IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 16-1329

SIERRA CLUB, FLINT RIVERKEEPER,
and CHATTAHOOCHEE RIVERKEEPER,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

On Petition for Review of Orders of the Federal Energy Regulatory Commission, 154 FERC ¶ 61,080 (Feb. 2, 2016) and 156 FERC ¶ 61,160 (Sept. 7, 2016)

PETITIONERS' EMERGENCY MOTION FOR STAY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Administrative Order

Federal Register Notices

Regulations

GLOSSARY

Pursuant to Circuit Rule 28(a)(3), the following is a glossary of acronyms and abbreviations used in this motion:

CEQ	Council on Environmental Quality
CO_{2e}	Carbon Dioxide Equivalent
EIS	Environmental Impact Statement
EPA	Environmental Protection Agency
FEIS	Final Environmental Impact Statement
FERC	Federal Energy Regulatory Commission
GHG	Greenhouse Gas
NEPA	National Environmental Policy Act
NGA	Natural Gas Act
NO_x	Nitrogen Oxides
$PM_{2.5/10}$	Particulate Matter
VOCs	Volatile Organic Compounds

INTRODUCTION AND TIME EXIGENCIES INVOLVED

Pursuant to Fed. R. App. P. 18(a) and D.C. Cir. R. 18, Petitioners Sierra Club *et al.* seek an emergency stay of the Federal Energy Regulatory Commission ("Commission" or "FERC") Order issued February 2, 2016, for the Southeast Market Pipelines Project (the "Project") pending this Court's ruling on the merits. The Project's components include a 500-mile natural gas pipeline that will start in Alabama, extend through Georgia, and terminate in Florida. Pipeline construction has already begun and is causing irreparable harm in environmental justice communities along the route as well as permanent impacts to the environment. Accordingly, Petitioners request a stay within 10 days of this filing.[1]

This motion meets this Circuit's standards for a stay pending review. The Commission has authorized the Project in violation of the National Environmental Policy Act (NEPA). Without a stay, construction could render moot full and complete relief that this Court could grant. Furthermore, this appeal raises important legal questions that are the subject of high-level disputes between the Commission and the U.S. Environmental Protection Agency (EPA) and Council on

[1] As required by Fed. R. App. P. 18(a)(1), Petitioners moved for a stay of the Order on March 3, 2016, which the Commission denied on March 30, 2016, on the grounds that justice did not require a stay and Petitioners would not suffer irreparable harm. *See* Ex. N. On September 7, 2016, the Commission denied Petitioners' Request for Rehearing. Ex. O. On September 29, 2016, the Commission denied Petitioners' request for stay of the Commission's notices to proceed with construction. Ex. P.

Environmental Quality (CEQ), on whether the Commission must consider the indirect impacts of its action on greenhouse gas emissions that cause climate change.

RELIEF REQUESTED

Petitioners ask this Court to stay the Commission's Certificates of Public Necessity and Convenience[2] authorizing the Project; and enjoin the continuing construction of the Project or, in the alternative, the portions of it in the environmental justice communities in Dougherty County, Georgia identified in Exhibit A. This relief is limited pending resolution of this appeal.[3]

STANDARD OF REVIEW

A party seeking a stay pending review must show that it is likely to prevail on the merits; the prospect of irreparable injury to the moving party if relief is withheld; the possibility of harm to other parties if relief is granted; and the public interest. D.C. Cir. Rule 18(a)(1); *Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958). A moving party need not show a "mathematical probability" of success on the merits, and relief may be granted if the movant has made a "substantial case" on the merits. *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc*., 559 F.2d 841, 843 (D.C. Cir. 1977). The

[2] The Certificate Order is attached as Exhibit S.
[3] Undersigned counsel has conferred via telephone with counsel for other parties. Respondent and Movant-Intervenors oppose the motion.

appropriate standard is the traditional "arbitrary and capricious" standard under the Administrative Procedure Act. 5 U.S.C. § 706(2)(A).

ARGUMENT

I. PETITIONERS ARE LIKELY TO PREVAIL ON THE MERITS

This appeal raises two important merits issues. First, 83.7% of the pipeline crosses or is within one mile of an environmental justice community, *i.e.* one consisting of a minority or low-income population. The Commission skirted its NEPA duties by using totally wrong metrics to find there would be no disproportionate impact on these communities. Second, the Commission failed and refused to consider the impacts of the greenhouse gases of the power plants to be served by the pipeline. It did so over EPA's objections and the CEQ Guidance interpreting the NEPA regulations that require such analysis. The Commission knew when, where and in what amount the downstream emissions would occur; and its lack of analysis was contrary to well-known tools and modeling that were readily available to the Commission.[4]

A. Statutory Overview

The Natural Gas Act (NGA) requires persons engaged in natural gas transportation or sales to obtain a Certificate of Public Convenience and Necessity

[4] Petitioners provide illustrative examples of the Commission's arbitrary action for purposes of briefing this motion. They intend to identify other aspects of the Commission's action that are legally flawed at the time the Court conducts briefing on the merits.

from the Commission before constructing facilities for the transportation or sale of gas. 15 U.S.C. § 717f(c)(l)(A). The Commission must deny this Certificate unless the Commission determines that the proposed activity "will be required by the present or future public convenience and necessity." 15 U.S.C. § 717f(e).[5]

The issuance of a Certificate is subject to the requirements of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq*. NEPA requires federal agencies to take a "hard look" at the environmental consequences of an action, including all direct, indirect, and cumulative environmental impacts of the decision, as well as alternatives. *See* 40 C.F.R. §§ 1502, 1508; *Sierra Club v. Peterson*, 717 F.2d 1409, 1413 (D.C. Cir. 1983); *Nevada v. Department of Energy*, 457 F.3d 78, 87 (D.C. Cir. 2006). NEPA's purpose is to ensure "that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts" and that "the relevant information will be made available to the larger audience that may also play a role in … the decisionmaking process." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

[5] The NGA gives this Court jurisdiction to review Commission Orders as to these Certificates. *See* 15 U.S.C. § 717r(b).

B. Petitioners are likely to prevail on their claim that the Commission's environmental justice analysis is arbitrary and capricious and violates NEPA.

The CEQ regulations implementing NEPA define "effects" or "impacts" that agencies must analyze in an environmental impact statement (EIS) to include "ecological . . ., aesthetic, historic, cultural, economic, social or health, whether direct, indirect or cumulative." 40 C.F.R. § 1508.8. According to the CEQ, this includes "environmental justice" impacts such as human health or ecological impacts on minority and low-income populations.[6] In addition, Executive Order 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*,[7] requires federal agencies to consider if a project's impacts on health and the environment would be disproportionately high and adverse for minority and low-income populations. Where, as here, the agency considers environmental justice issues in its EIS, the Court reviews that analysis and compliance with the Executive Order under the APA's "arbitrary and capricious" standard. *Communities Against Runway Expansion, Inc. (CARE) v. F.A.A.*, 355 F.3d 678, 688 (D.C. Cir. 2004).

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[6] *See* Council on Environmental Quality, *Environmental Justice Guidance Under the National Environmental Policy Act*, attached as Exhibit F, p. 8. This guidance interprets NEPA as implemented through the CEQ regulations. *Id.* at 21. CEQ's interpretation of NEPA is entitled to substantial deference. *Andrus v. Sierra Club*, 442 U.S. 347, 357-58 (1979).

[7] 59 Fed. Reg. 7629 (1994).

The Commission's EIS acknowledged that 83.7% of the Project would cross or be within one mile of environmental justice populations, including 135 environmental justice communities and environmental justice communities in five of the seven affected census tracts in Dougherty County, Georgia. *See* Ex. M (Final EIS) at 3-215, 216, 218.[8] The Project includes five compressor stations contributing significant amounts of air pollution, including a massive one in Albany, Georgia, in the middle of an African-American residential neighborhood with two large subdivisions, a mobile home park, schools, recreational facilities, and a 5,000-plus member Baptist Church. *See* Ex. B (Congressmen's letter to FERC); Ex. M at 3-218. Despite local protests and the objections of Georgia's members of the Congressional Black Caucus on the discriminatory siting of the project, the Commission found the Project "would not disproportionately impact environmental justice populations." Ex. M at 3-217, 3-221.

As EPA explained, the Commission's finding that there would be *no* disproportionate impact was based on a blatantly faulty methodology. Ex. C at 4-5. First, the Commission compared the concentration of minority and low-income populations residing in each of the Commission's "land-based" alternatives *to each other* to find no disproportionate impact, not to the concentration of the general

[8] Exhibit M contains the excerpts of FERC's final environmental impact statement cited in this motion in the order they appear in the EIS.

population. *Id*; Ex. M at 3-216. That conflicts with the CEQ's Guidance interpreting its regulations directing agencies to determine whether the impact "appreciably exceeds . . . the general population."[9] *See also Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 541 (8th Cir. 2003) (to determine whether there is a disproportionate adverse effect "an agency must compare the demographics of an affected population with demographics of a more general character…").

Second, the Commission used a simple metric of *miles* to determine that there was no disproportionate impact on environmental justice communities, thus dismissing that they are already overburdened with other industrial facilities and infrastructure with impacts on drinking water supplies, neighborhoods, and air and water pollution compared to the general population.[10] In related fashion, the Commission relied on its presumption of co-locating new pipelines with decades-older pipelines without any regard for whether the environmental justice community was already overburdened. *See* Ex. M at 3-218.

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[9] *See* Ex. C (1/25/16 EPA letter) at 4-5 and Ex. F (CEQ Environmental Justice Guidance, App. A) at 25. FERC also failed to consider the "no-action" alternative, EPA's liquefied natural gas import alternative, and the undersea pipeline alternative in its environmental justice comparison, which would further demonstrate the disparate impact of the chosen route on environmental justice communities.

[10] *See* Ex. D (10/26/15 EPA letter) at 14; Ex. B at 1 (south Dougherty County already has 259 hazardous waste facilities, 78 facilities releasing air pollutants, 20 facilities releasing toxic pollutants, and 16 facilities releasing water pollutants).

The Commission also found there would be no disparate impact because the Project would not result in "significant adverse impacts on any population." *Id.* at 3-217. But there the Commission failed to consider that the environmental justice communities are being harmed disproportionately by the risk of leaks and explosions, lost property values, and construction impacts such as right-of-way clearing, heavy machinery, traffic, noise, and air pollution.

In sum, the Commission did not comply with the CEQ regulations, and its environmental justice analysis "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise" and was, therefore, arbitrary and capricious. *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1313 (2014).

C. Petitioners are Likely to Prevail on their Claim that the Commission's Lack of Analysis of Downstream Greenhouse Gases and Climate Change was Arbitrary and Capricious and Violates NEPA.

NEPA requires that agencies consider a project's direct and indirect effects, as well as their significance, in an environmental impact statement. 40 C.F.R. §§ 1508.8, 1502.16. Indirect effects "are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." *Id*. at § 1508.8(b). *See also N.Y. v. Nuclear Regulatory Comm'n,* 681 F.3d 471, 476 (D.C. Cir. 2012). For example, the CEQ has explained that the indirect effects analysis

must include "impacts associated with the end-use of the fossil fuel." Council on Environmental Quality, Final GHG Guidance at 16 n.42.[11] Similarly, in *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520 (8th Cir. 2003), the Court held an EIS for a rail line delivering coal to power plants was required to analyze air quality impacts of burning that coal since they were "reasonably foreseeable." *Id.* at 549; *see also Border Power Plant Working Grp. v. Dep't of Energy*, 260 F. Supp. 2d 997, 1028-29 (S.D. Cal. 2003) (air impacts of Mexican power plant were reasonably foreseeable result of constructing new transmission line to California grid).

Here, the Commission failed to consider the impacts of burning the gas delivered by the pipeline; specifically, emissions of greenhouse gases. Approximately 93 percent of the pipeline's capacity, 1,000,000 dekatherms per day, will be delivered to Florida Power & Light and Duke Energy Florida and used to supply other specific natural gas power plants. 154 FERC ¶ 61080 (Feb. 2, 2016); Ex. M at 1-5, 3-291 to 3-292. FERC argued that analysis of the emissions from these facilities would be "speculative" because it would require "assumptions rather than direct parameters" of these facilities. Ex. M at 3-297. This Court "must reject [FERC's] attempt … to shirk [its] responsibilities under NEPA" by labeling

[11] *Available at* https://www.whitehouse.gov/sites/whitehouse.gov/files/documents/nepa_final_ghg_guidance.pdf.

discussion of future environmental effects "as 'crystal ball inquiry.'" *Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1092 (D.C. Cir. 1973). "Reasonable forecasting and speculation is … implicit in NEPA." *Id.*

The EPA pointed the Commission to methods to reasonably estimate emissions from these facilities. Ex. C at 4; Ex. D at 25. This included CEQ's Draft 2014 Climate Guidance, *see* Ex. D at 25,[12] and the U.S. Department of Energy's May 29, 2014 report: *Life Cycle Analysis of Natural Gas Extraction and Power Generation,* which "outlines the type of analysis that would provide the emissions estimates that FERC could use for this project." Ex. C at 4-5.[13] In light of this information, there is no record support for the Commission's assertion that analysis of these emissions would be "speculative." Ex. M at 3-297.

Nor can the Commission excuse this omission by arguing that "portions of [the natural] gas would be consumed by power plants" that were converting from coal to natural gas, which FERC asserted "would reduce current GHGs emissions" from those plants. Ex. M at 3-297. That does not excuse it from determining the impacts of GHG emissions from burning the natural gas. Even if considered a net benefit, NEPA requires a hard look at all environmental impacts, including

[12] The draft guidance is Exhibit H hereto.
[13] EPA also has a tool for converting dekatherms to GHGs that FERC could have used. *See* U.S. EPA Greenhouse Gas Equivalencies Calculator, *available at* https://www.epa.gov/energy/greenhouse-gas-equivalencies-calculator.

beneficial impacts. 40 C.F.R. § 1508.27(b)(1). More importantly, the possibility that *some* emissions will be offset does not excuse FERC's failure to quantify emissions from the other power plants that FERC admits will not displace coal. Ex. M at 3-298.

Nor does the Commission's claim that considering GHGs would "not meaningfully inform the decision-making process" justify its action. Ex. M at 3-297. In issuing a Certificate, the Commission considers the public interest and will approve a project only "where the public benefits of the project outweigh the project's adverse impacts," which includes analysis of clean air impacts and environmental impacts. *Minisink Residents for Environmental Preservation and Safety v. FERC*, 762 F.3d 97, 102-03 n.1 (D.C. Cir. 2014). That these power plants will undergo separate permitting and "be subject to pertinent emission and mitigation requirements," Ex. M at 3-298, does not remove them from the scope of the Commission's NEPA obligations. *Calvert Cliffs' Coordinating Comm., Inc. v. U. S. Atomic Energy Comm'n*, 449 F.2d 1109, 1122-23 (D.C. Cir. 1971).

FERC also erred in concluding that combustion of delivered gas was not "caused" by FERC's approval of the pipeline. Ex. O at 27, n.132 (*citing EarthReports, Inc. v. FERC*, 828 F.3d 949, 952 (D.C. Cir. 2016)). *EarthReports* turned on the Natural Gas Act's peculiar treatment of natural gas exports. Because the Department of Energy had "exclusive" authority over exports,

the Commission had "no ability" to prevent exports from occurring, and NEPA analysis of export-related effects was not required. *Id.* at 952, 955 (quotation omitted). Here, no other agency has exclusive authority to consider the effects of the pipeline's gas deliveries. *EarthReports* therefore does not apply. The Commission's approval of the pipeline is instead the ordinary case in which NEPA requires an agency to consider indirect effects that the agency does not directly regulate. *Mid States*, 345 F.3d at 550; *see also Sierra Club v. Army Corps of Engineers*, 803 F.3d 31, 40 n.3 (D.C. Cir. 2015); *City of Davis v. Coleman*, 521 F.2d 661, 675, 677 (9th Cir. 1975).

This inadequate analysis of indirect effects and GHG emissions has become the Commission's *modus operandi*, prompting EPA to consistently criticize the Commission, both in this proceeding, Ex. C at 4, and in other FERC dockets. Recently three EPA Regions called for a headquarters meeting with the Commission on the need to analyze "end use product combustion as an indirect emission." Ex. G at 2. They explained: "Combustion of the product is a reasonably foreseeable effect of this [pipeline] project, and falls squarely within the obligation to consider indirect impacts under NEPA." *Id.* at 7. The CEQ also interprets its regulations to require analysis of the GHG climate impacts of the downstream-use to comply with NEPA. Ex. H. The EPA directed the Commission to CEQ's guidance on this, to no avail. Ex. D at 2.

II. PETITIONERS WILL SUFFER IRREPARABLE HARM WITHOUT A STAY

"Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable." *Amoco Prod. Co. v. Gambell*, 480 U.S. 531, 545 (1987); *see also Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 25 (D.D.C. 2009) ("[E]nvironmental and aesthetic injuries are irreparable.").

The Intervenor pipeline companies are already clearing the right-of-way, trenching and constructing the pipeline.[14] According to the Final EIS, this will cause permanent, irreparable harm from clearing the 115- to 150-foot construction right-of-way the length of the pipeline, including the removal of topsoil, trees, shrubs, brush, roots, and large rocks, and removing or blasting soil and bedrock to create a 6- to 8-foot trench. Ex. M at 2-21 to 25, 2-30, 2-32. Following construction, a 50-foot-wide *permanent* right-of-way would be maintained along the entire 685-mile length of the Project. *Id*. at 2-1, 2-21 to 25. In total, the Project would impact approximately 11,393 acres temporarily during construction and 4,147 acres permanently throughout operation. *Id.* at 2-21. Project construction would have "long term" effects on 4,369.7 acres of forest. *Id.* at 3-294. Project operation would adversely affect 1,633.5 acres of forest with 1,550.1 acres or 95%

[14] *See* Ex. R (Notices of Commencement of Construction); Ex. I at ¶¶ 16-17, 20; Ex. J at ¶ 14.

being permanently destroyed due to maintenance of the pipeline right-of-way. *Id.*

The Final EIS finds that "[a]ir quality will be affected by construction and operation of the [Southeast Market Pipelines] Project." *Id.* at 3-233. Total annual estimated emissions for construction of the Project include approximately 2,923.81 tons of particulate matter ($PM_{2.5/10}$), 1,113 tons of nitrogen oxides (NO_x), 700 tons of volatile organic compounds (VOCs), and 338,270 tons of carbon dioxide equivalent (CO_{2e}). *See id.* at 3-250 to 3-252 for additional air pollutants. Operation of the compressor stations and the meter and regulator station is expected to emit annually additional tons of pollutants over the life of the Project. *See id.* at 3-253, 257. A significant portion of these would be emitted from the Albany compressor station. *Id.* 3-257. These emissions would have a long-term and therefore irreparable impact on air quality.[15]

The Final EIS further states that "[c]onstructing and operating the pipelines would impact surface waters." *Id.* at 3-54. Construction activities "would temporarily increase sedimentation and turbidity rates, decrease dissolved oxygen concentrations, result in the loss and modification of aquatic habitat, and increase

[15] NO_x and VOCs harm respiratory, cardiological, neurological, and kidney functions causing nosebleeds, burning spasms, nausea, fluid in the lungs, lung damage, fatigue, cancer, and premature death. *See, e.g.*, EPA, Volatile Organic Compounds: Health Effects, https://www.epa.gov/indoor-air-quality-iaq/volatile-organic-compounds-impact-indoor-air-quality#Health_Effects; EPA, Nitrogen Dioxide Pollution, https://www.epa.gov/no2-pollution/basic-information-about-no2#Effects.

the potential for the introduction of fuels and oils from accidental spills." *Id.*

The Project would cross and impact 1,958 wetland systems and 699 waterbodies. Ex. M at ES-7, 3-48, 3-67. Trees and vegetation would be removed, impacting 877.7 acres of wetlands. *Id.* at ES-7, 2-39. Impacts to 562.7 acres of forested wetlands would be "*long-term* in the temporary work areas and *permanent* in the maintained pipeline easement." *Id.* (emphasis added). Regeneration of forested wetlands to preconstruction conditions is expected to take 30 years or longer. *Id.* at 3-70. The pipeline would also go through the Green Swamp, known as the "liquid heart of Florida," which is a 560,000-acre area that is the headwaters to four major rivers in Florida. Ex. D at 7.[16]

The Final EIS identified thousands of karst features within 0.25 mile of the Project path in Florida, and 240 potential sinkholes within 0.25 mile of the Project path in Georgia. Ex. M at 3-6, 3-8. The Final EIS states these "are of particular concern because they can . . . provide an avenue for surface-based pollutants to quickly enter groundwater and surface water resources." *Id.* at 3-4. This is underlain by the Floridan Aquifer System, which provides drinking water to 10

[16] In August 2016, Petitioners filed a lawsuit in the 11th Circuit Court of Appeals against the U.S. Army Corps of Engineers for its Clean Water Act section 404 permit on the pipeline, and sought preliminary relief based on the water crossing and wetlands harms, which was denied. Petitioners subsequently dismissed that case. The instant case involves different claims and different defendants, and is not limited to those harms.

million people. *Id.* at 3-26, 3-27. As noted by the EPA, a pipeline rupture could "detrimentally impact the Floridan Aquifer's protective cover, which will leave water supplies with increased vulnerability to existing land-use and storm water-related pollution." Ex. D at 25. Also, pipeline construction could release hazardous materials and drilling mud into this aquifer and pollute the drinking water. Ex. M at 3-40 to 3-41. The pipeline also crosses the well field in Albany, Georgia that is the drinking water supply for 35,000 residents. *Id.* at 3-6.

Finally, Petitioners are submitting four declarations that are representative of some of the irreparable injuries the pipeline will cause to their members. Sierra Club and Flint Riverkeeper member Gerry Hall and Sierra Club members Merrillee Malwitz-Jipson, Robin Koon, and Roger Marietta own private property, run businesses and/or recreate in the areas impacted by the Project, and will be irreparably harmed from pipeline construction and operation. *See* Exs. I, J, K and L.[17]

III. POSSIBILITY OF HARM TO OTHER PARTIES IF RELIEF IS GRANTED

The Commission will not be harmed by a stay. The Intervenor pipeline companies will claim substantial monetary costs and penalties under terms of their construction and supply contracts. However, they entered into contracts and

[17] These declarations also establish Petitioners' standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992).

acquired land along their preferred route *before* the Commission issued the Certificates, when the NEPA process was in its early phase. Ex. D (EPA letter) at 1-2. The Commission informed them that if they proceeded with construction before it ruled on Petitioners' Request for Rehearing, which they did, they ran the risk that "the Commission could revise or reverse [its] initial decision *or that our orders will be overturned on appeal*."[18] Thus, they assumed the risk, and any injury to them is "self-inflicted" and cannot be used to tip the balance of equities. *Jones v. SEC*, 298 U.S. 1, 18 (1936) (it is well established that where a defendant with notice in an injunction proceeding completes acts sought to be enjoined the court may by mandatory injunction restore the *status quo*); *Sierra Club v. U.S. Army Corps of Engineers*, 645 F.3d 978, 997 (8th Cir. 2011) (when defendants "jump the gun" or "anticipate[ ] a pro forma result" in permitting applications, they become "largely responsible for their own harm"); *F.T.C. v. Weyerhaeuser Co*., 648 F.2d 739, 741 (D.C. Cir. 1981) ("The defendants acted at their peril in completing the act that the FTC sought to enjoin."); *Davis v. Mineta*, 302 F.3d 1104, 1116 (10th Cir. 2002).

Stays are not limited to cases where financial imbalances are not present. Where a plaintiff has shown environmental injury is "sufficiently likely," the Supreme Court has held that "the balance of harms will usually favor the issuance

[18] Ex. N (FERC Order Denying Stay) at 4 (emphasis added).

of an injunction to protect the environment." *Amoco Prod. Co*., 480 U.S. at 545.

Stays might never be ordered if defendants can determine the equities by contracting and investing in the project while administrative or judicial review is pending and build as fast as possible to further tilt the equities. If this is determinative it would allow those with sufficient financial resources essentially to buy their way out of injunctions in advance and avoid NEPA compliance. Without a stay, that could be the outcome here, since the project is scheduled to be finished and operational in May 2017.[19]

Finally, Petitioners are asking for an expedited ruling in this case, which would shorten the length of the stay and lessen harms to the other parties. If the Court does not stay the Certificates, Petitioners request an injunction on continued construction in the environmental justice areas in Dougherty County identified in Exhibit A. This would enable construction to continue in other areas along the pipeline route while protecting these communities and preserving the *status quo* there, to enable full consideration of alternatives on remand should Petitioners prevail on the merits.

IV. GRANTING THE STAY IS IN THE PUBLIC INTEREST

Congress instructed agencies to comply with NEPA "to the fullest extent

[19] *See, e.g*., excerpts from "Precedent Agreement by and between Sabal Trail Transmission, LLC and Florida Power & Light Company" attached as Ex. Q.

possible," 42 U.S.C. § 4332, and congressional intent and statutory purpose can be taken as a statement of public interest. *Johnson v. U.S.D.A.*, 734 F.2d 774, 788 (11th Cir. 1984). *See also Fund For Animals v. Clark*, 27 F. Supp. 2d 8, 15 (D.D.C. 1998) (the public interest is "served by having the federal defendants address the public's expressed environmental concerns, as encompassed by NEPA"); *Seattle Audubon Society v. Evans*, 771 F. Supp. 1081, 1096 (W.D. Wash. 1991), *aff'd*, 952 F.2d 297 (9th Cir. 1991) ("[t]his invokes a public interest of the highest order: the interest in having government officials act in accordance with the law").

The alternatives analysis is "the heart of the environmental impact statement." 40 C.F.R. § 1502.14. Allowing construction to continue would create a situation where, if this Court remands the matter to the Commission, the "no-action" alternative and alternate routes will almost certainly not be considered. This is not in the public interest. *See, e.g.*, *Davis v. Mineta*, 302 F.3d 1104, 1115, n.7 (10th Cir. 2002) (once part of a project proceeds "before the environmental analysis is complete a serious risk arises that the analyses of alternatives required by NEPA will be skewed toward completion of the entire Project"); *Maryland Conservation Council, Inc. v. Gilchrist*, 808 F.2d 1039, 1042 (4th Cir. 1986) (finding "the completed segments would stand like gun barrels pointing into the heartland of the park.... Non-federal actors may not be permitted to evade NEPA

by completing a project without an EIS and then presenting the responsible federal agency with a *fait accompli*."). If construction is allowed to continue, it would defeat the purpose of NEPA, to ensure that the agency's decision will be premised on the fullest possible canvassing of environmental issues before the "irreversible momentum" of agency approval. *Jones v. Dist. of Columbia Redevelopment Land Agency*, 499 F.2d 502, 511 (D.C. Cir. 1974).[20]

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court grant their motion for stay.

Dated: October 24, 2016

Respectfully submitted,

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[20] Petitioners request that the Court waive the bond requirement or impose a nominal bond under the public interest exception to Fed. R. Civ. P. 65(c). *See, e.g.*, *Kansas v. Adams*, 705 F.2d 1267, 1269 (10th Cir. 1983); *California ex rel. Van De Kamp v. Tahoe Reg'l Planning Agency*, 766 F.2d 1319, 1325-26 (9th Cir. 1985).

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CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)

Petitioners' Emergency Motion for Stay complies with the type-volume limitation and typeface requirements of FRAP 32(a) because it is no more than twenty (20) pages in length and has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point font size and Times New Roman type style.

Dated: October 24, 2016

/s/ Steven D. Caley
Steven D. Caley

ADDENDUM: Certificate of Parties and Corporate Disclosure Statement

In accordance with D.C. Cir. Rules 27(a)(4) and 28(a)(1), Petitioners certify that the following persons are parties, movant-intervenors, or *amici curiae* in this Court:

1. **Parties**

   Petitioners Sierra Club, Flint Riverkeeper, and Chattahoochee Riverkeeper

   Respondent Federal Energy Regulatory Commission

2. **Movant-Intervenors**

   Sabal Trail Transmission, LLC

   Transcontinental Gas Pipe Line Company, LLC

   Florida Southeast Connection, LLC

   Florida Power & Light Company

   Duke Energy Florida, LLC

3. ***Amici Curiae***

   At present, no parties have moved for leave to participate as *amici curiae.*

In accordance with FRAP 26.1 and D.C. Cir. Rule 26.1, Petitioners certify that none of them have any parent companies, and there are no parent companies that have a 10 percent or greater ownership interest in them. Sierra Club is a national non-profit organization dedicated to the protection, preservation, and enjoyment of the environment. Flint Riverkeeper is a Georgia non-profit

organization dedicated to the protection, preservation, and enjoyment of the Flint River and its watershed. Chattahoochee Riverkeeper is a Georgia non-profit organization dedicated to the protection, preservation, and enjoyment of the Chattahoochee River and its watershed.

CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2016, I electronically filed the foregoing Petitioners' Emergency Motion for Stay and exhibits in support with the Clerk of the Court by using the appellate CM/ECF System, sent four copies to the Court via Federal Express, and served copies of the foregoing via the Court's CM/ECF system on all ECF-registered counsel.

/s/ Steven D. Caley
Steven D. Caley