

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

APPALACHIAN VOICES et al.,

Petitioners

v.

Case No. 18-1114

FEDERAL ENERGY REGULATORY
COMMISSION,

Respondent,

and

ATLANTIC COAST PIPELINE, LLC,

Intervenor.

**APPALACHIAN VOICES *ET AL.*'S
MOTION FOR STAY OF THE CERTIFICATE ORDER**

As authorized by Federal Rule of Appellate Procedure 18(a), Petitioners request a stay pending review of the October 13, 2017 Federal Energy Regulatory Commission (“FERC”) order issuing a Certificate of Public Convenience and Necessity in *Atlantic Coast Pipeline, LLC*, 161 FERC ¶ 61,042 (Oct. 13, 2017) (“Certificate Order”), Ex. A.¹ That order authorizes Atlantic Coast Pipeline, LLC

¹ As required by Fed. R. App. P. 18(a)(1), Petitioners moved for a stay of the Order before FERC. FERC has not acted on that request. Petitioners informed the other parties in this case of their intent to file this motion; FERC and Atlantic Coast Pipeline, LLC are opposed.

(“Atlantic”) to construct a 604-mile, 42-inch-diameter gas pipeline—the Atlantic Coast Pipeline (“ACP”)—from West Virginia to North Carolina, and to use federal eminent domain power to take private property along the project’s route. The shippers that have contracted for 89% of the total capacity of the ACP are corporate affiliates of Atlantic, and as described below, there is substantial evidence undermining FERC’s conclusion that those contracts are reliable indicia of market demand for the project. Irreparable harm to the environment and Petitioners’ members is imminent: Atlantic has already begun clearing trees for construction. *See* Letter Order re: Partial Notice to Proceed with Tree Felling (Jan. 19, 2018) (FERC eLibrary No. 20180119-3052), Ex. B.

Petitioners, whose members reside near, recreate on, and own land that will be taken and harmed by the ACP, request that the Court stay the pipeline construction authorized by FERC’s Certificate Order to prevent irreparable injury to their property, environmental, aesthetic, and recreational interests pending completion of the Court’s review in this case.

ARGUMENT

I. Petitioners Satisfy the Requirements for a Stay.

A court’s analysis whether to issue a stay pending review requires “consideration of four factors: ‘(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) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)).

a. Petitioners Make a Strong Showing of Likelihood of Success on the Merits.

FERC’s Certificate Order suffers from critical flaws that render it unlawful. FERC may only issue a certificate permitting an interstate natural gas pipeline after it has determined that the project is required by the public convenience and necessity. 15 U.S.C. § 717f(c)(1)(A). FERC implements the Natural Gas Act through its 1999 Certificate Policy Statement, but the agency disregards that policy in a systematic manner, ensuring approval of any project with signed precedent agreements (contracts for pipeline capacity).

Consistent with that practice, the first critical flaw in FERC’s Certificate Order is that it based its finding of public benefit of the pipeline solely on Atlantic’s capacity contracts with its own corporate affiliates. In doing so, FERC ignored its own policy and refused to consider substantial evidence in the record showing that the precedent agreements between Atlantic and its affiliates are not reliable indicia of market demand.

A second critical flaw is that FERC authorized Atlantic’s exercise of eminent domain to forcibly obtain the property of as many as 600 landowners

without meaningful consideration of the harm that will result to those landowners. By so doing, FERC again contradicted its own policy.²

FERC's Certificate Order violates the Natural Gas Act. FERC failed to apply its own policy and ignored evidence in the record; therefore, the Commission lacked substantial evidence to support its conclusion that the pipeline meets the public convenience and necessity standard. These failures allow Atlantic to exercise eminent domain and cause environmental harm in violation of the Act's requirement that such harm only be allowed for projects required by the public convenience and necessity.

i. Statutory and Regulatory Background

Under the Natural Gas Act, a proponent of an interstate natural gas pipeline must obtain a "certificate of public convenience and necessity" from FERC. 15 U.S.C. § 717f(c)(1)(A). "FERC issues a certificate if it finds that the proposed project 'is or will be required by the present or future public convenience and necessity.'" *E. Tenn. Nat. Gas Co. v. Sage*, 361 F.3d 808, 818 (4th Cir. 2004) (quoting § 717f(e)). This standard—not merely public use—must guide FERC's consideration of applications to construct new pipelines. If FERC cannot conclude

² Petitioners identified numerous other defects in FERC's approval process in the Request for Rehearing, including claims that FERC failed to meet its obligations under the National Environmental Policy Act (NEPA). Petitioners reserve their right to pursue those claims in their merits brief.

that a pipeline is necessary based on substantial evidence, it may not authorize the taking of private property for that project.

FERC implements the Natural Gas Act through its 1999 Certificate Policy Statement (“Policy Statement”), which establishes the framework the agency must follow to determine whether a proposed project meets that standard. *See* Certification of New Interstate Natural Gas Pipeline Facilities, 88 FERC ¶ 61,227, 61,747 (Sept. 15, 1999), *clarified*, 90 FERC ¶ 61,128 (Feb. 9, 2000), *further clarified*, 92 FERC ¶ 61,094, 61,373 (July 28, 2000). The Policy Statement establishes a balancing test that requires FERC to balance any residual adverse impacts against “evidence of public benefits to be achieved.” *Id.* ¶ 61,745. Pipelines that impose adverse impacts will only be approved “where the public benefits to be achieved ... outweigh the adverse impacts. *Id.* ¶ 61,747.

FERC must base its determination of public convenience and necessity on “substantial evidence.” 15 U.S.C. § 717r(b). “The substantial evidence inquiry turns ... on whether that evidence adequately supports [FERC’s] ultimate decision,” *Fla. Gas Transmission Co. v. FERC*, 604 F.3d 636, 645 (D.C. Cir. 2010), based on consideration of the record as a whole, *see Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) (“The substantiality of evidence must take into account whatever in the record fairly detracts from its weight.”).

The substantial evidence standard is functionally equivalent to the arbitrary and capricious standard under the Administrative Procedure Act, *James City Cty. v. EPA*, 12 F.3d 1330, 1337 n.4 (4th Cir. 1993), requiring an agency to “examine the relevant data and 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 U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

ii. FERC Lacked Substantial Evidence of Market Demand to Support a Finding that Public Benefit Outweighed Adverse Impacts.

FERC acted arbitrarily and capriciously when it approved the ACP based solely on the existence of precedent agreements with Atlantic’s corporate affiliates. First, it ignored its Policy Statement, which recognizes that “[t]he amount of capacity under contract ... is not a sufficient indicator by itself of the need for a project....” Policy Statement, 88 FERC ¶ 61,744; *see also* Order Clarifying Statement, 90 FERC ¶ 61,390 (“[A]s the natural gas marketplace has changed, the Commission’s traditional factors for establishing the need for a project, such as contracts and precedent agreements, may no longer be a sufficient indicator that a project is in the public convenience and necessity.”).

Moreover, the Policy Statement acknowledged that problems created when precedent agreements are the sole indicator of need are exacerbated when those

agreements are between affiliated companies. *See* Policy Statement, 88 FERC ¶ 61,744. (“Using contracts as the primary indicator of market support for the proposed pipeline project also raises additional issues when the contracts are held by pipeline affiliates.”) Contracts between affiliated companies create the risk of self-dealing to inflate perceived market demand and are not reliable indicators of the need for a project. *See id.* ¶ 61,748 (“A project that has precedent agreements with multiple new customers may present a greater indication of need than a project with only a precedent agreement with an affiliate.”).

The 1999 Policy Statement sought to remedy problems caused by FERC’s historic reliance on precedent agreements as the sole indicator of market demand, one of the prime indicators of public benefit for a proposed project. To that end, the Commission established a list of factors to assess market demand. *See id.* ¶ 61,747. Those factors include, but are not limited to, “precedent agreements, demand projections, potential cost savings to consumers, or a comparison of projected demand with the amount of capacity currently serving the market.” *Id.*

Although a central purpose of the 1999 Policy Statement was to eliminate FERC’s sole reliance on precedent agreements, the agency relied exclusively on such agreements to approve the ACP. *See* Certificate Order, 161 FERC ¶ 61,042 at P 63. (“Precedent agreements signed by Atlantic for approximately 96 percent of the project’s capacity adequately demonstrate that the project is needed.”). FERC

also dismissed Petitioners' concern that contracts between affiliated companies are not reliable indicators of market demand. *See id.* at P 59 (“Moreover, the fact that five of the six shippers on the ACP Project are affiliated with the project’s sponsors does not require the Commission to look behind the precedent agreements to evaluate project need.”).

To justify its flawed approach, FERC improperly relied on language in the Policy Statement that “precedent agreements are still significant evidence of project need or demand.” *Id.* at P 54. While precedent agreements may provide evidence of demand, the Policy Statement makes clear that such agreements alone constitute insufficient evidence. *See* Policy Statement, 88 FERC ¶ 61,744. FERC plainly disregarded what its 1999 Policy Statement was intended to clarify: reliance on affiliate precedent agreements as the sole indicator of demand is improper.

FERC also wrongly contended that “it is current Commission policy to not look behind precedent or service agreements to make judgments about the needs of individual shippers.” Certificate Order, 161 FERC ¶ 61,042 at P 54. The section of the Policy Statement cited by FERC does not discuss *current* policy as of 2017, but *previous* FERC policy—the very policy the 1999 Policy Statement replaced. *See* Policy Statement, 88 FERC ¶ 61,744 (discussing FERC’s pre-1999 policy).

FERC's ACP decision, therefore, improperly relied on a policy it explicitly rejected in 1999.

Several Commissioners have recently criticized FERC's sole reliance on precedent agreements. In February 2017, former Commission Chairman Norman Bay criticized the practice in his statement on the Northern Access Pipeline. *See Nat'l Fuel Gas Supply Corp.*, 158 FERC ¶ 61,145 (Feb. 3, 2017) (Comm'r Bay, separate statement) (observing that "focusing on precedent agreements may not take into account a variety of other considerations, including, among others: ... whether the precedent agreements are largely signed by affiliates; or whether there is any concern that anticipated markets may fail to materialize."). In October 2017, Commissioner LaFleur dissented to the Certificate Order for the ACP, urging the Commission to consider "whether evidence other than precedent agreements should play a larger role in our evaluation regarding the economic need for a proposed pipeline project." Certificate Order, 161 FERC ¶ 61,042 (Comm'r LaFleur, dissenting). And in January 2018, Commissioner Glick wrote in his dissent in FERC's PennEast pipeline decision that "[b]y itself, the existence of precedent agreements that are in significant part between the pipeline developer and its affiliates is insufficient to carry the developer's burden to show that the pipeline is needed." *PennEast Pipeline Co., LLC*, 162 FERC ¶ 61,053 (Jan. 19, 2018) (Comm'n Glick, dissenting). He concluded that in such circumstances, "the

Commission must consider additional evidence regarding the need for the pipeline.” *Id.*

Not only did FERC disregard its current Policy Statement, it disregarded substantial evidence in the record undermining the reliability of Atlantic’s precedent agreements as a proxy for market demand. First, expert evidence in the record showed that contracts supporting the ACP differ from earlier pipeline projects approved by FERC: Atlantic’s agreements for 93 percent of the pipeline’s contracted capacity are with affiliated companies that are also regulated utilities. *See* Pet’rs’ Mot. for Evidentiary Hr’g 12-16, Attachs. 1-4 (June 21, 2017) (FERC eLibrary No. 20170621-5160), Ex. C. Atlantic and the affiliated utilities holding contracts on the ACP are owned by parent companies—Dominion Energy, Duke Energy, or Southern Company—whose shareholders will profit from the pipeline. *See id.*

Table 1. ACP Affiliate relationships.

Parent Company	Percent Ownership of Atlantic Coast Pipeline, LLC	Subsidiary Shippers	Contracted Capacity
Dominion Resources, Inc.	48%	Virginia Power Services	300,000 Dt/day (20% of total capacity)
Duke Energy	47%	Duke Energy Progress Duke Energy Carolinas Piedmont Natural Gas	885,000 Dt/day (59% of total capacity)
Southern Company	5%	Virginia Natural Gas	155,000 Dt/day (10.3% of total capacity)

Atlantic Coast Pipeline, LLC, Abbreviated Application for a Certificate of Public Convenience and Necessity and Blanket Certificates 7-8, 12 (Sept. 18, 2015) (FERC eLibrary No. 20150918-5212) (“ACP Application”). This record shows that the ownership and financial structure behind the ACP creates a powerful incentive for pipeline investment even if market demand is weak or absent. *See* Pet’rs’ Mot. for Evidentiary Hr’g 18-19. This is especially true given the high guaranteed return embodied in the recourse rate FERC approved for the project in the Certificate Order. *See id.*, Attach. 4. Consistent with FERC’s Policy Statement,

expert evidence in the record demonstrates that FERC must look outside the precedent agreements to determine whether the ACP is necessary.

In its cursory dismissal of record evidence addressing the affiliated nature of Atlantic's contracts, FERC stated only that its "primary concern regarding affiliates of the pipeline as shippers is whether there may have been undue discrimination against a non-affiliate shipper" which, it observed, is not present for the ACP. Certificate Order, 161 FERC ¶ 61,042 at P 59. However, FERC failed to consider the primary issue: the risk that agreements between a pipeline developer and affiliated utilities, as opposed to arm's-length agreements between independent actors, are not suitable proxies for market demand.

Moreover, FERC failed to consider record evidence that market demand for the ACP is weak or nonexistent. According to Atlantic's application, 79% of the pipeline's capacity will supply power plants. ACP Application at 6-8, 12 (Sept. 18, 2015) (FERC eLibrary No. 20150918-5212); Pet'rs' Mot. for Evidentiary Hr'g 12-16, Attachs. 1, 2, 3 & 4. Expert analysis in the record shows that demand for electricity—and consequently, the need for natural gas to fuel power plants—has leveled off in Virginia and North Carolina since the ACP's precedent agreements were signed in 2014. *See* Pet'rs' Mot. for Evidentiary Hr'g 19-29, Attachs. 1 & 5.

FERC never acknowledged that ACP's precedent agreements were three years old at the time it issued the Certificate Order. The record establishes that

electricity load in the territories of Dominion Energy Virginia, Duke Energy Progress, and Duke Energy Carolinas will not experience the growth rates the utilities predicted in 2014, when they contracted for ACP capacity. *See id.* For Virginia, load forecasts from PJM Interconnection, the independent regional grid manager, are level for the next ten years, sharply contradicting the forecasts from Dominion Energy Virginia. *See id.* at 19-22, Attachs. 1 & 5. In North Carolina, forecasts from Duke Energy Progress and Duke Energy Carolinas have dropped considerably since 2014. *See id.* at 24-29, Attach 1. Furthermore, the Energy Information Administration projects that demand for natural gas to fuel power plants in the Southeast will remain below 2015 levels until 2034. *See id.* at 17-18.

Record evidence also shows that existing pipeline capacity is adequate to meet natural gas demand in Virginia and North Carolina without the ACP. FERC gave this evidence only superficial consideration in its Certificate Order. *See* Certificate Order, 161 FERC ¶ 61,042 at P 56. An analysis from Synapse Energy Economics showed that even under a “high demand” scenario, the capacity of the existing pipeline system, with upgrades that FERC has now approved, would be adequate. *See* Pet’rs’ Mot. for Evidentiary Hr’g at 30-31, Attach. 6. FERC brushed aside the Synapse analysis, concluding that “long-term demand projections, such as those presented in the Synapse Study” are uncertain. Certificate Order, 161 FERC ¶ 61,042 at P 56. But FERC failed to consider that the Synapse Study

modeled a range of demand projections to address that very uncertainty. FERC cannot resort to its generic position—market studies are unreliable because demand varies—to avoid engaging with expert studies that contradict its preferred outcome.

Synapse analyzed the potential to convert the Transco Mainstem, the largest North-South pipeline on the East Coast, to bidirectional flow to allow Marcellus gas to move southward from Pennsylvania as far south as Alabama. *See* Pet'rs' Mot. for Evidentiary Hr'g 30-31, Attach. 6. Not only did FERC not address Synapse's analysis, it failed to acknowledge that it already approved the project that would complete the Transco conversion. *See* Order Issuing Certificate, *In re Transcon. Gas Pipe Line Co., LLC* 158 FERC ¶ 61,125 (Feb. 3, 2017). Despite clear evidence to the contrary, FERC summarily dismissed the Transco pipeline as not having enough available capacity to be a viable alternative to the ACP. *See* Final Environmental Impact Statement for the Atlantic Coast Pipeline and Supply Header Project under CP-15-554 et al. 3-4 to 3-5 (July 21, 2017) (FERC eLibrary No. 20170721-4000) ("Final EIS"); Certificate Order, 161 FERC ¶ 61,042 at P 57. But the record shows that the approved conversion project will move more Marcellus gas to the Southeast than ACP (1.7 bcf/day), and that gas would be available for end users like utilities in Virginia and North Carolina. *See id.* at P 4, 11. Moreover, FERC approved the Mountain Valley Pipeline in October 2017,

another producer-backed project that will supply 2.0 bcf/day of Marcellus gas into the Transco system, confirming that this system has available capacity. *See* Order Issuing Certificates, *In re Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043 at P 6, 10 (Oct. 13, 2017) (FERC eLibrary No. 20171013-4002).

More recent evidence that Petitioners submitted to the record with their Rehearing Request confirms that market demand for the pipeline in Virginia and North Carolina is weak or nonexistent. In September 2017, proceedings before the Virginia State Corporation Commission (“SCC”) showed that Dominion Energy Virginia is relying on inflated electricity load forecasts. Questioning the utility’s counsel, an SCC Commissioner observed that the utility’s load forecast “appear[ed] to be always high year after year” and asked, “[W]hat is the Company going to do about refining it or redefining it to recognize that you shouldn’t put too high a confidence level in that projection?” Pet’rs Rehearing Request at 28-29. In North Carolina, the Duke Energy utilities sharply reduced their electricity load forecasts in 2017 in Integrated Resource Plans filed with the North Carolina Utilities Commission. *See id.* at 30-35. Because the ACP is primarily slated to fuel gas-fired power generation, the decline in demand for generation is central to the question whether the pipeline is needed. FERC failed to consider this issue.

In conclusion, FERC’s decision “to not look behind precedent or service agreements to make judgments about the needs of individual shippers,” Certificate

Order 161 FERC ¶ 61,042 at P 54, renders its finding of public benefit arbitrary and capricious because it “failed to consider an important aspect of the problem.” *State Farm*, 463 U.S. at 43. To compound the problem, FERC not only ignored its 1999 Policy Statement, but adhered to its arbitrary sole reliance on precedent agreements instead of meaningfully considering substantial evidence in the record indicating a lack of market demand.

iii. FERC Superficially Considered Adverse Impacts to Landowners.

In determining whether to issue a Certificate, FERC must assess the adverse impacts of the project—including effects on landowners and communities—and balance those impacts against evidence of public benefits. Policy Statement, 88 FERC ¶ 61,745. Here, FERC’s finding that the public benefits of ACP outweigh the adverse impacts is not supported by substantial evidence, and its balancing analysis runs counter to the Policy Statement. FERC relied on Atlantic’s purported minimization of impacts to landowners and communities from the use of eminent domain to find that the project’s benefits outweigh its adverse impacts. In so doing, FERC failed to actually assess and balance the residual adverse impacts from the use of eminent domain against the ACP’s supposed public benefits. FERC’s finding that the project is required by the public convenience and necessity is therefore arbitrary and capricious.

FERC's Policy Statement recognizes that landowners and communities along a pipeline's route have an interest in avoiding unnecessary construction and any adverse impacts to property that result from the use of eminent domain. Policy Statement, 88 FERC ¶ 61,748. The Policy Statement thus encourages applicants to minimize adverse impacts to those interests at the outset. *Id.* ¶ 61,745. FERC's review of an applicant's minimization efforts, however, "is not intended to be a decisional step in the process for the Commission." *Id.* Though FERC may suggest further minimization, "the choice of how to structure the project at this stage is left to the applicant's discretion." *Id.* The meaningful analysis comes *after* such minimization efforts: "If residual adverse effects ... are identified, after efforts have been made to minimize them, then the Commission will proceed to evaluate the project by balancing the evidence of public benefits to be achieved against the residual adverse effects." *Id.*; *see also id.* ¶ 61,749 ("[T]he more adverse impact a project would have on a particular interest, the greater the showing of public benefits from the project required to balance the adverse impact.").

Here, FERC relied entirely on Atlantic's purported minimization efforts to find that the ACP's public benefits outweigh its adverse impacts. FERC merely discussed measures Atlantic took to co-locate a small portion of its pipeline with existing rights-of-way and to incorporate route variations "for various reasons,

including landowner requests.”³ Certificate Order, 161 FERC ¶ 61,042 at P 65. FERC then found that “while we are mindful that Atlantic has been unable to reach easement agreements with many landowners, for purposes of our consideration under the Certificate Policy Statement, we find that Atlantic has generally taken sufficient steps to minimize adverse impacts on landowners and surrounding communities.” *Id.* Based on this conclusory determination, FERC resolved that “the benefits that the ACP Project will provide to the market outweigh any adverse effects on ... landowners or surrounding communities.” *Id.* at P 70.

FERC’s evaluation of the considerable adverse impacts of Atlantic’s use of eminent domain lacked any serious analysis. FERC did not address the number of landowners that would be affected or identify the amount, character, or categories of property to be taken, nor the impact that taking would have on surrounding communities. Its boilerplate conclusion provides no rational assessment of how or why any of the ostensible benefits outweigh the adverse impacts to landowners.

The residual impacts that FERC failed to assess are substantial. Approximately twenty percent of the 2,900 landowners in the path of ACP have not reached voluntary agreements for easements across their property. John

³ FERC does not say, and apparently did not analyze, how many of the 201 route variations it touts were actually in response to landowners concerns, as opposed to Atlantic’s own engineering needs or requests from state and federal agencies to avoid sensitive resources.

Murawski, *Atlantic Coast Pipeline to Take Landowners to Court to Clear Way for 600-Mile Project*, News Observer (Nov. 16, 2017), <http://www.newsobserver.com/news/business/article184993198.html>. In all, nearly 600 landowners will be subject to eminent domain proceedings. *See id.* The ACP has faced considerable opposition from landowners and communities along its path. *See, e.g.*, Michael Martz, *Gas Pipeline Faces Mountain of Opposition in Western Virginia*, Richmond Times Dispatch (Jan. 3, 2015), www.richmond.com/news/virginia/gas-pipeline-faces-mountain-of-opposition-in-western-virginia/article_2f830d85-f1ac-5e77-95e6-c25dafd66699.html.

Whether Atlantic has “generally taken sufficient steps to minimize adverse impacts,” Certificate Order, 161 FERC ¶ 61,042 at P 65, does not answer the relevant question: whether the residual impacts are outweighed by the public benefits. Accordingly, FERC’s application of its balancing test was arbitrary and capricious because it did not “examine the relevant data and articulate a satisfactory explanation for its action.” *State Farm*, 463 U.S. at 43. FERC’s subsequent conclusion that the public benefits of the ACP outweigh the adverse impacts lacks the support of substantial evidence and renders FERC’s finding that the ACP is “required” by the public convenience and necessity arbitrary and capricious.

b. Petitioners Will Be Irreparably Injured Absent a Stay.

Construction of the ACP will cause imminent, significant, and permanent harm to the property and recreational and aesthetic interests of Petitioners' members. Once this harm occurs, it cannot be undone. Atlantic will seize private property, including farmland owned by families for generations; clear thousands of acres of mature forests, including stands of old growth trees; and blast and flatten miles of mountain ridges to build the ACP. *See* Certificate Order, 161 FERC ¶ 61,042 at P 65-66; Final EIS at 4-38; 4-44; 4-137; 4-167. It will trench through hundreds of waterways and wetlands, including mountain streams with vulnerable brook trout populations, permanently damaging these waterways. *See* Final EIS at 4-94; 4-100; 4-128; 4-213; 4-215; 4-243.

The Supreme Court and the Fourth Circuit recognize that this kind of environmental harm, “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 v. Vill. of Gambell*, 480 U.S. 531, 545 (1987); *Nat’l Audubon Soc’y v. Dep’t of Navy*, 422 F.3d 174, 201 (4th Cir. 2005). For example, courts in this Circuit have found that filling a stream valley constitutes irreparable harm because “the damage cannot be undone” and “money cannot rectify this type of loss.” *Ohio Valley Envtl. Coal. v. U.S. Army Corps of Eng’rs*, 528 F.Supp. 2d 625, 631-32 (S.D.W. Va. 2007). And numerous courts have found that the cutting of mature

trees constitutes irreparable harm that warrants preliminary relief. *See, e.g., League of Wilderness Defs. v. Connaughton*, 752 F.3d 755, 764 (9th Cir. 2014); *Tioronda, LLC v. New York*, 386 F. Supp. 2d 342, 350 (S.D.N.Y. 2005). For these reasons, a stay is necessary to protect Petitioners' members from irreparable harm until the Court reviews the merits of FERC's decision to approve the pipeline.

FERC itself acknowledges that construction of the ACP will cause irreparable harm. *See, e.g.,* Final EIS at 4-75 (acknowledging permanent effects on soil resources that cannot be mitigated); 4-128 (describing the risk of substantial, long-term harm to water quality); 4-153 (identifying permanent harm to thousands of acres of mature forests). Petitioners submit 25 declarations from members whose land will be taken and degraded by Atlantic, who live near the proposed route, and who use national forest lands and other resources that will be harmed by the pipeline. Petitioners' members' declarations confirm the harm identified by FERC and describe in clear and compelling detail the harm each declarant would suffer without a stay. *See* Ex. D.

In one of the most striking examples of the harm that will occur from pipeline construction, Atlantic will blast and flatten Appalachian mountain ridges to establish working platforms to install the pipeline. *See, e.g.,* Final EIS at 4-38 (“Another source of project-induced landslides are narrow ridgetops that require widening and flattening to provide workspace in the temporary right-of-way.”). In

one instance, the pipeline will run approximately 0.7 of a mile along the crest of Little Mountain in Bath County, Virginia, requiring that Atlantic lower the ridge by blasting, irreparably disfiguring the mountain. *See* W. Limpert Decl. ¶ 16, Ex. D. Below Little Mountain, the pipeline will cross more than a half mile of property owned by William Limpert, where it will require the clearing of a mature forest with trees that are hundreds of years old, before ascending another narrow, steeply sloped ridge, which will also be blasted and flattened. *See id.* ¶ 5, 11-13, 17-21.

In total, 11,776 acres of land would be disturbed by construction. *See* Final EIS at 4-349. Furthermore, ACP has already begun eminent domain proceedings in the Western District of Virginia against some of Petitioners' members. *See Carpenter Tech. Corp. v. City of Bridgeport*, 180 F.3d 93, 97 (2d Cir. 1999) (finding threat of irreparable injury from potentially wrongful exercise of eminent domain).

As courts have long recognized, no amount of money can recreate a mature forest, which will take hundreds of years to return after cutting, or restore an iconic Appalachian ridgeline once Atlantic blasts and flattens it. "Money can be earned, lost, and earned again; a valley once filled is gone." *Ohio Valley Envtl. Coal.*, 528 F. Supp. 2d at 632. The same is true of harm to the environment threatened by the construction of the ACP. Therefore, legal remedies cannot cure these harms, and a stay is justified.

c. Neither Atlantic nor FERC Will Be Substantially Injured by Issuance of a Stay.

A stay pending FERC's resolution of Petitioners' Rehearing Request is unlikely to result in any substantial injury to Atlantic, and certainly not to FERC. Atlantic will likely argue that delaying its construction schedule will result in economic harm. While such harm is relevant, any potential temporary harm to Atlantic's economic interests is outweighed by the irreparable harm to the environment caused by pipeline construction. *See Connaughton*, 752 F.3d at 766 (finding that temporary delay of one year resulting in economic harm to ski resort developer was not so substantial as to outweigh the irreparable environmental harm faced by plaintiffs). *See also Bair v. Cal. Dep't of Transp.*, No. C 10-04360 WHA, 2011 WL 2650896, at *8 (N.D. Cal. July 6, 2011) (irreparable harm to redwoods outweighed cost of delaying the project for a year as a result of time of year restrictions); *Idaho Sporting Cong., Inc. v. Alexander*, 222 F.3d 562, 569 (9th Cir. 2000) (finding irreparable harm of cutting old growth trees outweighed financial harm to Forest Service, companies, and local communities).

d. A Stay Pending a FERC Decision on Rehearing is in the Public Interest.

In cases involving preservation of the environment, the balance of harms generally favors the grant of injunctive relief. *See Amoco*, 480 U.S. at 545 ("If such injury is sufficiently likely ... the balance of harms will usually favor the issuance

of an injunction to protect the environment.”). Here, construction impacts to forests, streams, and wetlands, and the resulting loss of ecological services they provide, constitute injury to the public interest in protecting natural resources pursuant to environmental and property protection laws.

Moreover, the public interest requires that the eminent domain power granted to Atlantic be exercised for the public benefit. The public, therefore, has an interest in FERC’s compliance with the Natural Gas Act by its terms—public convenience and necessity—when it grants the extraordinary power of eminent domain to a private company. Finally, as discussed above, the record demonstrates that there is no immediate need for the ACP to meet the region’s energy needs, such that the public’s interest in having adequate energy infrastructure would not be threatened by a stay. Indeed, the record establishes that the pipeline is completely unnecessary because there is sufficient capacity in current pipelines to transport natural gas most of the way to ACP’s end-users.

CONCLUSION

Accordingly, Petitioners request that the Court stay the pipeline construction authorized by FERC’s Certificate Order for the Atlantic Coast Pipeline pending completion of the Court’s review in this case.

Respectfully submitted,

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DATED: March 8, 2018

CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(g), I certify that this motion complies with the word limit of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this motion contains 5,199 words.

I further certify that this motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared using a proportionally spaced typeface, Times New Roman, 14-point font.

/s/ Gregory Buppert
Gregory Buppert (Va. Bar No. 86676)
SOUTHERN ENVIRONMENTAL LAW CENTER

DATED: March 8, 2018

CERTIFICATE OF SERVICE

I hereby certify that on March 8, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Gregory Buppert
Gregory Buppert (Va. Bar No. 86676)
SOUTHERN ENVIRONMENTAL LAW CENTER

DATED: March 8, 2018