No. 18-30257

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

OPPOSITION TO MOTION FOR STAY PENDING APPEAL

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TABLE OF CONTENTS

INTRODUCTION 1

FACTUAL BACKGROUND...2

STANDARD OF REVIEW 5

ARGUMENT 6

I. BBP IS UNLIKELY TO PREVAIL ON THE MERITS OF THIS APPEAL ……………………………………………………………6

A. The District Court Applied the Correct Injunction Standard. 7

B. The District Court Correctly Found that Plaintiffs Were Likely to Prevail on the Merits of their Mitigation Claims 9

C. The District Court Correctly Found that the Corps Ignored the Issue of Historic Noncompliance and Cumulative Effects...11

II. PLAINTIFFS WILL BE IRREPARABLY HARMED BY A STAY 14

III. BBP's CLAIMS OF ECONOMIC HARM ARE NEITHER IRREPARABLE NOR DO THEY OUTWEIGH THE HARM TO PLAINTIFFS FROM A STAY 17

CONCLUSION 22

TABLE OF AUTHORITIES

Page(s)

Cases

Aberdeen & Rockfish R. Co. v. Students Challenging Regulatory Agency Procedures, 409 U.S. 1207 (1972)....................5, 6

Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127 (9th Cir. 2011)....................8

Amoco Prod Co. v. Village of Gambell, 480 U.S. 531 (1987)....................17

Canal Auth. of Fla. v. Callaway, 489 F.2d 567....................15

City of Atlanta v. Metro. Atlanta Rapid Transit Auth., 636 F.2d 1084 (5th Cir. 1981)....................21

Florida Medical Ass'n, Inc. v. U. S. Dept. of Health, Ed. and Welfare, 601 F.2d 199 (5th Cir. 1979)....................7

Janvey v. Alguire, 647 F.3d 585 (5th Cir. 2011)....................17

Jefferson Community Health Care Centers, Inc. v. Jefferson Parish Government, 849 F.3d 615 (5th Cir. 2017)....................8

Kaepa, Inc. v. Achilles Corp., 76 F.3d 624 (5th Cir. 1996)....................21

League of Wilderness Defenders v. Connaughton, 752 F.3d 755 (9th Cir. 2014)....................20

Nken v. Holder, 556 U.S. 418 (2009)....................5

NRDC v. Winter,
555 U.S. 7 (2008) 8

O'Reilly v. U.S. Army Corps of Engineers,
477 F.3d 225 (5th Cir. 2007) .... *passim*

Productos Carnic, S.A. v. Central American Beef and Seafood Trading Co.,
621 F.2d 683 (5th Cir. 1980) 7

Sabine River Auth. v U.S. Dept. of Interior,
951 F.2d 669 (5th Cir. 1992) 6

Sandoz, Inc. v. FDA,
439 F.Supp.2d 26 (D.D.C.2006) 17

Sierra Club v. Peterson,
185 F.3d 349 (5th Cir. 1999) 17

Sierra Club v. U.S. Army Corps,
645 F.3d 978 (8th Cir. 2011) 20

Standing Rock Sioux Tribe v. U.S. Army Corps,
2017 WL 456714 (D.D.C. 2017) 18, 20

Texas v. United States,
787 F.3d 733 (5th Cir. 2015) 5

Federal Regulations

30 C.F.R. § 320.4(a) 13

33 C.F.R. § 320.4(b)(3) 12

33 C.F.R. § 332.3(a) 9

33 C.F.R. § 332.3(b)(1) 9

33 C.F.R. § 332.3(e) 9

40 C.F.R. § 230.93 9

40 C.F.R. § 1508.27(b)(7) 13

INTRODUCTION

After extensive briefing and two days of hearings, the District Court issued a narrowly tailored injunction temporarily stopping construction in a portion of a crude oil pipeline in an especially sensitive area. The injunction covers just 14% of the pipeline's 162-mile length. Based on evidence that went almost entirely unchallenged by defendants, the District Court found that the injunction was necessary to prevent irreparable environmental harm to the Atchafalaya Basin, a site of national ecological and cultural significance.

In a thorough opinion, the Court found that plaintiff-appellees Atchafalaya Basinkeeper et al. ("Basinkeeper") were likely to prevail on the merits of two of their claims under the Clean Water Act ("CWA") and National Environmental Policy Act ("NEPA"). First, the Court held that defendant U.S. Army Corps of Engineers ("Corps") had failed to adequately analyze and explain its decision to allow the project's proponent, appellant Bayou Bridge Pipeline ("BBP") to mitigate the destruction of hundreds of acres of the Basin's unique cypress swamps by purchasing "mitigation credits" at a site 55 miles away, in a different kind of ecosystem that bore virtually no ecological relationship to the damage the project would cause. Second, the Court held that the Corps failed to take a "hard look" at the impacts of the project in light of a historic pattern of noncompliance with conditions in similar permits for pipelines in the Basin. Finally, the Court found

that the company's assertions of catastrophic economic harm to be unsupported, and that the public interest weighed in favor of an injunction.

To stay the injunction, BBP must demonstrate that the District Court's careful effort constituted an abuse of its discretion. This it cannot do. The District Court gave all parties ample opportunity to present their arguments, and carefully weighed the evidence and the arguments for two weeks after the close of the hearing. It issued a 60-page opinion meticulously explaining the parties' arguments, the governing law, and the evidence. Its findings were supported and well-reasoned—the opposite of abuse of discretion. Moreover, a stay would deprive plaintiffs of meaningful relief, as construction through the Basin could be complete before this appeal could be resolved. Perhaps most saliently, BBP cannot lawfully resume construction in the Basin even if the stay were lifted, as its permit prohibits construction when water levels reach a certain height. That height has already been reached, and river levels will likely remain high for months. This Court should deny the motion to stay.

FACTUAL BACKGROUND

The Atchafalaya Basin contains the largest contiguously forested wetlands in North America. ABK Ex. 1, ¶ 7.[1] Characterized by unique cypress-tupelo

[1] References to exhibits filed by appellants will be denoted as "BBP Ex. _" and to those filed by plaintiff-appellees denoted as "ABK Ex. _."

swamps, the Basin supports more than 250 bird species and a diverse array of wildlife. BBP Ex. 4, at 2-3. It plays a critical flood protection role, and during major floods water is diverted into the Basin to protect communities downstream. *Id.* It contributes significantly to the state's economy, generating hundreds of millions of dollars through tourism, hunting, and fishing. *Id*. As befits this national treasure, Louisiana's Comprehensive Master Plan for a Sustainable Coast proposes to expend billions of dollars on wetland restoration and flood risk reduction, including in the Basin. ABK Ex. 2, at 96.

Oil and gas pipelines have degraded extensive portions of the Basin. ABK Ex. 3, ¶¶ 12, 46; ABK Ex. 4, ¶¶ 8-9. Routing pipelines through the Basin destroys forests, creates devegetated canals, and results in "spoil banks," which are linear piles of dredged soil dumped adjacent to canal trenches. Canals transport and deposit sediments into sensitive forest swamps, destroying these highly productive ecosystems. BBP Ex. 3, at 3-5; ABK Ex. 3, ¶¶ 18-22, 25-30. Spoil banks inhibit the natural pattern of water flow, deteriorating water quality. *Id*. ¶¶ 12, 46; ABK Ex. 4, ¶¶ 25-30; 36-40. Leaving spoil banks in place after pipeline construction has been completed violates permits issued by the Corps, but has nonetheless been commonplace in the Basin. BBP Ex. 4, at 4-5; ABK Ex. 5, ¶¶ 12-19.

On October 3, 2016, the Corps released a notice regarding a proposal for a major new pipeline that would cross the Basin. BBP Ex. 16. Plaintiffs (and many

others) submitted extensive comments to the Corps, focusing on the extraordinary values at risk in the Basin and the need for comprehensive environmental review. BBP Ex. 4, at 5-8. The comments emphasized past noncompliance with other Corps pipeline permits, as well as the abysmal safety and compliance record of BBP's parent company. *Id.* Highlighting the risks of building a major new crude oil pipeline through one of the nation's ecological crown jewels, commenters asked the Corps to perform a full environmental impact statement ("EIS") before making a decision on the underlying permits.

On December 14, 2017, the Corps issued a § 404 permit authorizing the project, BBP Ex. 21, accompanied by a "memorandum" constituting the Corps' environmental review. BBP Ex. 19. The analysis concluded that the project's impacts were not significant enough to warrant a full EIS. *Id.* at 91. The Corps dismissed concerns about the pattern of noncompliance with other pipeline permits as "irrelevant." *Id.* at 26. The permit authorizes BBP to clear a 75-foot wide channel across the Basin, which would destroy hundreds of acres of unique cypress swamp. The Corps proposed to offset the impacts of this loss through the purchase of mitigation "credits" for a different kind of forest than the one being cleared, at a site 55 miles away. ABK Ex. 3, ¶¶ 32-36; ABK Ex. 1, ¶¶ 24-28.

Plaintiffs filed this action on January 11, 2018, and, once it became evident that construction was about to begin, filed a motion seeking a preliminary

injunction on construction within the Basin. The District Court ordered briefing from all parties and convened an evidentiary hearing. On February 8, the Court heard expert and fact witness testimony from plaintiffs that took a full day; the following day the Court heard nearly three hours of legal argument. Two weeks later, the Court issued its ruling. BBP Ex. 27 ("PI Op."). This appeal followed.

STANDARD OF REVIEW

The law sets the highest standard, abuse of discretion, for granting a stay of an injunction pending appeal. *Texas v. United States*, 787 F.3d 733, 747 (5th Cir. 2015). A stay is an "intrusion into the ordinary processes of administration and judicial review" and hence "is not a matter of right, even if irreparable injury might otherwise result to the appellant." *Nken v. Holder*, 55 6 U.S. 418, 427 (2009). This highly deferential standard flows from the recognition that courts issuing a preliminary injunction engage in a careful and often difficult balancing of the equities. *Aberdeen & Rockfish R. Co. v. Students Challenging Regulatory Agency Procedures,* 409 U.S. 1207, 1218 (1972). Consequently, a district court decision issuing an injunction should not be disturbed unless "plainly the result of improvident exercise of judicial discretion." *Id*.

Appellants cannot satisfy that standard here. The District Court allowed comprehensive briefing, held a full evidentiary hearing, and oversaw an extensive oral argument. Its 60-page ruling applied the correct standard of review, laid out

the parties' positions, summarized the evidence, and clearly explained the basis for its decision. It found plaintiffs were unlikely to prevail on the merits of some claims, but likely to prevail on others. Even if this Court "doubts the correctness of the action"—and there is no basis to do so—it is not an abuse of discretion. *Id.*

ARGUMENT

I. BBP IS UNLIKELY TO PREVAIL ON THE MERITS OF THIS APPEAL.

Challenges to decisions under NEPA and CWA are reviewed under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, to determine whether the decision was "arbitrary, capricious, or contrary to law." A reviewing court does not substitute its judgment for that of the agency, but must "studiously review the record to ensure that the agency has arrived at a reasoned judgment based on a consideration and application of the relevant factors." *Sabine River Auth. v U.S. Dept. of Interior*, 951 F.2d 669, 678 (5th Cir. 1992); *O'Reilly v. U.S. Army Corps of Engineers*, 477 F.3d 225, 230 (5th Cir. 2007) ("[T]his restriction does not turn judicial review into a rubber stamp. In conducting our NEPA inquiry, we must make a searching and careful inquiry into the facts and review whether the decision ... was based on consideration of the relevant factors and whether there has been a clear error of judgment."). The District Court correctly employed this standard to find that the plaintiffs were likely to prevail on the merits of two of their claims.

A. The District Court Applied the Correct Injunction Standard.

BBP first attacks the District Court's use of a "sliding scale" to weigh the injunction factors. The effort fails, for two reasons. First, the District Court explicitly found that the plaintiffs had shown a "substantial likelihood" of success on the merits. PI Op., at 17, n. 94. While the Court discussed the question of whether a more relaxed standard would suffice, that discussion is immaterial to its ultimate holding.

Second, the District Court got the law exactly right. In the Fifth Circuit, courts balance the various injunction factors, and a strong showing of irreparable harm will offset something less than a "substantial" likelihood of success on the merits. "Where the other factors are strong, *a showing of some likelihood of success on the merits* will justify temporary injunctive relief[.]" *Productos Carnic, S.A. v. Central American Beef and Seafood Trading Co*., 621 F.2d 683, 686 (5th Cir. 1980) ("it is not even necessary that a substantial likelihood of success be shown."). Under this approach, a "sliding scale can be employed, balancing the hardships associated with the issuance or denial of a preliminary injunction with the degree of likelihood of success on the merits." *Florida Medical Ass'n, Inc. v. U. S. Dept. of Health, Ed. and Welfare*, 601 F.2d 199, 203 (5th Cir. 1979).

While other Fifth Circuit cases have recited the conventional four-part test without explicitly noting this "sliding scale," these foundational cases remain good

law. *Jefferson Community Health Care Centers, Inc. v. Jefferson Parish Government*, 849 F.3d 615, 626 (5th Cir. 2017) (while "there is no particular degree of likelihood of success that is required in every case, the party seeking a preliminary injunction *must establish at least some likelihood of success* on the merits before the court may proceed to assess the remaining requirements.") (emphasis added) District Courts in this Circuit regularly cite these foundational cases, and apply a balancing approach to injunctions. BBP Ex. 8, at 5.

BBP argues that the Supreme Court eliminated the discretion to balance the injunction factors in *NRDC v. Winter*, 555 U.S. 7 (2008). That is incorrect. *Winter* altered the sliding scale for preliminary injunctions in only one respect: it held that no matter the weight accorded to the other injunction factors, plaintiffs always need to demonstrate a "likelihood" of irreparable harm. As to the sliding scale on the other factors, *Winter* is silent. *See id*. at 51 (Ginsberg, J., dissenting) ("This Court has never rejected that formulation [i.e., sliding scale], and I do not believe it does so today.") With the exception of the Fourth Circuit, all the Courts to explicitly consider the issue have agreed that *Winter* has no impact on a Court's ability to apply a sliding scale in a situation where the showing of irreparable harm is strong. *See Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). There was no error here.

B. <u>The District Court Correctly Found that Plaintiffs Were Likely to Prevail on the Merits of their Mitigation Claims.</u>

The District Court conducted a particularly thorough analysis of the Corps' decision to allow the destruction of nearly 600 acres of forested wetlands in the Basin on the basis of a requirement to purchase "mitigation bank" credits 55 miles away from the project site that bore virtually no ecological or hydrologic relationship to the damaged area. PI Op., at 39. BBP's effort to demonstrate that the District Court's analysis was improper falls short.

The District Court first walked through the Corps' mitigation regulations, highlighting that their primary objective is to "replace lost functions and services." 33 C.F.R. § 332.3(b)(1). As their foundation, the regulations mandate that mitigation must be "be commensurate with the amount and type of impact." 40 C.F.R. § 230.93; 33 C.F.R. § 332.3(a). These regulations put strict limits on using mitigation that is "out-of-kind" - i.e., of a different type or resource than the affected area. BBP Ex. 8, at 19-20. Indeed, out-of-kind mitigation is expressly prohibited unless other approaches have proven impracticable, and the Corps makes an affirmative finding, with careful analysis, that such an approach would best serve the needs of the resource. *Id*. at 20-21; 33 C.F.R. § 332.3(e); § 32.3(c)(2). Neither the Corps nor BBP pointed to any such findings or analysis below, nor does BBP do so here. That is because the Corps never made them, in violation of its own regulations.

The Court also closely scrutinized and rejected defendants' arguments that the regulations established a "mechanical and rigid hierarchy" under which mitigation banks—no matter their location or relationship to the affected area—were always favored above other approaches. PI Op., at 35. While observing that the regulations generally prefer mitigation bank credits when certain conditions were met, the District Court correctly found that there was zero "analysis or consideration" about whether these conditions were met or whether the chosen approach met the overarching goals of the mitigation regulations. *Id*. at 38. The Court got it exactly right.

BBP devotes the bulk of its motion to explaining how the Corps' "Louisiana rapid assessment method" ("LRAM") justified the mitigation plan adopted by the Corps. Motion at 12. But LRAM is not a regulation, or even a final policy. BBP Ex. 26 ("Interim Version 1.0"). It does not and cannot override the plain language of the Corps' mitigation regulations, for example, the requirement that the Corps assess whether mitigation is "sufficient to replace lost aquatic functions," and the strict limitations on using out-of-kind mitigation discussed above. Moreover, its complaint that the Court failed to give LRAM due consideration rings hollow, as BBP relies on documents that were never part of the record before the District Court in the first place. *See id*. The District Court was right to focus on the Corps'

actual decision and the record behind it, and correctly found it arbitrary and capricious under well-settled precedent.

In this Circuit, "mere perfunctory or conclusory language" regarding a mitigation proposal is insufficient to satisfy the CWA and NEPA. *O'Reilly,* 477 F.3d at 231. The District Court properly found the Corps' mitigation determination to be arbitrary and capricious, and contrary to the Corps' regulations, for failure to demonstrate that the mitigation will adequately remediate the unavoidable impacts of hundreds of acres of lost cypress swamp. PI Op., at 44. There is no error that warrants a stay.

C. The District Court Correctly Found that the Corps Ignored the Issue of Historic Noncompliance and Cumulative Effects.

There was extensive evidence before the District Court that the terms of other pipeline permits issued by the Corps in the Basin had been routinely violated, with no enforcement by the Corps. BBP Ex. 4, at 4-5, 21-24; BBP Ex. 8, at 15-19. There was further uncontested evidence that this noncompliance has had devastating impacts to the ecology of the Basin. BBP Ex. 9, at 44, 49-55; ABK Ex. 4, ¶¶ 14-17; ABK Ex. 3, ¶¶ 18-22, 25-30. As noted below, "virtually every commenter who participated in the permit process raised this issue of noncompliance as a reason either to deny the permit or to conduct a full EIS." PI Op., at 45.

However, in issuing this Permit, the Corps deemed this extensive evidence and pointed public concern to be "irrelevant," BBP Ex. 19 at 26, and imposed the same permit conditions that had been included in previous pipeline permits, but proven ineffective. *Compare* ABK Ex. 5, ¶¶ 11-19, 23-25; *with* BBP Ex. 21, at Special Condition (9), (17). The legal question before the District Court was straightforward: was the evidence regarding historic noncompliance with other pipeline permits in the Basin "irrelevant," as the Corps and BBP contended, or was it an issue that the Corps needed to address in some meaningful way? Carefully considering the evidence and parties' arguments, the District Court found that the Corps was required to "consider and address" this long-standing pattern of noncompliance, and that it failed to do so. PI Op., at 49. That is because the law requires consideration of a project's cumulative impacts "when added to other past, present, and reasonably foreseeable future actions." *Id., citing* 40 C.F.R. § 1508.7; 33 C.F.R. § 320.4(b)(3). The Court held that prior non-compliance was relevant to considering the cumulative impacts of this pipeline. PI Op., at 49.

The Court based its findings in part on the Corps' concession that the pipeline will "contribute cumulatively to wetland alteration and loss," but nonetheless provided "utterly no analysis of permit conditions or mitigation that address this admitted cumulative effect." *Id*. at 49-50. This finding was not an abuse of discretion, and is amply supported by governing law. *O'Reilly,* 477 F.3d

at 231; *see also* 40 C.F.R. § 1508.27(b)(7) (cumulatively significant impacts may trigger EIS).

In this motion, BBP abandons its position below that historic noncompliance is "irrelevant." Instead, it now claims that the Corps *did* consider the impacts of historic noncompliance. Motion at 15-16. This ruse should not succeed. BBP misleadingly cites to a section of the Corps' § 404 Memo that simply summarizes public comments. In fact, not a word in the Corps decision suggests that the Corps grappled with this critical problem and arrived at a reasonable solution. Instead, it expressly deemed the issue to be irrelevant, and imposed the same permit conditions that the record demonstrated had been imposed—and ignored with no consequence—many times before. The District Court correctly found this approach to be arbitrary.

Bayou Bridge further misconstrues the District Court ruling as having created a presumption that BBP would "violate" its permit conditions. Motion at 16. That was never Basinkeepers' argument, and it is not what the Court held. Rather, Plaintiffs cited black-letter law that the Corps must consider and address "reasonably foreseeable" outcomes under NEPA. *O'Reilly,* 477 F.3d at 234-235. Similarly, the CWA explicitly requires the Corps to weigh "all those factors which become relevant in each particular case." 30 C.F.R. § 320.4(a). When it came to

the issue of historic noncompliance, and the obvious need for different kinds of approaches, the Corps failed to consider this factor.

BBP's last argument, that plaintiffs' failed to "prove" noncompliance, is its most baffling. Motion at 15. The District Court reviewed an extraordinarily rich record establishing this history, including numerous permits for other pipelines, expert and fact witness testimony, comments from federal and state agencies, and numerous government reports highlighting the problem. PI Op., at 39-45. No party disputed that this was the single most important issue raised during the permit's public and agency comment process. This Court should defer to the District Court's factual findings, which are supported by the evidence. BBP is unlikely to prevail in its appeal of the District Court's ruling in this regard.

II. PLAINTIFFS WILL BE IRREPARABLY HARMED BY A STAY.

A stay of the preliminary injunction would mean that construction in the Basin could immediately resume, and likely be completed before the appeal could be resolved. Based on extensive undisputed testimony and evidence, the District Court found that such construction would irreparably damage the Basin's fragile ecology. BBP attacks these findings, but its efforts are unpersuasive.

First, it seizes upon the District Court's use of the word "potentially" in describing the hydrologic harm that would occur if a new channel is cut across the Basin. Motion, at 18. But the District Court plainly understood that plaintiffs must

show a *likelihood* of irreparable harm. PI Op., at 11-16. In its bench ruling, the Court noted that there had been "significant" testimony that hydrologic damage "will occur" if construction is completed. BBP Ex. 9, at 175; *id*. at 47-52. In fact, the evidence revealed that these concerns were particularly acute this spring in light of the rapidly raising hydrograph. *Id*. at 56. Moreover, the District Court found other forms of irreparable harm (like destruction of forested wetlands and individual ancient trees) to be not just "likely" but certain. *Id*. at 175; *see also* PI Op., at 40-41. BBP's effort to take a single word out of context must fail.

Second, BBP repeats its argument, considered and forcefully rejected below, that the harm is *de minimis* because the destruction of 600 acres of rare cypress forested wetlands appears small when compared to the Basin as a whole. PI Op., at 39; *compare O'Reilly*, 477 F.3d at 229 (invaliding permit for 39 acres of wetlands). The argument is wrong both legally and factually. Courts have repeatedly rejected the argument that environmental harm can be ignored by simply comparing it to some larger area. *See Canal Auth. of Fla. v. Callaway*, 489 F.2d 567, 575 (comparison of affected area to others is "irrelevant"); BBP Ex. 4, at 34-36 (citing cases). Under BBP's theory, every square foot of the Basin could be clearcut without a finding of harm because it constitutes only a tiny portion of the Mississippi Basin as a whole. That is not the law.

Moreover, in addition to the footprint of the clearing, the Court heard extensive unrebutted testimony that cutting a lateral channel through the Basin would cause significant harms beyond simply the loss of trees—such altering sediment deposition patterns that can dramatically alter both the Basin and the coast. ABK Ex. 1, ¶¶ 11-14; ABK Ex. 6; ABK Ex. 3. BBP did not meaningfully contest this testimony during the hearing, and does not try to do so now. Destruction of nearly 600 acres of rare and valuable cypress wetlands, which will have cascading impacts to the ecology of both the Basin and the coast, is hardly *de minimis*.

Appellants also argue that the harm here cannot be irreparable because the law allows impacts to be "mitigated" through compensation in some circumstances. But appellants muddle the issue on the legal merits (whether the Corps lawfully established mitigation requirements) with the separate factual question of whether plaintiffs have demonstrated irreparable harm for purposes of an injunction. The District Court considered and explicitly rejected this argument. BBP Ex. 9, at 174-5 ("Mitigation doesn't somehow repair a harm."). Construction of the pipeline will damage or destroy hundreds of acres of sensitive and important cypress swamp. PI Op., at 39. The fact that the law allows such harm to occur if certain conditions are met is immaterial to the question of whether it is "irreparable" for purposes of an injunction. It also begs the question of whether

the mitigation is lawful in the first place. The District Court correctly held that it was not. BBP's bold assertion that "no case" allows an injunction to prevent harm that the law doesn't otherwise prohibit, Motion at 21, is particularly perplexing. Countless preliminary injunctions in environmental case do precisely that. *See, e.g., Sierra Club v. Peterson*, 185 F.3d 349, 375 (5th Cir. 1999) (upholding injunction on "even-aged" logging allowed under federal law).

III. BBP'S CLAIMS OF ECONOMIC HARM ARE NEITHER IRREPARABLE NOR DO THEY OUTWEIGH THE HARM TO PLAINTIFFS FROM A STAY.

BBP's primary argument is that it will be harmed by contract penalties and delayed profits in the absence of a stay. In making this argument, it ignores well-established law that such damages are neither "irreparable," nor do they outweigh truly irreparable environmental damage. *Janvey v. Alguire*, 647 F.3d 585, 600 (5th Cir. 2011); *Amoco Prod Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987); *see also Sandoz, Inc. v. FDA*, 439 F. Supp. 2d 26, 32 (D.D.C. 2006) ("To successfully shoehorn potential economic loss into the irreparable harm requirement, a plaintiff must establish that the economic harm is so severe as to 'cause extreme hardship to the business' or threaten its very existence"). BBP, whose parent company generates billions in revenues, itself argued to the District Court that "it is well settled that economic harm is not irreparable." BBP Ex. 8, at 28. It offers no reason for taking a contrary position here.

Appellants showing of financial harm also fails on factual grounds. The District Court found its speculative claims of financial damage to be unconvincing. PI Op., at 56. This conclusion mirrored another recent District Court finding that the same company's "predictions of economic devastation" should be treated with "skepticism." *Standing Rock Sioux Tribe v. U.S. Army Corps*, 2007 WL 456714, *9 (D.D.C. 2017). BBP seeks to supplement this inadequate showing with additional data submitted *after* the Court's ruling. BBP Ex. 24. However, this new evidence is no more convincing than its previous effort. Mr. Frey's declaration is carefully hedged: he offers an estimate of "potential" daily damages that could be "up to approximately" $500,000 day. *Id.*[2] He then contradicts himself, observing that BBP's construction contractor sought $2.2 million for demobilizing and standing by for the first week, a rate significantly below his estimate of $500,000/day.[3] Critical details are left unanswered: for example, the contract lists eight different kinds of crews, including "directional drilling" crews with much higher standby and demobilization costs. Any implication that these crews were already mobilized conflicts with Sunland's initial declaration they were not, and it

[2] The injunction had been in place nearly a week at the time of this declaration, but BBP offers only estimates of "potential" damages rather than calculations of actual harm.

[3] If Sunland, BBP's contractor, is being paid $2.2 million for standing by due to the injunction, it is unclear why the injunction would cause "harm" to Sunland, as its President testified to the District Court. ABK Ex. 7, ¶ 18.

doubtful that these drilling crews would be mobilized prior to the completion of clearing. Ex. 7, ¶ 17. Only a small portion of right-of-way through the Basin had been cleared prior to the injunction, and only one mile of trench dug. *See* Declaration of Dean Wilson, ¶¶ 4-7, 14. Further, BBP argues that the injunction "may" result in layoffs—only moments after arguing that the "possibility" of harm does not justify injunctive relief. Motion, at 18, 21. Overall, BBP's speculative estimate of "potential" economic damages do not weigh in favor of a stay.[4]

BBP's argument fails for another reason, as BBP would be unable to lawfully resume construction even if the injunction were stayed. Under the § 408 permit, work must cease and excavations must be backfilled during a "high river event," defined as a Carrolton gage reading of 11.0 feet or higher. Ex. 20, at 5. The Carrolton gage reading is now over 14 feet. Declaration of Ivor Van Heering, ¶ 14 & Ex. 4. By BBP's own admission, construction in the Basin cannot occur during high water. Motion, at 2. But high water is not a month away, as BBP claims—it is already here, and unlikely to subside for several months. *Id.* ¶ 10.[5]

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[4] The District Court also found that because the injunction only applied to a small portion of the overall project, BBP could mitigate some costs by sequencing construction. PI Op., at 60. BBP's declarant claims that doing so is impossible, but without ever describing why. Even if construction crews are limited to individual spreads, "Spread 3" is 55 miles long—over twice as long as the enjoined portion.

[5] BBP also evinces a newfound interest in environmental protection, claiming that already disturbed areas will be "washed away" in high water without a stay.

Even if BBP was not so constrained, rapidly rising waters in the Basin make the prospect of resuming construction at this time even more harmful than previously believed. *Id.* ¶ 4.

BBP's primary grievance is that the injunction will delay when the pipeline becomes operational and starts generating revenue. BBP Ex. 24, ¶ 16. But a delay in collecting hoped-for profits does not outweigh irreparable environmental damage. *League of Wilderness Defenders v. Connaughton*, 752 F.3d 755, 765 (9th Cir. 2014). This is especially true when those profits arise from permitsthat were improperly issued to begin with. Moreover, BBP chose to proceed with construction despite this lawsuit and the injunction request, and hence bears some responsibility for any economic damages arising from the injunction. *Sierra Club v. U.S. Army Corps of Eng'rs*, 645 F.3d 978, 998 (8th Cir. 2011); *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 2017 WL 456714, at * 9 (rejecting "cri de couer" over lost profits because company assumed risk by proceeding with pipeline construction in face of controversy).

Motion at 2. But its permit requires such excavated sites to be backfilled with the onset of high water—which happened before the injunction was issued. Ex. 20, at 5. Moreover, such a concern, even if legitimate, should be addressed by a modest modification to the injunction, not a stay that allows them to destroy hundreds of additional acres. It should also be dealt with in the District Court in the first instance. Fed. R. App. P. 8(a)(1).

BBP also contends that the District Court erred by not granting its request to order a half-billion-dollar bond. BBP Ex. 8, at 33. But the amount of the bond set by a District Court in issuing a preliminary injunction is discretionary; indeed, a court may choose not to set a bond at all. *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 628 (5th Cir. 1996); *City of Atlanta v. Metro. Atlanta Rapid Transit Auth.*, 636 F.2d 1084, 1094 (5th Cir. 1981) (no bond required where parties engaged in public-interest litigation to protect local citizens). BBP argues that a bond must be sufficient to cover all of its potential damages, including loss of potential profits. Motion at 11. This is not correct. Fed. R. Civ. P. 65(c) requires the movant to give security in an amount the court considers "proper." In making this discretionary determination, courts balance a movant's likelihood of success on the merits, the irreparability and severity of harm as well as the potential harm to the defendant, and the hardship of the bond to the moving party. The Court did precisely that, and set a reasonable $10,000 bond. This is a consequential bond for plaintiff organizations. *See* Wilson Decl. ¶ 20; ABK Ex. 8. A larger bond would effectively deprive plaintiffs of the relief to which the District Court found them entitled. *Id.* The District Court did not abuse its discretion in requiring a $10,000 bond. [6]

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[6] With respect to the public interest, to which BBP only devotes a few sentences, Basinkeeper incorporates by reference the arguments it made to the District Court. BBP Ex. 4, at 39; BBP Ex. 8, at 32.

CONCLUSION

For the foregoing reasons, Appellants motion for a stay pending appeal should be denied.

Respectfully submitted this 2nd day of March, 2018.

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__*(s) Jan E. Hasselman*__
Attorney for Appellees

Dated: March 5, 2018

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I hereby certify that on this 5th day of March 2018, I filed the foregoing document using the CM/ECF system. Service was accomplished by the CM/ECF system.

Alisa Coe
Attorney for the Appellees