ORAL ARGUMENT HAS NOT BEEN SCHEDULED

In the United States Court of Appeals for the District of Columbia Circuit

Nos. 17-1236 & 17-1240 (consolidated)

SIERRA CLUB,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITIONS FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

RESPONDENT'S OPPOSITION TO EMERGENCY MOTION FOR STAY AND TO EMERGENCY PETITION UNDER ALL WRITS ACT

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November 16, 2017

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GLOSSARY

Certificate Order	*NEXUS Gas Transmission, LLC*, 160 FERC ¶ 61,022 (Aug. 25, 2017)
Commission or FERC	Federal Energy Regulatory Commission
Environmental Statement or EIS	Final environmental impact statement issued for the NEXUS pipeline project proposal
Mot.	Movant-Petitioner Sierra Club Motion for Emergency Stay, filed on Nov. 13, 2017
NEPA	National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321, *et seq.*
NEXUS	NEXUS Gas Transmission, LLC
P	The internal paragraph number within a FERC order
Pet.	Movant-Petitioner Sierra Club Emergency Petition for Writ Staying the FERC Order, filed on Nov. 13, 2017
Project	NEXUS pipeline project
Tolling Order	*NEXUS Gas Transmission, LLC*, Docket No. CP16-22-001 (Oct. 23, 2017)

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INTRODUCTION

Movant-Petitioner Sierra Club asks this Court for the extraordinary remedy of indefinitely delaying the NEXUS pipeline project ("Project"). But Sierra Club fails to establish extraordinary circumstances justifying such a request. Indeed, Sierra Club makes its request a mere five days after the Court denied Sierra Club's substantially similar request, filed by the same organization (Appalachian

Mountain Advocates) on behalf of Sierra Club, to stay a different pipeline proceeding.[1]

The Federal Energy Regulatory Commission ("FERC" or "Commission") recently granted a certificate of public convenience and necessity to the NEXUS Project; requests for rehearing of the Commission's certificate decision are pending. The Project is an interstate natural gas pipeline that the Commission has determined, in its expert judgment and after thorough consideration and balancing of competing values, is in the public interest.

Sierra Club's emergency plea ignores one-half of the Commission's public interest balance—whether the need for, and benefits from, the Project outweigh potential adverse impacts. The Commission found substantial benefits from consumer access to new sources of natural gas in Ohio and Michigan.

As to the other half of the balance, Sierra Club ignores an array of mitigation measures designed to minimize, if not eliminate, environmental impacts. The Commission considered all views (including those of Sierra Club) in its Certificate Order and in its comprehensive environmental impact statement for the Project that informed that order, consistent with its responsibilities under the Natural Gas Act

[1] *See Allegheny Defense Project, et al.*, Nos. 17-1098, *et al.* (D.C. Cir. Nov. 8, 2017) (denying motion for stay of Atlantic Sunrise pipeline proceeding) (Sierra Club was one of several movants).

and the National Environmental Policy Act of 1969 (NEPA). The Commission is, as it must be under the statutes it administers, sensitive to all perspectives, whether economic or environmental in nature. The Commission was particularly sensitive to environmental concerns here, as evidenced by its lengthy and comprehensive Environmental Impact Statement. To the extent that Sierra Club and other parties believe that the Commission has been insensitive or inattentive to their concerns, they can request—and have requested—agency rehearing, as contemplated by the Natural Gas Act; the agency has not yet made a final decision.

The requested stay would upset the Commission's public interest balance and imperil the Project. Accordingly, it must be denied. This and other courts have repeatedly rejected similar efforts to halt the effectiveness of the Commission's natural gas infrastructure decisions prior to judicial review on the merits. In fact, in the past six years, courts have denied all 16 emergency requests for stays of the effectiveness of Commission natural gas certificate orders, including:

- *Allegheny Defense Project, et al. v. FERC*, No. 17-1098 (D.C. Cir. Nov. 8, 2017) (denying stay of pipeline construction based upon a challenge to FERC's analysis of indirect impacts);

- *Adorers of the Blood of Christ, et al. v. FERC*, No. 5:17-cv-3163 (E.D. Pa. Sept. 28, 2017) (denying preliminary injunction to stop pipeline construction and operation), *on appeal*, No. 17-3163 (3d Cir. Oct. 13, 2017) (denying injunction pending appeal);

- *Sierra Club, et al. v. FERC*, No. 16-1329 (D.C. Cir. Nov. 17, 2016) (denying stay of pipeline construction based upon a challenge to FERC's indirect impacts analysis); and

- *City of Boston, et al. v. FERC*, No. 16-1081 (D.C. Cir. Oct. 28, 2016) (denying stay of pipeline in-service date based upon a challenge, in part, to FERC's cumulative impacts analysis).[2]

Sierra Club has not presented any legitimate reason why this Court should reach a different decision here.

BACKGROUND

This case concerns the Commission's issuance of three conditional certificates of "public convenience and necessity" under section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c). One certificate authorized NEXUS Gas Transmission, LLC ("NEXUS") to build and operate the NEXUS pipeline project; another certificate authorized Texas Eastern Transmission, LP to expand its

[2] The other twelve court orders denying stays of FERC natural gas infrastructure orders are: *Catskill Mountainkeeper, et al. v. FERC*, No. 16-345 (2d Cir. Feb. 24, 2016); *In re Clean Air Council*, No. 15-2940 (3d Cir. Dec. 8, 2015); *Town of Dedham v. FERC*, No. 1:15-cv-12352, 2015 WL 4274884 (D. Mass. July 15, 2015); *EarthReports, Inc. v. FERC*, No. 15-1127 (D.C. Cir. June 12, 2015); *In re Stop the Pipeline*, No. 15-926 (2d Cir. Apr. 21, 2015); *In re Del. Riverkeeper Network*, No. 15-1052 (D.C. Cir. Mar. 19, 2015); *Minisink Residents for Envt'l Pres. and Safety v. FERC*, No. 12-1481 (D.C. Cir. Mar. 5, 2013); *Feighner v. FERC*, No. 13-1016 (D.C. Cir. Feb. 9, 2013); *Del. Riverkeeper Network v. FERC*, No. 13-1015 (D.C. Cir. Feb. 6, 2013); *In re Minisink Residents for Envt'l Pres. and Safety*, No. 12-1390 (D.C. Cir. Oct. 11, 2012); *Coal. for Resp. Growth & Res. Conservation v. FERC*, No. 12-566 (2d Cir. Feb. 28, 2012); and *Summit Lake Paiute Indian Tribe and Defenders of Wildlife v. FERC*, Nos. 10-1389 & 10-1407 (D.C. Cir. Jan. 28, 2011 & Feb. 22, 2011).

existing system in Pennsylvania and Ohio and interconnect with the NEXUS pipeline project; and the third certificate authorized DTE Gas Co. to expand its existing system and lease some of its pipeline capacity to NEXUS. *See NEXUS Gas Transmission, LLC*, 160 FERC ¶ 61,022, PP 1-3, 5 ("Certificate Order"), *reh'g pending*. Sierra Club's petition and emergency motion for stay challenge only the conditional certificate granted to NEXUS.

The challenged certificate order authorizes NEXUS, upon satisfying necessary environmental conditions, to construct new facilities to transport, in total, approximately 1.5 million dekatherms of natural gas per day from the Appalachian Basin to Ohio and Michigan—including to markets along the NEXUS pipeline system. *See id*. PP 1, 6-10; EIS 1-3. The Project also will connect with existing pipeline facilities in Michigan that will allow natural gas to be transported to the Dawn Hub in Ontario, Canada. *See* Certificate Order PP 1, 9, 22.

The Commission balanced the public benefits of the Project against potential adverse consequences. *See* Certificate Order PP 33-34. The Commission found evidence of public need for the Project based on "growing demand" for natural gas in the region. *See id.* PP 37-38. NEXUS entered into long-term agreements for firm service with eight shippers to use close to 60 percent of the Project's total capacity. *See id*. P 41. NEXUS also explained that many new natural gas-fired

power plants have been planned in the region, and the owners of some of those plants filed letters of support in this proceeding. *See id.* P 38.

In addition to its need assessment under the Natural Gas Act, the Commission conducted a detailed environmental review consistent with its obligations under the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.* Its review of the application resulted in a 541-page final environmental impact statement ("Environmental Statement" or "EIS").

Before issuing the Environmental Statement, the Commission reviewed over 7,000 written comments, and considered oral comments from more than 580 people who spoke at twelve public meetings. Certificate Order PP 105, 107. NEXUS also considered and adopted 239 route variations, a 91 percent change to its original route design, to avoid or reduce effects on environmental or other resources, resolve engineering issues, or address stakeholder concerns. *See id*. P 141. While the Commission found that the Project would result in some adverse environmental impacts, it concluded that those impacts would be reduced to less-than-significant levels by implementing 39 mandatory conditions to avoid, minimize, and mitigate potential environmental impacts associated with the Project. *See id*. P 108; Certificate Order App. B.

Although the Commission's order and Environmental Statement addressed numerous issues, Sierra Club raises just three merits issues in its stay motion and

petition to this Court. First, Sierra Club contends that the Commission violated the Natural Gas Act in finding that the Project's public benefits outweigh its adverse impacts. *See* Mot. 9-11. Second, Sierra Club argues that the Commission violated NEPA by giving "terse treatment to important alternatives [to the Project], including the 'no action' alternative." Mot. 17-18. Third, Sierra Club asserts that the Commission violated NEPA because it "does not adequately address the climatological effects of downstream natural gas usage from the NEXUS pipeline." Mot. 19. The Commission addressed all three of those issues in its Certificate Order. *See infra* pp. 14-22.

Sierra Club and other parties requested rehearing and asked the Commission to stay the Project. Those requests are still pending before the Commission. On October 23, 2017, the Secretary of the Commission issued a procedural order tolling the period of time for the Commission to issue an order addressing the matters raised in the requests for rehearing of the Certificate Order. *NEXUS Gas Transmission, LLC*, Docket No. CP16-22-001 (Oct. 23, 2017) ("Tolling Order") ("[R]ehearing of the Commission's order is hereby granted for the limited purpose of further consideration.").

ARGUMENT

Sierra Club seeks judicial intervention too soon—the Commission has not yet acted on the merits of recently-filed requests for rehearing of its Certificate Order, and thus has not yet issued a final order in this proceeding.

Nor has Sierra Club justified the extraordinary remedy of a stay. *See Munaf v. Geren*, 553 U.S. 674, 691 (2008) (stay pending appeal "is an extraordinary and drastic remedy; it is never awarded as of right"); *Reynolds Metals Co. v. FERC*, 777 F.2d 760, 762 (D.C. Cir. 1985) (petitions for stay under All Writs Act must "satisfy the normal requirements . . . for all extraordinary relief—*i.e.*, the well established requirements that we routinely apply to motions for stay pending appeal").

In order to obtain such extraordinary relief, Sierra Club must establish: (1) a strong showing that it is likely to prevail on the merits of its appeal; (2) that, without such relief, it will be irreparably injured; (3) a lack of substantial harm to other interested parties; and (4) that the public interest favors a stay. *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). Courts "must balance the competing claims of injury and must consider the effect . . . of the granting or withholding of the requested relief," and "pay particular regard for the public consequences . . . ." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 9 (2008) (quotations omitted).

I. Sierra Club Seeks Extraordinary Relief From A Non-Final FERC Order

This Court has jurisdiction to review "only final orders of the Commission." *Transwestern Pipeline Co. v. FERC*, 59 F.3d 222, 226 (D.C. Cir. 1995). And it has clarified that the "presumption that Congress intends judicial review of administrative action applies . . . *only* to final agency action." *Pub. Citizen, Inc. v. FERC*, 839 F.3d 1165, 1171 (D.C. Cir. 2016) (internal quotation and citation omitted); *see also id*. ("Final agency action is that which 'mark[s] the consummation of the agency's decisionmaking process.'") (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (alteration by Court)).

The Certificate Order is not final agency action. Sierra Club and other parties recently requested rehearing before the agency, and those requests remain pending—rendering the Order non-final. *See, e.g.*, *Clifton Power Corp. v. FERC*, 294 F.3d 108, 111-12 (D.C. Cir. 2002) (a petition for review filed before the rehearing order issues is "incurably premature" and "must be dismissed"); *Papago Tribal Utility Auth. v. FERC*, 628 F.3d 235, 238-39 & n.11 (D.C. Cir. 1980) (explaining that a party must file for Commission rehearing before it may file a petition for review, and that the order denying requests for rehearing is the final, reviewable agency order).

Sierra Club's conviction that rehearing requests are not pending, *see* Mot. 2-3, does not conjure finality. This and other courts have uniformly determined that

Natural Gas Act section 19(a), 15 U.S.C. § 717r(a), does not require the agency to act on the merits of a rehearing request within 30 days. Rather, the Commission appropriately "acts upon the application for rehearing" by providing notice within that timeframe that it intends to further consider a rehearing request, as it did here in its October 23, 2017 Tolling Order. *See Cal. Co. v. FPC*, 411 F.2d 720, 721 (D.C. Cir. 1969) ("the Commission has power to act on applications for rehearing beyond the 30-day period so long as it gives notice of this intent"); *City of Glendale, Cal. v. FERC*, No. 03-1261, 2004 WL 180270, at *1 (D.C. Cir. Jan. 22, 2004) ("A petition for review of an agency order filed while an administrative request for reconsideration of the same order remains pending is incurably premature. Nor is there merit to petitioner's contention that this court should treat FERC's orders tolling the period for resolving petitioner's requests for agency rehearing as effectively denying rehearing; the tolling orders do not resolve the rehearing requests but simply extend the time to consider them.").[3]

[3] Courts of appeals in other circuits have uniformly reached the same conclusion. *See Kokajko v. FERC*, 837 F.2d 524, 525 (1st Cir. 1988); *Gen. Am. Oil Co. v. FPC*, 409 F.2d 597, 599 (5th Cir. 1969); *see also Del. Riverkeeper Network v. FERC*, 243 F. Supp. 3d 141, 145-46 (D.D.C. 2017) ("The D.C. Circuit has held that section 717r's language requiring the Commission to take action with regard to a rehearing request within 30 days, or have it deemed denied, does not require FERC to act on the merits.") (collecting cases), *on appeal*, D.C. Cir. No. 17-5084.

Further, just last week, when the Court denied Sierra Club's similar motion (filed with other movants) for an emergency stay of the Atlantic Sunrise pipeline project in *Allegheny Defense Project*, Nos. 17-1098, *et al.*, the Court did so despite similar objections to the timeliness of agency action on rehearing. *See Allegheny Defense Project, et al.*, Nos. 17-1098, et al. (D.C. Cir. Nov. 8, 2017). In that case, the tolling order issue was fully briefed in motions to dismiss, which were referred to the merits panel prior to Sierra Club's filing of the emergency motion to stay the Atlantic Sunrise project. Then, in rejecting that emergency motion, the Court found that movants had not satisfied the "stringent requirements" for a stay, "including given the issues raised in the pending motions to dismiss." Because similar issues are present in this case—and the agency action is equally non-final—the Court should reach the same conclusion here. *See Reynolds Metals*, 777 F.2d at 762 ("[R]elief under the All Writs Act . . . is an 'extraordinary remedy that may be invoked only if the statutorily prescribed remedy' is 'clearly inadequate.'") (quoting *In re GTE Service Corp.*, 762 F.2d 1024, 1027 (D.C. Cir. 1985)).

Sierra Club's primary concern, underlying both its emergency motion and All Writs petition, is that pipeline construction can commence before the completion of the agency rehearing and judicial review process. But this does not undermine the validity of the statutorily-prescribed remedy. Indeed, Congress designed the Natural Gas Act to produce that default outcome. *See* 15 U.S.C.

§ 717r(c) ("The filing of an application for rehearing under [15 U.S.C. § 717r(a)] shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order."); *Pub. Citizen*, 839 F.3d at 1174 (explaining in the context of the analogous FERC-administered Federal Power Act that, where judicial review is limited due to an operation of law, "[a]ny unfairness associated with this outcome inheres in the very text of the [statute]. Accordingly, it lies with Congress, not this Court, to provide the remedy."); *accord Telecomms. Research and Action Ctr. v. FCC*, 750 F.2d 70, 79 (D.C. Cir. 1984) ("Postponing review until relevant agency proceedings have been concluded 'permits an administrative agency to develop a factual record, to apply its expertise to that record, and to avoid piecemeal appeals.'").

"In short, the All Writs Act does not authorize a court to circumvent bedrock finality principles[.]" *In re Murray Corp.*, 788 F.3d 330, 335 (D.C. Cir. 2015) (citing *Penn. Bureau of Corr. v. U.S. Marshals Serv.*, 474 U.S. 34 (1985), and *Schlagenhauf v. Holder*, 379 U.S. 104 (1964)).

II. Sierra Club Cannot Show A Likelihood Of Success On The Merits

Sierra Club cannot meet the "'independent, free-standing requirement'" of demonstrating a likelihood of success on the merits. *Sherley v. Sebelius*, 644 F.3d 388, 393 (D.C. Cir. 2011) (citing *Winter*, 555 U.S. at 22). In the context of a National Environmental Policy Act claim, this Court has explained that a petitioner

must "clearly establish[]" a violation to obtain injunctive relief. *Cuomo v. NRC*, 772 F.2d 972, 976 (D.C. Cir. 1985) (finding that petitioner failed to demonstrate a "substantial case on the merits").

Commission action under the Natural Gas Act is entitled to a high degree of deference. *See Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1308 (D.C. Cir. 2015) (because the grant or denial of a certificate of public convenience and necessity is "peculiarly within the discretion of the Commission," the Court does not "substitute its judgment for that of the Commission"). So too with Commission action under NEPA. *See Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 377-78 (1989). If an agency's NEPA "decision is fully informed and well-considered, it is entitled to judicial deference and a reviewing court should not substitute its own policy judgment." *EarthReports v. FERC*, 828 F.3d 949, 954-55 (D.C. Cir. 2016).

Here, the Commission satisfied its Natural Gas Act and NEPA responsibilities, and its decisions are supported by substantial record evidence – demonstrated by the 541-page Environmental Statement considering the proposed Project. In contrast to this extensive analysis, Sierra Club focuses on three discrete elements of the Certificate Order: the determination of public need for the Project; the consideration of alternatives; and the purported downstream climate impacts

indirectly caused by the Project. It has not demonstrated that it is likely to succeed on any of these three claims.

A. The Commission Reasonably Determined That There Is A Public Need For The Project

Sierra Club appears to argue that, in finding a need for the Project, the Commission "ignore[d]" its own policy by giving too much weight to the existence of long-term contracts between NEXUS and customers. Mot. 11-12. Sierra Club also points to evidence purportedly indicating that the Project will not "add capacity to meet any increase in market demand" and is not competitive. Mot. 14-17. These arguments fundamentally misunderstand current Commission policy and the Commission's analysis in this case.

The Commission's policy is to assess a project's need by analyzing whether the pipeline is financially supported without subsidization from existing customers, and whether the applicant has attempted to eliminate or minimize adverse effects on customers, other pipelines in the market, and landowners and communities along the pipeline route. Certificate Order P 33-34.

The Commission considered all of those factors in this case. *See id.* P 35 (finding no impact on existing customers and "no adverse impact on other pipelines in the region or their captive customers"); *id.* PP 36-37, 141, n.131 (finding NEXUS sought to minimize landowner and community impacts by siting 45 percent of the route using existing rights-of-way and previously disturbed

property and making 239 route changes in response to stakeholder concerns); *id.* PP 38-41 (noting "growing demand" for natural gas in the region and long-term contracts for 59 percent of the Project's capacity); *id.* PP 42-46 (analyzing, but ultimately rejecting, potential design alternatives); *id.* P 48 (explaining that all risk associated with unsubscribed capacity falls solely on NEXUS); *id.* P 49 (noting that NEXUS has obtained easements for over 93 percent of the route without the use of eminent domain). Based on those "benefits" and "minimal adverse impacts," the Commission concluded that—subject to numerous environmental and operating conditions—the "public convenience and necessity requires approval of the NEXUS proposal." *Id.* P 51.

Sierra Club contends that it is problematic that "46% of subscribed capacity is retained by" companies affiliated with NEXUS, including two companies that may be able to insulate themselves from financial losses by passing their costs on to captive ratepayers in Michigan. Mot. 13. The Commission reasonably disagreed. *See* Certificate Order P 47 ("No evidence suggesting affiliate abuse has been filed in this proceeding."); *id.* P 48 n.38 (explaining that issues concerning an affiliate's ability to recover costs from captive customers at the distribution level are within Michigan's—not the Commission's—jurisdiction).

B. The Commission Reasonably Considered Alternatives To The Project

Sierra Club argues that the Commission violated NEPA by failing to consider alternatives to the Project, including the "no action" alternative, Mot. 17-18, but it cannot demonstrate a likelihood of success on that claim. The Commission's thorough analysis of alternatives in the Environmental Statement and the Certificate Order directly contradicts Sierra Club's assertions.

In analyzing the proposed Project, the Commission evaluated "a wide range of alternatives . . ., including the no-action alternative, system alternatives, major route alternatives, minor route variations, and aboveground facility site alternatives." Certificate Order P 142; *id.* PP 143-155 (providing detailed discussion of alternatives); EIS 3-1 – 3-141 (same). The Commission rejected arguments that renewable energy sources are a viable alternative to the Project. Certificate Order P 143. The Commission agreed that renewable energy sources are a reasonable alternative to fossil fuel-fired electricity generating facilities. *Id.* But the Commission explained that it is "the states, . . . not this Commission, that regulate generating facilities;" and, therefore, "[a]uthorizations related to how markets would meet demands for electricity are not part of the applications before the Commission." *Id.*

C. The Commission Reasonably Assessed The Project's Downstream Effects On Climate Change

Sierra Club focuses on the downstream effects, i.e., "the climatological effects of downstream natural gas usage from the NEXUS Pipeline." Mot. 19. Sierra Club offered the same focus, earlier this month, in its unsuccessful motion for stay of the Atlantic Sunrise pipeline proceeding. *See supra* p. 11.

Here, the Commission reasonably explained that the downstream use of the natural gas did not qualify as an indirect effect, as defined by the Council on Environmental Quality, because the gas "will be delivered into the interstate natural pipeline grid, and its end use is not predictable." Certificate Order P 173, n.191; *see also* EIS 4-278 ("[T]he upstream production and downstream combustion of natural gas is not casually connected because the production and end-use would occur with or without the projects.").

In any event, the Commission took the requisite "hard look" at the Project's potential impacts on climate change. It developed estimates of the direct greenhouse gas emissions associated with construction and operation of the Project, as well as generic downstream emissions. *See* Certificate Order PP 172-73; EIS 4-278 – 4-279. The Commission also found that its estimate of the Project's downstream greenhouse gas emissions "represents an upper bound . . . because some of the gas may displace other fuels . . . [and] displace gas that otherwise would be transported via different means." Certificate Order P 173; *see*

also EIS 4-278 – 4-279 ("[T]his value may represent a significant overestimation of emissions because it assumes the total maximum capacity is transported 365 days per year.").

All of this satisfies this Court's recent *Sierra Club* decision. There, this Court held that a FERC environmental impact statement "should have either given a quantitative estimate of the downstream greenhouse emissions that will result from burning the natural gas that the pipelines will transport or explained more specifically why it could not have done so." *Sierra Club v. FERC*, 867 F.3d 1357, 1374 (D.C. Cir. 2017). Of those two paths, Sierra Club concedes that FERC took the former approach here—i.e., it "quantified the downstream emissions," Mot. 19.

In Sierra Club's view, however, *Sierra Club* requires more. It contends that the Commission should have "evaluated the additional emissions' effect on climate change." Mot. 20.

Sierra Club's argument stretches *Sierra Club* too far. *See* 867 F.3d at 1371 ("We conclude that at a minimum, FERC should have estimated the amount of power-plant carbon emissions that the pipelines will make possible"); *id*. at 1374 (requiring quantification or explanation). This Court declined the petitioner's invitation in that case to require a more detailed climate assessment from the agency—that is, it did not decide whether to require FERC to connect "downstream carbon emissions to particular climate impacts" using a particular

carbon valuation tool. *Id*. at 1375. Instead, it asked the Commission to explain on remand whether the agency could use that tool.[4] *See also EarthReports*, 828 F.3d at 956.

The Commission, in its discretion here, used an accepted methodology—developed by the EPA—to determine a conservative estimate of downstream greenhouse gas emissions. *See* Certificate Order P 173; EIS 4-278 – 4-279; *see also Constitution Pipeline Co. LLC*, 154 FERC ¶ 61,046, P 128 n.198 (2016) (explaining agency discretion "to determine the type and level of analysis that is appropriate and that the investment of time and resources should be reasonably proportional to the importance of climate change-related considerations.").

III. Sierra Club Has Not Established An Irreparable Injury

A claim of irreparable injury absent a stay must be "both certain and great; it must be actual and not theoretical." *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). This includes the "further requirement that the movant substantiate the claim that irreparable injury is 'likely' to occur." *Id.* ("The movant must provide proof . . . indicating that the harm is certain to occur in the near future."). Unsupported assertions are insufficient. *Cuomo*, 772 F.2d at 978. The

[4] The Court's mandate in *Sierra Club* has not yet issued. Pending before the Court are petitions for rehearing as to the Court's choice of remedy—whether the Court should have vacated the FERC certificate orders underlying the *Sierra Club* appeal.

party seeking relief must show that "the injury complained of [is] of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm." *Wis. Gas*, 758 F.2d at 674 (quotation omitted). A stay is not a matter of right; rather, any injury must be balanced against the other stay factors. *See Nken v. Holder*, 556 U.S. 418, 427 (2009) (a stay is an exercise of judicial discretion dependent upon the circumstances of the particular case).

Here, Sierra Club alleges harm to its members' recreational, aesthetic, and property interests caused by "mature tree clearing, soil compaction, and stream crossings." Mot. 21. Sierra Club also asserts that "it is certain that mature trees will be cleared imminently, creating immediate impacts to the interests of Petitioner's members' property." Mot. 21-22 (citing declarations). These conclusory assertions do not suffice to demonstrate irreparable injury. *See Cuomo*, 772 F.2d at 978.

Sierra Club's allegations also ignore the mitigation measures designed to minimize, if not eliminate altogether, environmental impacts. The Commission carefully addressed concerns about tree clearing, soil compaction, and stream crossings, and many others, in its Environmental Statement and concluded that, as mitigated, none of the impacts would be significant. *See* EIS 4-1 – 4-280, 5-1.

As to tree clearing, the Environmental Statement found that due to NEXUS's use of existing rights-of-way, and the eventual regrowth of trees outside

the permanent right-of-way, "the permanent conversion of forested lands would not result in a significant impact." EIS 5-6; *see also id.* 4-71 – 4-75. And impacts on vegetation "would be further mitigated through implementation of the applicants' construction and restoration plans and our recommendations." EIS 5-6; *id.* 4-75 ("Vegetation clearing impacts can be minimized by using special construction techniques, proper restoration measures, and post-construction monitoring.").

As to soil compaction, any impacts would be minimal and limited geographically. *See* EIS 4-27 (Project would permanently impact only 26.6 acres of compaction prone soils); *id.* 4-29 – 4-30 (discussing measures to mitigate soil compaction); *id.* 5-3 (concluding that potential soil impacts would be avoided or mitigated "to less than significant levels"). Similarly, as to stream crossings, the Environmental Statement concluded that there would be "no long-term effects on surface waters." EIS 5-4. And the Commission found that "proper construction techniques and timing can ensure that impacts are temporary and minor." Certificate Order P 124.

The Commission thus reasonably considered and addressed any potential environmental impacts caused by the Project. *See also* Certificate Order App. B (environmental mitigation conditions for the Project); *EarthReports*, 828 F.3d at 958 (affirming FERC's NEPA review because it addressed concerns at length and

made its authorization contingent on compliance with all applicable regulations and coordination with relevant agencies).

IV. A Stay Will Substantially Injure Other Parties

The Court must consider whether "a stay would have a serious adverse effect on other interested persons." *Va. Petroleum Jobbers Ass'n. v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958). This Court has recognized that entities have a protected property interest in permits issued by the government. *See 3883 Conn. LLC v. Dist. of Columbia*, 336 F.3d 1068, 1074 (D.C. Cir. 2003) ("the permit holder has a substantial interest in the continued effect of the permit and in proceeding with a project without delay").

Enjoining the Commission-issued certificate and halting the Project, while the agency considers rehearing requests, would seriously jeopardize the availability of additional capacity needed to transport natural gas to Midwestern markets. *See, e.g.*, Certificate Order P 40 ("There is also no evidence that available capacity exists on other pipelines to provide the 885,000 [dekatherms] per day of service currently subscribed by the NEXUS shippers."). Such an outcome would harm not only the certificate holder, but also the eight project shippers that have executed long-term supply agreements with NEXUS, many of which are local distribution companies that supply natural gas to residential and small commercial customers. *See id.* P 9.

V. The Public Interest Does Not Favor A Stay

The public interest is a "crucial" factor in "litigation involving the administration of regulatory statutes designed to promote the public interest." *Va. Petroleum Jobbers*, 259 F.2d at 925. The Natural Gas Act charges FERC with regulating the interstate transportation and wholesale sale of natural gas in the public interest. *See, e.g.*, *Columbia Gas Transmission Corp. v. FERC*, 750 F.3d 105, 112 (D.C. Cir. 1984). Because the Commission is the "presumptive[] guardian of the public interest," its views "indicate[] the direction of the public interest" for purposes of deciding a stay request. *N. Atl. Westbound Freight Ass'n v. Fed. Mar. Comm'n*, 397 F.2d 683, 685 (D.C. Cir. 1968); *see Myersville*, 783 F.3d at 1307-08 (Congress has entrusted FERC to determine if a certificate is in the public interest).

Here, a stay of the Project would not serve the public interest. The Commission found a strong showing of need in issuing the certificates to provide natural gas to meet the region's growing demand. *See* Certificate Order PP 33-51. A stay would frustrate these objectives.

As for the Commission's October 23 Tolling Order, affording the agency additional time to consider requests for rehearing, it neither creates final action nor evidences bad faith by the agency; Sierra Club's claims to the contrary are unfounded. *See* Mot. 2-9; *see also supra* pp. 9-12.

CONCLUSION

For the foregoing reasons, Sierra Club's emergency motion and petition for stay of pipeline construction should be denied.

Respectfully submitted,

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November 16, 2017

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g) and Circuit Rule 32(e), I certify that this motion complies with the type-volume limitation of the Court's November 14, 2017 order in this case because this motion contains 5,195 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 in Times New Roman 14-point font using Microsoft Word 2013.

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CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 16th day of November 2017, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system.

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