improperly enjoined.

Emergency consideration is needed because the timing for the injunction—which plaintiffs waited a month-and-a-half to seek—could not be worse. The onset of the rainy season—within a month of today—means high waters in the Basin. Bayou Bridge had already begun digging the pipeline's trench there. The permit requires Bayou Bridge to backfill any open trench and halt construction if river levels exceed a certain height. Given that possibility, Bayou Bridge built into its schedule the potential need to suspend or curtail construction at times between April 1 and June 30. These next few weeks of construction are therefore critical to meeting the pipeline's November 2018 in-service date.

The injunction separately threatens environmental harm. Because digging had begun, mounds of dirt sit alongside the right-of-way. Yet the injunction against "any further action" prevents Bayou Bridge from stabilizing the right-of-way and implementing erosion-control measures to prevent high waters from washing those mounds away. Emergency consideration is necessary to prevent this risk—which plaintiffs have acknowledged as problematic. Julie Dermansky, *Federal Judge Halts Bayou Bridge Pipeline Installation, But Photos Show Dam-*

age Already Inflicted, DeSmog Blog (Feb. 25, 2018) (Plaintiffs' witness: "[T]hese mountains of dirt will likely be washed away.").[1]

This Court should therefore stay the order pending appeal. *See* Fed. R. App. P. 8(a). Given the urgency, Bayou Bridge requests that the Court order responses to this motion by March 5, 2018 and resolve it by March 7, 2018, five days after its filing. Bayou Bridge has contacted the other parties per Fifth Circuit Rule 27.4. Plaintiffs will file an opposition.

BACKGROUND

The Bayou Bridge Pipeline will carry crude oil approximately 163 miles from Lake Charles to St. James, Louisiana. Ex. 1 ¶ 1. The Atchafalaya Basin—a large river swamp—accounts for approximately 23 miles of the route. Ex. 22 ¶ 15. Because the route crosses numerous federal projects and easements, Bayou Bridge needed permits from the Corps under the Clean Water Act, 33 U.S.C. § 1344 (Section 404), and the Rivers and Harbors Act, 33 U.S.C. § 408 (Section 408). The National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(2)(C), also required the Corps to determine whether environmental impacts would be significant.

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

1. In October 2016 the Corps gave public notice that Bayou Bridge applied for a Section 404 permit, Ex. 16, followed by notice of a Section 408 application. Ex. 17. Both notices invited comment, and plaintiffs did so extensively. Ex. 1 ¶ 8.

The Corps completed a 92-page environmental assessment (EA) for the Section 404 permit, addressing environmental impacts across the entire pipeline and finding none to be significant. Ex. 19. Having concluded the same in a 135-page EA for the Section 408 permit (for federal projects and easements), Ex. 18, the Corps issued both permits to Bayou Bridge on December 14, 2017, effectively authorizing construction including through the Basin. Ex. 20, Ex. 21.

2. The permits account for the "880,000 acres of forested wetlands" in the Atchafalaya Basin. Ex. 1 ¶ 34. To minimize environmental impacts to the Basin, the pipeline route parallels, and in some places slightly widens, existing permanent rights-of-way in the Basin (*i.e.*, areas disturbed by prior construction). Ex. 22 ¶ 8.

Construction at certain points will require Bayou Bridge to create temporary "spoil banks" (mounds of dirt placed alongside the trench). The Section 404 permit requires Bayou Bridge to "restore all temporary work areas, construction [rights-of-way], and access paths … by reestablishing pre-existing wetland contours and conditions immediately following project completion." Ex. 21 at 5.

Some trees in the Basin must be cleared to maintain the permanent narrow right-of-way. Ex. 19 at 2. This includes 0.03% of cypress-tupelo forested wetlands and between approximately 5 and 17 old-growth cypress trees within the Basin. Ex. 9 at 80, 123; Ex. 23 ¶ 10. To offset these unavoidable impacts, the Corps ordered Bayou Bridge to purchase mitigation-bank credits per Corps regulations, 33 C.F.R. § 332.3. Ex. 9 at 18; Ex. 19 at 65, 69. These credits—a commonly used mitigation tool—generally fund the restoration or maintenance of similar wetlands in the same watershed so as to offset unavoidable loss of wetland functions. *See generally* Compensatory Mitigation for Losses of Aquatic Resources, 73 Fed. Reg. 19,594 (Apr. 10, 2008). Bayou Bridge purchased all of its credits from the Corps-approved mitigation bank for the Basin, and all credits are located within the Basin. Ex. 19 at 65, 70.

3. Plaintiffs are environmental groups and a trade association. Although the permits were issued on December 14, 2017, plaintiffs waited until January 11, 2018 to sue the Corps. Ex. 1. Bayou Bridge and a contractor, Stupp Brothers, intervened. Ex. 5; D.E. 42. Plaintiffs challenge the environmental analysis underlying the permits for work in the Basin as arbitrary and capricious under the Administrative Procedure Act. Ex. 1 ¶¶ 72-164.

Plaintiffs then waited another 18 days to move for a preliminary injunction and a temporary-restraining order, invoking only their Section 404 claims. Ex. 4 at 10; D.E. 16 at 4. They argued that the Corps

inadequately addressed three things within the Basin: oil-spill risks and impacts; alleged noncompliance with permit conditions by previously built pipelines; and mitigation. Ex. 5 at 15-34. The primary irreparable harm plaintiffs asserted was the clearing of cypress-tupelo swamp, including an unspecified number of legacy trees. *Id.* at 34-35.

The district court denied the TRO the next day. It "reviewed the [Corps's] 92-page" environmental analysis and found, in a reasoned order, that the Corps had "clearly addresse[d]" plaintiffs' concerns. Ex. 6 at 5.

After expedited briefing, the court held a two-day preliminary-injunction hearing, including testimony on irreparable harm. Ex. 13 at 1; Ex. 9 at 3. The intervenors also presented sworn declarations and exhibits, with the declarants available for cross-examination. The court confined the record on the motion to the testimony and exhibits admitted at the hearing. Ex. 10 at 14-15.

Two weeks later, on February 23rd, the court issued an order that said simply: "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." Ex. 13 at 2. Bayou Bridge promptly appealed and moved for a stay in the district court because the order violated Federal Rule of Civil Procedure 65(d)'s requirement that "[e]very order granting an injunction … state the reasons why it issued" and "describe in reasonable

detail … the act or acts restrained," along with Rule 52(a)'s requirement that an order granting an interlocutory injunction "similarly state the findings and conclusions that support" it.

Late on February 27th, the court issued its reasons and denied the stay motion as moot. Ex 27. The court employed a "sliding scale" for the preliminary injunction factors; ruled that the Corps adequately considered the risks and impacts of an oil spill but could not say the same for mitigation or prior noncompliance of other pipelines; and found irreparable harm in a single paragraph. *Id.*

Bayou Bridge separately appealed this ruling and again sought a stay in the district court, asking the court to rule by noon today. The court failed to act, so Bayou Bridge now moves this court for an emergency stay pending appeal given the exigencies involved. *See* Fed. R. App. P. 8(a)(1).[2]

[2] 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 because—by the district court's own admission—the reasons and findings that must be stated under Rules 65(d) and 52(a) *before* an injunction may issue would "be assigned at a later date." Ex. 13 at 2. Yet the court's second order did not mention, much less purport to vacate or modify, the first. Hence it is unclear which order remains operative, if not both.

ARGUMENT

In determining whether to grant a stay pending appeal, this Court considers "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009) (citation omitted). "The first two factors … are the most critical" and with the other factors favor a stay here. *Id.*

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

Bayou Bridge is likely to succeed on appeal because the district erred in applying the four preliminary-injunction factors. Among other errors, the court applied an out-of-date "sliding-scale" to evaluate them; it held that the Corps failed to consider issues that the agency did in fact consider; and it found irreparable harm where there was none.

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

In assessing the preliminary-injunction factors, the district court applied "a sliding scale" that "takes into account the intensity of each" factor and assigns no "fixed quantitative value" to any. Ex. 27 at 9-10, 17. All the court could say with certainty was that an injunction would not issue if there is "no chance" of success on the merits; "some likelihood" sufficed. *Id.* at 17. The court relied on cases from the 1970s. *Id.*

The sliding-scale is no longer operative. In *Winter v. NRDC*, 555 U.S. 7, 21-22 (2008), the Supreme Court rejected the notion that a stronger showing on one factor (likelihood of success on the merits) could compensate for a weaker showing on another (irreparable harm). The Court reiterated in *Munaf v. Geren*, 553 U.S. 674, 690 (2008), that the movant "must demonstrate … 'a likelihood of success on the merits.'" *See also Nken*, 556 U.S. at 438 (Kennedy, J., concurring) ("When considering success on the merits and irreparable harm, courts cannot dispense with the required showing of one simply because there is a strong likelihood of the other."). After these cases, the sliding-scale is "no longer controlling, or even viable." *Am. Trucking Ass'ns v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009).

Post-*Winter*, this Court has repeatedly reversed injunctions for a failure to establish a substantial likelihood of success on the merits. *See La Union Del Pueblo Entero v. FEMA*, 608 F.3d 217, 225 (5th Cir. 2010) ("Plaintiffs cannot show a substantial likelihood of prevailing on the merits[.] Thus, even if Plaintiffs have *some chance* of prevailing … the preliminary injunction was issued in error.") (emphasis added); *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 584 (5th Cir. 2012) (failure to establish "substantial" likelihood "fatal").

The district court therefore applied the wrong legal standard. Despite its statement in a footnote that it "would reach the same conclusion" under the "substantial likelihood" standard, Ex. 27 at 17 n.94, it

neither explained how nor made findings to that end. It solely applied the sliding-scale to find a mere "likelihood." *Id.* at 45, 51. Even there, the court's "some likelihood" standard simply meant greater than "no chance" of success, with no "fixed quantitative value" beyond that minimal threshold. *Id.* at 17. Under the district court's approach, even the *possibility* of success sufficed. That alone is reason to reverse.

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

Plaintiffs generally claim that the Corps acted arbitrarily and capriciously in failing to consider certain environmental issues. Under this "highly deferential" standard of review, agency action may be set aside only for "a clear error of judgment." *Hayward v. DOL*, 536 F.3d 376, 379-80 (5th Cir. 2008) (citation omitted). An agency need only "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation omitted). Even applying the outdated sliding-scale to plaintiffs' challenges under this highly deferential standard for agency review, plaintiffs failed the first preliminary-injunction requirement.

1. The Corps Adequately Considered Mitigation.

The Corps's regulations specify types of compensatory mitigation for "unavoidable impacts" to waters of the United States, which the

Corps "shall consider … in the order presented." 33 C.F.R. § 332.3(b)(1). First in the order of priority are mitigation-bank credits, which the Corps "should give preference to" given their many advantages over other options. *Id.* § 332.3(b)(2). If "the bank has the appropriate number and resource type of credits available," the permittee's obligation "may be met by" those credits, and the Corps need not consider lower-priority options, such as permittee-responsible mitigation. *Id.* The district court criticized the Corps for treating this as a "hierarchy," when the agency's adopting release described it as just that. 73 Fed. Reg. at 19,600 ("We have therefore established a hierarchy.").

To offset the impacts to cypress-tupelo swamp in the Basin, the Corps required Bayou Bridge to purchase *all* available cypress-tupelo credits from the Corps-approved mitigation bank for the Basin. When those credits were exhausted, the Corps required Bayou Bridge to purchase credits for another type of forested wetland—bottomland-hardwood. *See* Ex. 19 at 65-70. Credits for the entire pipeline exceed $20 million.

The district court faulted the Corps for not saying why its "'preference' for mitigation bank credits was appropriate" or how bottomland-hardwood credits "mitigate[d] the loss of function of value" from impacts to cypress-tupelo swamp. Ex. 27 at 38, 41, 43. To the contrary, the

Corps applied its own judgment under its own regulations in concluding that the mitigation bank properly performs its function.

The Corps explained that it had applied its Louisiana Wetland Rapid Assessment Method (LRAM) to conclude that the appropriate number and type of credits were available. Ex. 19 at 65 (LRAM "was utilized to determine the acquisition of a total of 714.5 acres of *suitable* habitat credits.") (emphasis added). LRAM is a methodology that "quantif[ies] adverse impacts associated with permit applications and environmental benefits associated with compensatory mitigation projects" to determine the appropriate number and resource type credits necessary to offset a given impact. Ex. 26 at 5. Because the number and type of credits were appropriate, the Corps explained that its mitigation was "in accordance with the preferred mitigation hierarchy" set by regulation. Ex. 19 at 65 (404 EA); *see also id.* at 70.

By relying on its own method—LRAM—through application of its own regulation, the Corps specifically addressed how bottomland-hardwood credits offset impacts to cypress-tupelo swamp. The methodology explains that "[s]everal of the habitats … provide similar wetland functions or naturally exist together as a community," and that bottomland-hardwood wetlands and cypress-tupelo wetlands are "grouped together." Ex. 26 at 9. It quantifies the impact to types of wetlands based on factors such as their "habitat" and "hydrologic conditions." *Id.* at 11-34. It also quantifies the "mitigation potential" of a bank based on fac-

tors such as the "net level of functional change" "based on the wetland project type." *Id.* at 35; *see also id.* at 35-39. LRAM then compares the specific wetland impact to the mitigation potential of the bank to determine the appropriate number of credits. The Corps reasonably relied on its expertise and judgment, expressed in LRAM, that bottomland-hardwood credits would adequately mitigate the impact to cypress-tupelo wetlands. That conclusion was due deference—not disregard.

No further "discussion, analysis, or explanation" was required. *See* Ex. 27 at 43. Indeed, the district court recognized that the EA gave "appropriate consideration" to oil-spill risks based on a "spill risk model utilized by the Corps," but not included in the EA. Ex. 27 at 27-28. The same goes for mitigation and LRAM, which the court did not even mention. Moreover, because there has not been time to compile the administrative record that includes all analyses and assessments *underlying* the EA, plaintiffs are even *less* likely to succeed on the merits.

The Corps's application of an established methodology to its regulations distinguishes the case from *O'Reilly v. U.S. Army Corps of Engineers*, 477 F.3d 225 (5th Cir. 2007), on which the district court relied. *O'Reilly* dealt with challenges to multiple forms of mitigation (not just the use of a mitigation bank); there was no challenge to the type of wetlands available in the mitigation bank, and the EA did not identify a particular method such as LRAM. *Id.* at 233. In contrast to the conclusory EA there, *id.* at 234, the Corps explained that there was an appro-

priate number and type of credits per LRAM and that its regulations thus allowed those credits. The district court's failure even to mention LRAM fully distinguishes *O'Reilly*.[3]

In sum, the Corps applied a technical methodology within its discretion and expertise to reach a factual finding supported by substantial evidence and then applied the plain terms of its own regulations to that factual finding to reach a conclusion—the opposite of arbitrary-and-capricious action. *See Huls Am., Inc. v. Browner*, 83 F.3d 445, 452 (D.C. Cir. 1996) (agency is given "an extreme degree of deference" for matters "within its technical expertise") (citation omitted).

The Corps's decision is even more defensible in view of the alternatives: Plaintiffs proposed that Bayou Bridge remove existing spoil banks within the Basin, even though that property does not belong to Bayou Bridge. Ex. 25 at 16. Such permittee-responsible mitigation is not only disfavored by Corps regulations (given the lack of expertise permittees have with mitigation, *see* 33 C.F.R. § 332.3(b)), it does nothing to offset the loss of forested wetlands.[4]

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[3] Plaintiffs vaguely criticized LRAM below, Ex. 4 at 29, but "an agency's choice among reasonable analytical methodologies is entitled to deference." *Communities Against Runway Expansion, Inc. v. FAA*, 355 F.3d 678, 689 (D.C. Cir. 2004).

[4] The district court asserted that the Corps gave "no analysis or explanation" for why it was "impracticable" to mitigate further by placing the pipeline deeper. Ex. 27 at 40. Yet the Corps explained—on the

[Footnote continued on next page]

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

The district court next asserted that "the Corps failed to sufficiently consider and address past noncompliance and cumulative effects in relation to this proposed project." Ex. 27 at 49. The Corps adequately considered both distinct issues.

a. As for alleged past permit noncompliance by other pipelines, the district court 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." Ex. 27 at 49.

The EA itself shows otherwise. It expressly acknowledged plaintiffs' comments that "[t]he Corps must factor in its long-standing failure to enforce Section 404 permit conditions" requiring removal of spoil banks "when it assesses the significance of the impacts of this project and the efficacy of permit conditions to reduce those impacts to minimal." Ex. 19 at 14. As Bayou Bridge pointed out, though, the commenters failed to *prove* noncompliance. *Id.* at 23, 26 (past construction pre-dated regulations and permitting). The EA also acknowledged Bay-

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[Footnote continued from previous page]

same page the court cited—that doing so "would require additional clearing and cause an increase in wetland impacts." Ex. 19 at 12.

ou Bridge's response that the permit requires restoration of the right-of-way "to pre-construction contours." *Id.* at 23.

The Corps resolved this issue, explaining it "considered comments" on the topic, "review[ed] the applicant's responses to the comments and supporting documentation," and concluded that plaintiffs' concerns "may be addressed through … special permit conditions." Ex. 19 at 30. The Corps did just that—including a permit condition that required Bayou Bridge to "reestablis[h] pre-existing wetland contours and conditions immediately following project completion." Ex. 21 at 5. From the EA to the permit, the Corps's path "may reasonably be discerned"—permit conditions were sufficient to ensure future compliance *even assuming* prior noncompliance. *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974). The district court missed the signposts.[5]

The court deemed the Corps's explanation inadequate by substituting its judgment for the agency's. The court assumed it was likely—unless the Corps came up with contrary proof—that others had been non-compliant, Bayou Bridge would violate *its* permit conditions, and the Corps would not enforce them. The Corps had no obligation to as-

[5] This permit condition also refutes the alleged failure to address a putative cumulative impact from combining prior noncompliance with the project.

sume the same, especially given that public officers are presumed to "properly discharg[e] their official duties," *Am. Fed'n of Gov't Emps. v. Reagan*, 870 F.2d 723, 727 (D.C. Cir. 1989); judgments about the Corps's enforcement discretion are the agency's alone, *see* 5 U.S.C. § 701(a)(2); *Heckler v. Chaney*, 470 U.S. 821, 831 (1985); and the record lacked *evidence* showing noncompliance or nonenforcement, Ex. 19 at 23.[6] The Corps's judgment requires deference.

b. As for cumulative effects, the district court said that the EA provided "no analysis" addressing them. Ex. 27 at 50. The EA acknowledged a cumulative effect "to wetland alteration and loss." Ex. 19 at 50. Contrary to the district court's statement, the Corps also addressed that cumulative effect, explaining that the impact was not substantial in view of "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." Ex. 19 at 50.

The district court apparently disagreed with the Corps's judgment call on the ground that the agency's separate explanation of mitigation was inadequate. Ex. 27 at 50. The court's reasoning on this issue

[6] The Corps also responded by visiting the Basin to look at "existing pipeline" rights-of-way and "discuss the route, construction methods and issues with crossing" the Basin. Ex. 19 at 21.

therefore rises—and here falls—on whether the Corps adequately considered mitigation. The agency's consideration was more than adequate and entitled to deference.

The district court also overlooked "efforts taken" under the permit to mitigate wetland impacts through action on the route itself. The permit states: "Re-planting of desirable native tree species, erosion control, regrading, [and] on-going site management … may be necessary," Bayou Bridge must "monitor these areas on a regular basis," and the company must provide "photographic evidence" of the temporary right-of-way to the Corps, which retains authority to "requir[e] … additional compensatory mitigation, further remediation actions, and/or further monitoring." Ex. 21 at 5. The court had no basis for second-guessing the Corps's judgment that these were effective mitigation steps.

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

The district court found two types of harm, but neither is irreparable. First, the court asserted "that the project potentially threatens the hydrology of the basin." Ex. 27 at 16. "Potentially" means "existing in possibility." Merriam-Webster's Online Dictionary.[7] The court had earlier acknowledged that a preliminary injunction may not "be entered based merely on a 'possibility' of irreparable harm." *Id.* at 12. Nor is

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

there any finding as to the extent of possible effects from a single pipeline in a 1.4-million-acre basin. This assertion of harm is therefore insufficient.

Second, the court identified the "loss of legacy" (or old-growth) trees and the "destruction" of forested wetlands. Ex. 27 at 16. This putative harm is not irreparable for multiple reasons. To begin with, 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). The court made no finding on the *number* of legacy trees in danger. That alone is fatal. And nothing in the record supports a number greater than de minimis. By the admission of plaintiffs' own witness, about two-thirds of the Basin's 1.4 million acres is cypress-tupelo swamp. Ex. 9 at 123. He asserted that construction would impact some 300 acres of cypress-tupelo swamp in the Basin—or 0.03% of that swamp. *Id.* The harm is smaller still when limited to legacy trees. Bayou Bridge has identified *five* such trees within the permanent or temporary right-of-way. Ex. 23 ¶ 10. At the hearing plaintiffs alleged to have identified 17. Ex. 9 at 80. Even assuming a multiple of plaintiffs' number, the harm is de minimis for such an expansive region.

The district court reasoned that it is "not so much the magnitude but the irreparability of the threatened harm" that matters. Ex. 27 at 11. But that is true only when—unlike here—the harm is "more than de minimis." *Enterprise*, 762 F.2d at 472-73. Moreover, the district

court's own sliding-scale approach requires an "intensity" of harm. *Texas v. Seatrain Int'l, S.A.*, 518 F.2d 175, 180 (5th Cir. 1975). There is none here.

Separately, 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 Melancon, Inc. v. City of New Orleans*, 703 F.3d 262, 279 (5th Cir. 2012). Here, the "fundamental objective of *compensatory* mitigation" is to, well, compensate, for the very harm that plaintiffs assert—"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). Whatever their views on the merits, the district court and plaintiffs both recognized that some mitigation under lawful application of the regulations could offset the impacts here, which means that harm is not irreparable. The district court suggested that "the loss of legacy trees cannot be mitigated against or restored to the same condition." Ex. 27 at 16. But an adequate remedy need only compensate, not restore. And under the regulations, the loss of wetland functions even of these trees can and will be restored—the purpose of mitigation.

Even were there something special about *these* legacy trees, that harm is not irreparable because federal law *authorizes* such harm. That is, the Corps may allow "unavoidable impacts" to wetlands under its regulations. 33 C.F.R. § 332.3(a). Whatever harm plaintiffs might

suffer is not legally cognizable as irreparable harm because it is authorized by law. The reality is that most permits involve "unavoidable impacts"; under the district court's holding, those impacts constitute per se irreparable harm even though federal law permits them. No case allows plaintiffs to invoke federal law to obtain an injunction against harm that federal law allows.

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

For each day that the injunction remains in force, Bayou Bridge faces up to $500,000 in standby labor costs alone for crews in the Basin. Ex. 22 ¶ 18; Ex. 24 ¶¶ 13, 15. By contract, Bayou Bridge must pay these crews a wage to stand idle.[8] In addition, the company's contractors may "need to lay off or furlough as many as 500 workers." Ex. 22 ¶ 19. Bayou Bridge also faces an average future revenue loss of approximately $6 million for every month of delay completing the pipeline. *Id.* ¶ 23; *see also id.* ¶ 22 (additional costs from delay of up to $20 million per year). Plaintiffs did not refute these costs, which were documented before and at the hearing. In fact, they conceded that the injunction

[8] A prolonged stoppage could force Bayou Bridge to demobilize contractors and equipment instead. Demobilization costs, combined with "follow-on effects[,] could effectively cause project development to cease." Ex. 22 ¶¶ 17-19.

would cost Bayou Bridge. *See* Ex. 12 at 13. Bayou Bridge indisputably will suffer significant financial harm from the injunction.[9]

That harm is irreparable because the court required only a nominal $10,000 injunction bond. Ex. 27 at 59. Federal Rule of Civil Procedure 65(c) requires a bond "proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined." The inadequate bond here "produces irreparable injury, because the damages for an erroneous preliminary injunction cannot exceed the amount of the bond." *Mead Johnson & Co. v. Abbott Labs.*, 201 F.3d 883, 888 (7th Cir. 2000); *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 770 n.14 (1983); *see also Nichols v. Alcatel USA, Inc.*, 532 F.3d 364, 379 (5th Cir. 2008) (inadequate bond "insufficient to compensate" the enjoined party "for any damages it has suffered" if it "ultimately prevails"). From the second *hour* of the injunction, every expense incurred by Bayou Bridge has been irreparable harm.

Non-profits are not exempt from the rule. *Habitat Educ. Ctr. v. U.S. Forest Serv.*, 607 F.3d 453, 459–60 (7th Cir. 2010). And even where the movant claims "great hardship" the court at a minimum should require plaintiffs to "waiv[e] the limit on damages." *Continuum Co., Inc. v. Incepts, Inc.*, 883 F.2d 333, 335 (5th Cir. 1989). The court al-

[9] The district court therefore erred in dismissing these costs as unsupported "by specific details" when it balanced the harms. Ex. 27 at 56.

so improperly accepted plaintiffs' representations of hardship, but not Bayou Bridge's representations of loss, even though Bayou Bridge put its evidence into the record (and plaintiffs waived their opportunity to cross-examine the declarant), while plaintiffs did not (and presented no witnesses). Ex. 10 at 14.

III. The Remaining Factors Favor A Stay.

A stay would not substantially injure another party because, as explained earlier, any harm that plaintiffs may suffer is de minimis. In addition, a stay allowing construction of the pipeline would serve the public interest, as the Corps found in granting the Section 404 permit. The Corps explained that the pipeline "would provide the infrastructure necessary to transport domestic crude oil" to "refining facilities in response to growing U.S. market demands" and would "provid[e] economic benefits to the state" as a whole. Ex. 18 at 4-5. More to the point, an injunction would deprive local communities of "significant … taxes and revenue," result in lost jobs, furloughs, and "harm to workers, their families, their communities and the State." Ex. 22 ¶¶ 19-20, 24. The district court was "mindful" of these concerns, but erroneously found an injunction in the public interest without identifying anything countervailing. Ex. 27 at 56.

CONCLUSION

This Court should grant a stay pending appeal.

March 2, 2018

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CERTIFICATE OF COMPLIANCE WITH LENGTH LIMITS, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the length limit of Federal Rule of Appellate Procedure 27(d)(2) because it contains 5,188 words, as determined by the word-count function of Microsoft Word 2016, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and 5th Cir. R. 32.2

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5), and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Century font.

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CERTIFICATE OF ELECTRONIC COMPLIANCE

I hereby certify that on this 2nd 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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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of March, 2018, an electronic copy of the foregoing motion 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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CERTIFICATE OF EMERGENCY

I hereby certify that the facts supporting emergency consideration of this motion are true and correct.

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