

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

EARTHREPORTS, INC. (DBA)
PATUXENT RIVERKEEPER), SIERRA)
CLUB, AND CHESAPEAKE CLIMATE)
ACTION NETWORK,)

Petitioners,)

v.)

FEDERAL ENERGY REGULATORY)
COMMISSION,)

Respondent.)

No. 15-1127

**PETITIONERS' EMERGENCY MOTION FOR STAY PENDING JUDICIAL
REVIEW AND FOR EXPEDITED BRIEFING**

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Exhibit 4, Declaration of Frank Mazur, dated May 18, 2015

Exhibit 5, Declaration of Frederick Tutman, dated May 31, 2015

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Exhibit 7, Declaration of David Linthicum, dated May 29, 2015

Exhibit 8, Declaration of Dan Chu, dated May 15, 2015

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Exhibit G, Letter from Mario Tamburri, University of Maryland, Center for Environmental Science, Chesapeake Biological Laboratory, to Kimberley Bose, Secretary, Federal Energy Regulatory Commission, CP13-113-000, Accession No. 20140602-5111 (June 2, 2014)

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Exhibit K, Federal Energy Regulatory Commission, Order Granting Rehearing for Further Consideration, Dominion Cove Point LNG, LP, Docket No. CP13-113-001, Accession No. 20141113-3021 (Nov. 13, 2014)

Pursuant to Federal Rule of Appellate Procedure 18 and Circuit Rules 18 and 27(f), Petitioners EarthReports, Inc. (dba Patuxent Riverkeeper), Sierra Club, and the Chesapeake Climate Action Network move for an immediate stay of two orders of the Federal Energy Regulatory Commission (“FERC” or the “Commission”) that allow Dominion Cove Point LNG, LP to construct and operate a liquefied natural gas (“LNG”) export terminal in rural Calvert County, on the shores of the Chesapeake Bay.¹ Petitioners already have been harmed by project-related construction and need immediate relief to prevent further injury. While Petitioners’ timely motion for a stay languished before FERC for nearly seven months, the Commission issued 28 decisions authorizing Dominion to begin construction.² Armed with FERC’s approvals, Dominion built a pier that juts out 166 feet into the Patuxent River, cleared nearly 100 acres of forest to create a construction staging area, and began demolishing buildings to make way for a

¹ See Order, 148 FERC ¶ 61,244 (Sept. 29, 2014) (“Authorization Order”) (D’Ambrosio Decl., Ex. A); Order, 151 FERC ¶ 61,095 (May 4, 2015) (“Rehearing Order”) (denying Petitioners’ requests to rehear the Authorization Order and to stay construction) (D’Ambrosio Decl., Ex. B).

² Petitioners filed their request for rehearing of the Authorization Order—a prerequisite for seeking judicial review, 15 U.S.C. § 717r(a)—and their motion for a stay on October 15, 2014. Request for Rehearing, Accession No. 20141015-5159 (Oct. 15, 2014) (D’Ambrosio Decl., Ex. C); Motion for Stay Pending Rehearing, Accession No. 20141015-5160 (Oct. 15, 2014) (D’Ambrosio Decl., Ex. D); see also D’Ambrosio Decl. ¶¶ 7, 9 (listing 29 orders authorizing construction, 28 of which were issued after Petitioners sought a stay).

power plant that will run its operations—all before Petitioners could bring this challenge under the National Environmental Policy Act (“NEPA”).³

NEPA’s mandate to analyze the environmental consequences of proposed projects is “an extremely important statutory requirement to serve the public and the agency *before* major federal actions occur.” *Found. on Econ. Trends v. Heckler*, 756 F.2d 143, 157 (D.C. Cir. 1985). Contrary to NEPA’s intent, FERC’s decision to delay action on Petitioners’ request for rehearing and ignore Petitioners’ motion for a stay enabled Dominion to undertake substantial work before the administrative process was complete and Petitioners could seek judicial relief. To avoid further injury, now that their claims finally are ripe, Petitioners are filing this emergency motion to stay FERC’s orders and to halt all construction. Petitioners also respectfully request expedited consideration of their petition.

Counsel has informed the Clerk of this Court, FERC’s counsel, and Movant-Intervenor-Respondent Dominion’s counsel of Petitioners’ intent to file this emergency motion and the reasons why emergency relief is needed. D.C. Cir. R. 18(a)(2); *id.* 27(f). Petitioners respectfully request a decision on this motion by June 17, 2015, the date by which Dominion has sought permission to begin constructing foundations, to avoid further irreparable harm. The parties have

³ D’Ambrosio Decl. ¶¶ 7, 9 (listing the orders); *id.* ¶¶ 10–12 (construction photos).

agreed to a briefing schedule included in paragraph 3 of the attached Declaration of Jocelyn D’Ambrosio.

BACKGROUND

On April 1, 2013, Dominion sought FERC’s permission to convert a virtually idle LNG import facility in Calvert County, Maryland, into a facility able to export close to 1 billion cubic feet of LNG per day to customers in India and Japan.⁴ Calvert County is a largely rural county on a peninsula bordered by the Chesapeake Bay and the Patuxent River. The export terminal will be located in an otherwise residential community, with some homes barely 300 feet away.⁵

To construct the export terminal, Dominion has cleared nearly 100 acres of forest to create a laydown area for heavy construction materials and a parking lot for 1,700 employee cars.⁶ The construction materials, which could be up to 150 feet long and weigh up to 330 tons,⁷ will be barged to Dominion’s new pier on the Patuxent River and taken to the laydown area on slow-moving trucks.⁸ Within the unusually small, 59.5-acre footprint of the terminal site, Dominion will construct a

⁴ See Authorization Order ¶¶ 7 & n.14, 30 (D’Ambrosio Decl., Ex. A).

⁵ Environmental Assessment, CP13-113, Accession No. 20140515-4002, at 81 (May 15, 2014) (“EA”) (D’Ambrosio Decl., Ex. E).

⁶ *Id.* at 13; see also D’Ambrosio Decl. ¶¶ 10–12 (photos of area).

⁷ EA at 29 (D’Ambrosio Decl., Ex. E).

⁸ Implementation Plan, Accession No. 20140930-5346 at 1–2 (Sept. 30, 2014) (D’Ambrosio Decl., Ex. F).

130-megawatt, utility-scale power plant to provide energy to supercool the gas.⁹

Four new 102,500-gallon tanks will store flammable propane that will be trucked to the facility on the main road to Cove Point, which also serves as the local residents' principal emergency evacuation route.¹⁰

Once operational, the facility will emit air pollutants that harm human health and contribute to climate change.¹¹ Crowding the propane tanks and tanks of hazardous materials that are stripped out of the gas before it is liquefied onto the small site presents unusual safety hazards to nearby residents, whose principal protection from flammable vapor clouds will be a 60-foot sound barrier.¹² Vessels travelling through the Chesapeake Bay to the facility could introduce invasive species and otherwise pollute the Bay.¹³

The effects of Dominion's project will echo beyond Calvert County. Cabot Oil & Gas Corporation ("Cabot") has announced a contract with one of Dominion's customers to provide gas extracted in Susquehanna County,

⁹ EA at 8 (D'Ambrosio Decl., Ex. E).

¹⁰ *Id.* at 111 (describing tanks); *id.* at 158 (noting concern about evacuation).

¹¹ *Id.* at 112 & Table 2.7.1-6.

¹² *Id.* at 3 (noting facility footprint); *id.* at 126–30 (describing vapor cloud risks); *id.* at 148–57 (analyzing potential impacts and sound barrier protection (pp. 150–51)).

¹³ *See, e.g.*, Dr. Mario Tamburri, University of Maryland Chesapeake Biological Laboratory, Accession No. 20140602-5111 (June 2, 2014) ("Tamburri June 2014 Letter") (D'Ambrosio Decl., Ex. G); Dr. Mario Tamburri, University of Maryland, Chesapeake Biological Laboratory, Accession No. 20131112-5030 (Nov. 11, 2013) ("Tamburri Nov. 2013 Letter") (D'Ambrosio Decl., Ex. H).

Pennsylvania, for liquefaction and export from Cove Point.¹⁴ The additional natural gas development needed to meet the contract will scar the landscape, industrializing rural communities with gas drilling well pads, waste facilities, and pipelines.¹⁵ Cabot will ship its gas on a greenfield pipeline that will cut across undeveloped land to connect Susquehanna County to lines serving Cove Point.¹⁶ The impacts of Dominion's project reach overseas, too, to India and Japan, where the gas is likely to be burned. All told, the project's lifecycle greenhouse gas emissions—from wellhead to overseas consumer—are greater than the emissions from all of Maryland's coal-fired power plants, combined.¹⁷

¹⁴ See Press Release, Cabot Oil & Gas Corporation Provides Corporate Update, Announces Agreement to Provide Natural Gas to the Dominion Cove Point LNG Terminal (Dec. 19, 2013), *available at* <http://www.prnewswire.com/news-releases/cabot-oil--gas-corporation-provides-corporate-update-announces-agreement-to-provide-natural-gas-to-the-dominion-cove-point-lng-terminal-236538531.html>.

¹⁵ Comments on EA, CP13-113, Accession No. 20140616-5269, at 32–53 (June 16, 2014) (“EA Comments”) (D’Ambrosio Decl., Ex. I) (describing foreseeable induced natural gas drilling and pipeline development and effects).

¹⁶ *Id.* at 51–53 (discussing Transco’s proposed Central Penn Line, reported to “pave the way” for Cabot’s shipment of 350 MMcfd to Dominion Cove Point LNG to fulfill a 20-year supply commitment with Pacific Summit Energy (citation omitted)); Transcontinental Gas Pipe Line Company, Application at 10, CP15-138, Accession No. 20150331-5153 (Mar. 31, 2015) (D’Ambrosio Decl., Ex. J) (explaining that Cabot Oil & Gas Corp. “committed to 850,000 dt/day of firm transportation capacity from a new interconnection in Susquehanna County, Pennsylvania . . . of which . . . 350,000 dt/day [will be delivered] to the existing point of interconnection between Transco’s mainline and Dominion Transmission’s Pipeline located in Fairfax County, Virginia (the ‘Pleasant Valley Interconnection’),” which serves Cove Point).

¹⁷ EA Comments at 56–60 & Ex. 1 (D’Ambrosio Decl., Ex. I).

On May 15, 2014, FERC issued the environmental assessment (“EA”) for the project, despite evidence that the law required a more thorough environmental impact statement (“EIS”). The EA did not evaluate the indirect consequences of extracting and shipping the additional gas to Cove Point for export, nor did it calculate the project’s lifecycle greenhouse gas emissions.¹⁸ On September 29, 2014, the Commission finalized the EA and issued the Authorization Order. The following day, Dominion accepted the order and requested permission to begin significant “pre-construction activities.”¹⁹

On October 15, 2014, Petitioners submitted a timely request for rehearing of the Authorization Order, citing violations of NEPA and the Natural Gas Act. On the same day, Petitioners asked for a stay of the approval and a halt to planned construction. Just shy of 30 days later, FERC granted rehearing, but only to give itself more time to decide the merits, thereby avoiding an automatic and appealable denial.²⁰ *See* 15 U.S.C. § 717r(a)–(b). FERC ignored Petitioners’ motion for a stay, and the tolling order prevented Petitioners from seeking relief as Dominion moved forward with substantial “pre-construction activities.” *See Moreau v.*

FERC, 982 F.2d 556, 564 (D.C. Cir. 1993) (“[W]e hold that section 717r(a) denies

¹⁸ EA at 24–25, 163, 170–71 (D’Ambrosio Decl., Ex. E). The EA was defective for additional reasons that Petitioners do not discuss in this motion but will brief on the merits.

¹⁹ *See* D’Ambrosio Decl. ¶¶ 4–6.

²⁰ Order Granting Rehearing for Further Consideration, CP13-113-001, Accession No. 20141113-3021 (Nov. 13, 2014) (D’Ambrosio Decl., Ex. K).

us jurisdiction to review matters . . . raised in rehearing petitions before FERC until FERC denies the petition or until FERC rules on the merits of a granted petition for rehearing.”). Sleepless from construction noise and fearing for their families’ safety, residents began to sell their homes.²¹

It was not until May 4, 2015, that FERC finally denied Petitioners’ requests for rehearing and a stay. On May 7, 2015, Petitioners filed the instant action, and they now seek preliminary relief to halt the ongoing irreparable injuries.

ARGUMENT

In deciding whether to issue a stay pending review of an agency order, the Court must consider: (1) the likelihood that Petitioners will succeed on the merits of their claim; (2) whether Petitioners will suffer irreparable harm without a stay; (3) whether a stay will substantially harm other parties; and (4) the public interest. *See* D.C. Cir. R.18(a)(1); *see also, e.g., Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1291 (D.C. Cir. 2009); *Wash. Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). All factors favor Petitioners.

I. Petitioners Are Likely To Succeed with Their Claim that FERC’s NEPA Review Was Insufficient.

Petitioners are likely to succeed with their claim that FERC’s decision not to prepare an EIS for this major federal action, based on a flawed finding of no significant impact, was arbitrary and capricious. *See Sierra Club v. Peterson*, 717

²¹ *See* discussion at page 18, *infra*.

F.2d 1409, 1413 (D.C. Cir. 1983) (rejecting agency’s finding of no significant impact from proposed oil and gas leases). When reviewing whether an agency’s failure to prepare an EIS was arbitrary and capricious, this Court will consider, among other factors, whether the agency has “[taken] a ‘hard look’ at the problem in preparing the EA,” and, if the agency found the action would not significantly affect the environment, whether the agency “ma[de] a convincing case for its finding.” *Grand Canyon Trust v. FAA*, 290 F.3d 339, 340–41 (D.C. Cir. 2002) (citations and quotations omitted). “Judicial review of an agency’s finding of ‘no significant impact’ is not . . . merely perfunctory as the court must insure that the agency took a ‘hard look’ at the environmental consequences of its decision.” *Sierra Club*, 717 F.2d at 1413 (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n. 21 (1976)).

A. Petitioners Are Likely To Succeed with Their Claim that FERC Failed to Take a Hard Look at the Indirect Effects of Exporting Natural Gas from Cove Point.

Petitioners are likely to succeed with their claim that FERC unlawfully failed to take a hard look at the indirect effects of allowing Dominion to build a terminal capable of exporting nearly one billion cubic feet of LNG per day to India and Japan. Despite ample record evidence, FERC arbitrarily and capriciously refused to acknowledge the virtual certainty that opening up world markets to natural gas from the northeastern United States will have environmental

consequences beyond Calvert County, from the fields producing natural gas in Pennsylvania to the global climate. Most notably, the Commission claimed that it could not estimate how much natural gas would be produced to meet the project's demand, even though FERC undertook that very review for a pipeline project.

The indirect effects of a project that must be factored into the NEPA review include “effects related to induced changes in the pattern of land use . . . and related effects on air and water and other natural systems, including ecosystems.” 40 C.F.R. § 1508.8(b). Implicit in this requirement is a duty to engage in “reasonable forecasting” to predict effects, and failure to forecast reasonable effects is arbitrary and capricious. *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, and we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as ‘crystal ball inquiry.’”); *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 21 (D.D.C. 2009) (“The failure to fully consider an environmental impact has long been held to be arbitrary and capricious under the procedures set forth in NEPA.”). Under this standard, courts have required agencies evaluating energy infrastructure projects to look at consequences of their projects upstream and down. *See Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 549–50 (8th Cir.

2003) (downstream air emissions from burning mined coal); *Border Power Plant Working Grp. v. Dep't of Energy*, 260 F. Supp. 2d 997, 1028–29 (S.D. Cal. 2003) (upstream impacts from generating energy to be transported on electric line).

NEPA's requirement that agencies estimate the reasonably foreseeable environmental effects of projects they approve applies equally to FERC, which nevertheless has refused to evaluate how exporting nearly 1 billion cubic feet of natural gas per day will affect natural gas production. In doing so, FERC claimed that it was “virtually impossible to accurately estimate how much, if any, of the export volumes . . . will come from existing or new gas production.”²² Fewer than 10 days later, however, FERC revealed that it actually had estimated the number of additional natural gas wells needed to support the Constitution Pipeline project and potential upgrades.²³ FERC's insistence that it cannot do what it already has done is arbitrary and capricious. *Cf. Burlington N. & Santa Fe Ry. Co. v. Surface Transp. Bd.*, 403 F.3d 771, 776–77 (D.C. Cir. 2005) (“An agency must provide an adequate explanation to justify treating similarly situated parties differently.”).

Even if FERC had not demonstrated that it knows how to estimate the amount of new natural gas production needed to support Dominion's project, FERC still had an obligation to forecast the effects using available tools. For

²² Rehearing Order ¶ 37 (D'Ambrosio Decl., Ex. B).

²³ FERC, Final EIS for the Constitution Pipeline, CP13-499, Accession No. 20141024-4001, at 4-233 (Oct. 24, 2014) (estimating the number of natural gas wells needed to support a proposed 124-mile-long pipeline and potential upgrades).

example, in *Mid States*, the Court required an agency evaluating a proposal to construct a new rail line to reach coal mines to estimate how the increased availability of coal would affect air quality. 345 F.3d at 550. FERC complained that Petitioners had not identified any models that could be used to estimate production,²⁴ but Petitioners had cited two models, including the National Energy Modeling System developed by the Energy Information Administration, either of which would have allowed FERC to estimate how natural gas production would respond to the new market demand from Dominion's project.²⁵ With that information, FERC also could have disclosed the foreseeable adverse effects that the additional production would have on land, water, air, ecosystems, and communities.²⁶

FERC also unreasonably ignored real world evidence that Cabot was likely to drill additional wells or produce gas from dormant wells to meet its contracts²⁷—findings that are consistent with the Energy Information Administration's estimate that 60 to 70 percent of the demand created by export projects will be met with

²⁴ Rehearing Order ¶ 37 (D'Ambrosio Decl., Ex. B).

²⁵ EA Comments at 32–34 (D'Ambrosio Decl., Ex. I) (describing models); Rehearing Request at 30 (D'Ambrosio Decl., Ex. C).

²⁶ See EA Comments at 40–49 (D'Ambrosio Decl., Ex. I); see also New York State Dep't of Env'tl. Conserv., *Final Supplemental Generic Environmental Impact Statement on the Oil, Gas and Solution Mining Regulatory Program* (May 2015), available at http://www.dec.ny.gov/docs/materials_minerals_pdf/fsgeis2015.pdf (Volume 1) and http://www.dec.ny.gov/docs/materials_minerals_pdf/fsgeis2015rtcfull.pdf (Volume 2).

²⁷ See EA Comments at 34–40 (D'Ambrosio Decl., Ex. I).

new natural gas development.²⁸ Even Dominion predicts that the project will “support ongoing supply development” (that is, stimulate production in gas fields).²⁹ FERC also ignored evidence that Cabot’s gas is likely to travel to Cove Point via a newly proposed pipeline.³⁰

According to FERC, it need not consider the effect of drilling in Pennsylvania because “natural gas development will likely continue with or without the Cove Point Liquefaction Project.”³¹ In the face of abundant contrary evidence, FERC’s failure to support its assumption that a project capable of exporting nearly 1 billion cubic feet of natural gas per day over a period of 20 years will add no new production and its finding of no significant impact are arbitrary and capricious. *See Barnes v. U.S. Dep’t of Transp.*, 655 F.3d 1124, 1136–38 (9th Cir. 2011) (rejecting agency’s unsupported statement that air traffic would increase at the same rate irrespective of airport expansion); *Coal. for Canyon Pres. v. Bowers*, 632 F.2d 774, 782 & n.3 (9th Cir. 1980) (bald statement in highway project EIS that “pollution would ‘occur anyhow’ because traffic was

²⁸ EIA, *Effect of Increased Natural Gas Exports on Domestic Energy Markets* 6, 10 (2012), available at http://www.eia.gov/analysis/requests/fe/pdf/fe_lng.pdf.

²⁹ Dominion Cove Point LNG, LP, Application for Long-Term Authorization to Export LNG to Non-Free Trade Agreement Countries, FE Docket No. 11-128-LNG at 15 (Oct. 3, 2011); *id.* at 9 (claiming that “LNG exports will increase the opportunities for more robust development of energy resources”).

³⁰ *See* pages 4–5 and accompanying footnotes, *supra*; *see also* EA Comments at 51–53 (D’Ambrosio Decl., Ex. I).

³¹ Rehearing Order ¶ 27 (D’Ambrosio Decl., Ex. B); *see also id.* ¶¶ 26, 29; Authorization Order ¶¶ 225–37 (D’Ambrosio Decl., Ex. A).

bound to increase” “fail[ed] to give decision makers who are removed from the initial decision sufficient data from which to draw their own conclusions about air, noise, and water pollution”); *see also Brady*, 612 F. Supp. 2d at 21–23 (agency “arbitrarily and capriciously ignored [] environmental impacts”).

Petitioners also are likely to succeed with their claim that FERC arbitrarily refused to take a hard look at both the upstream greenhouse gas impacts and the emissions from shipping the LNG overseas and burning it in Japan and India.³² The record contains unrefuted evidence that Dominion’s project will induce additional natural gas production and that some of that gas will travel to Cove Point via a newly developed pipeline.³³ Petitioners submitted evidence that each stage of producing and shipping the gas to Dominion—drilling, producing, processing, transporting, storing, and shipping—could leak methane, a potent greenhouse gas.³⁴ Petitioners also submitted evidence that transporting the LNG overseas to be burned contributes to climate change.³⁵ FERC has not rejected this evidence, but nevertheless has failed to analyze the up- and downstream greenhouse gas impacts of the project. Petitioners thus are likely to succeed with

³² Authorization Order ¶ 246 (claiming that consumption was not part of the project) (D’Ambrosio Decl., Ex. A); Rehearing Order ¶¶ 57–59 (D’Ambrosio Decl., Ex. B).

³³ *See* pages 4–5 and accompanying footnotes, *supra*; *see also* EA Comments at 30–40, 50–53 (D’Ambrosio Decl., Ex. I).

³⁴ EA Comments at 57 (D’Ambrosio Decl., Ex. I).

³⁵ *Id.* at 57–58.

their claim that FERC's failure to examine those impacts violates NEPA's hard look standard. *See, e.g., S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 588 F.3d 718, 725–26 (9th Cir. 2011) (holding unlawful the failure to evaluate the environmental impacts of transporting and processing ore in approving a mining permit); *Mid States*, 345 F.3d at 549 (explaining that “it is almost certainly true” that a railroad's proposal to construct new tracks to access coal mines—“will increase the long-term demand for coal and any adverse effects that result from burning coal”).

B. Petitioners Are Likely To Succeed with their Claim that FERC Failed To Take a Hard Look at the Potentially Significant Water Quality Impacts from Increased Shipping to Cove Point.

Petitioners are likely to succeed with their claim that FERC did not take a hard look at the impacts of increasing industrialized shipping to Cove Point. The record contains expert evidence that both ballast water discharges and biofouling organisms carried on the exterior of foreign ships could introduce invasive species or other pollutants.³⁶ The pollutants in ballast water transported to Maryland could include radioactive material from Fukushima in Japan or pathogens from India, which “still suffers from periodic Cholera epidemics.”³⁷ FERC dismissed Petitioners' concerns, citing regulatory revisions that do not remove the risk of

³⁶ *See* Request for Rehearing at 14–19 (D'Ambrosio Decl., Ex. C); Tamburri June 2014 Letter (D'Ambrosio Decl., Ex. G); Tamburri Nov. 2013 Letter (D'Ambrosio Decl., Ex. H).

³⁷ Tamburri Nov. 2013 Letter at 1 (D'Ambrosio Decl., Ex. H).

significant impact, including ballast water regulations that may not even be in effect when the facility begins operating.³⁸

Current ballast water management regulations have been revised because earlier regulations provided inadequate protection for water quality.³⁹ The revisions require implementation of an approved ballast water management system. The Coast Guard has yet to approve *any* such system for use on ships, however, and thus has been forced to extend the implementation deadlines.⁴⁰ In the meantime, the open ocean exchange permitted under the current regulations “is limited in its ability to reduce the risk of ballast water invasive species.”⁴¹ Moreover, even when the new ballast regulations go into effect, there is still a risk to water quality. For example, because it is difficult to assess how many live organisms are in ballast water, the limitations do not necessarily protect against the risk of invasion.⁴² Moreover, even if identified, invasive species are very difficult to treat and remove.⁴³ As to the fouling organisms, Petitioners cited expert evidence that the regulations, which require rinsing anchors and anchor chains and

³⁸ Authorization Order ¶¶ 127–29 (D’Ambrosio Decl., Ex. A); Rehearing Order ¶¶ 71–74 (D’Ambrosio Decl., Ex. B).

³⁹ See 77 Fed. Reg. 17,254 (Mar. 23, 2012) (replacing regulations allowing for open ocean ballast water exchange).

⁴⁰ See Tamburri June 2014 Letter at 2 (D’Ambrosio Decl., Ex. G).

⁴¹ *Id.*

⁴² *Id.* at 3.

⁴³ *Id.*

cleaning the exterior of the ship, do not prevent against the significant risk of invasion.⁴⁴

Given the deficiencies in the regulations, an expert has warned that the regular influx of LNG tankers from Japan and India will create the “perfect scenario” for the introduction of invasive species and other pollutants that threaten aquatic ecosystems and public health.⁴⁵ Nonetheless, FERC continues to rely on the mere existence of the insufficient regulations to support its finding that increasing shipping to Cove Point will not have a significant impact on the environment. This Court has rejected that approach. *See Calvert Cliffs’ Coordinating Comm. v. U.S. Atomic Energy Comm’n*, 449 F.2d 1109, 1124 (D.C. Cir. 1971) (“Obedience to water quality certification[] . . . is not mutually exclusive with the NEPA procedures. It does not preclude performance of the NEPA duties . . . [but] essentially establish[es] a *minimum condition* for the granting of a license.”). Thus, Petitioners are likely to succeed with their claim that FERC’s finding of no significant impact is unjustified. *Ocean Advocates v. U.S. Army Corps of Eng’rs*, 402 F.3d 846, 864 (9th Cir. 2005) (explaining that to avoid preparing an EIS, the agency bears the burden of “put[ting] forth a ‘convincing statement of reasons’ that explain why the project will impact the environment no more than insignificantly” (citation omitted)).

⁴⁴ EA Comments at 18 (D’Ambrosio Decl., Ex. I).

⁴⁵ Tamburri June 2014 Letter at 2 (D’Ambrosio Decl., Ex. G).

II. Unless the Orders Are Stayed, Petitioners Will Suffer Irreparable Harm.

Unless this Court stays FERC's orders—stopping all work to build the export terminal—Petitioners will suffer irreparable injury. An injury is irreparable if it is “both certain and great,” as well as “actual and not theoretical,” not “something merely feared as liable to occur at some indefinite time.” *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). Petitioners already are suffering such injury because FERC has issued 29 orders allowing Dominion to clear-cut thousands of mature trees, build a pier into the Patuxent River, and demolish buildings to make way for the terminal.⁴⁶

Dominion's ongoing and planned construction activities interfere with Petitioners' members' use and enjoyment of their homes and community. The construction noise, which will continue throughout the three-year construction period, already intrudes upon leisure time in their backyards and previously peaceful walks and has kept others up at night. Eno Decl. ¶¶ 6–8; Heinhorst Decl. ¶ 8; Idhe Decl. ¶ 10. Some members are afraid that they, their friends, or neighborhood children will be injured when running, biking, or playing along roads congested with heavy construction traffic and have avoided favorite recreation areas. Eno Decl. ¶ 5; Heinhorst Decl. ¶ 9; Idhe Decl. ¶ 8; Mazur Decl. ¶ 6. The dust, noise, and visual blight of construction cause irreparable injuries

⁴⁶ See D'Ambrosio Decl. ¶¶ 7, 9 (listing orders).

because no monetary compensation is possible for those harms, even if they last only for a period of years. *See San Luis Valley Ecosystems Council v. U.S. Fish & Wildlife Serv.*, 657 F. Supp. 2d 1233, 1241 (D. Colo. 2009). Facing the hardships of life in a construction zone and the permanent safety risks of living in the shadow of the export terminal, some of Petitioners' members have made painful and financially difficult decisions to leave their homes, moving out of the immediate impact area of terminal construction and operations, while others are planning their moves. Heinhorst Decl. ¶¶ 5, 12–13; Mazur Decl. ¶¶ 3–11. Others still have remained in their community, plagued by safety concerns and seemingly endless noise and traffic. *See* Eno Decl. ¶¶ 10–15; Idhe Decl. ¶ 17.

Petitioners' members will suffer further irreparable injury if the Court does not stop Dominion from operating the pier on the Patuxent River. Even in good conditions, it can be difficult to boat and paddle in the area adjacent to Dominion's pier. With the promise of huge barges travelling to and from the pier, they are concerned that it is unsafe to recreate in the River near the pier and are planning on limiting or terminating use of this stretch of water. Eno Decl., ¶ 9; Hastings Decl. ¶ 8; Linthicum Decl. ¶¶ 9–10; Mazur Decl. ¶¶ 12–14. The barges also threaten to obscure scenic views of the River that Petitioners' members previously enjoyed. Hastings Decl. ¶¶ 7–8. The continuing and unavoidable interference with the favored recreational activities of Petitioners' members and their enjoyment of

unspoiled riverine scenery demonstrates the irreparable injury required for a stay. *See Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (finding that injury to one’s “ability to view, experience, and utilize [recreational areas] in their undisturbed state” was irreparable and weighed in favor of a stay).

III. Dominion Will Not Be Substantially Harmed by a Stay.

A stay of construction will not cause Dominion substantial harm. If this Court grants the stay, Dominion will be required to stop work until the Court issues a decision on the merits of the petition, which Petitioners request be decided on an expedited basis. Because Dominion knowingly raced to begin “pre-construction activities” while FERC reviewed Petitioners’ request for rehearing, Dominion assumed the risk that work would be halted when Petitioners finally were able to seek relief from this Court. *See, e.g., Millennium Pipeline Co.*, 141 FERC ¶ 61,022, 2012 WL 4845180, at *5 (Oct. 9, 2012) (recognizing “litigation risk” when the applicant “elect[ed] to proceed with construction” before judicial review of FERC’s order).

IV. The Public Interest Strongly Favors a Stay.

NEPA’s purpose is to preserve the nation’s valuable natural resources and to restore environmental quality for the benefit of current and future generations. *See* 42 U.S.C.A. § 4331. “The preservation of our environment, as required by NEPA . . . is clearly in the public interest.” *Earth Island Inst. v. U.S. Forest Serv.*,

442 F.3d 1147, 1177 (9th Cir. 2006), *abrogated on other grounds by Winter v. Natural Res. Def. Council*, 555 U.S. 7 (2008). To allow construction to continue while Petitioners' case is heard would contravene NEPA's purpose and deprive Petitioners and their members of the chance to obtain a full remedy under the law.⁴⁷

The public interest in ensuring that agencies comply with the laws designed to protect the environment, such as NEPA, also favors a stay. *See Davis v. Mineta*, 302 F.3d 1104, 1116 (10th Cir. 2002) (the public interest in completing a highway project "must yield to the obligation to construct the [p]roject in compliance with the relevant environmental laws"). Recognizing "the public interest in careful consideration of environmental impacts before major federal projects go forward," courts have "held that suspending such projects until that consideration occurs comports with the public interest." *Wild Rockies*, 632 F.3d at 1138; *Found. on Econ. Trends*, 756 F.2d at 157 (finding that NEPA underscores the public interest in vetting environmental consequences before resources are committed).

CONCLUSION

Petitioners meet the requirements for a stay of FERC's orders pending judicial review and respectfully request that the Court stay all construction allowed under the challenged orders. Petitioners also respectfully request that the Court expedite consideration of the merits of the case.

⁴⁷ Allowing construction to move forward only benefits Dominion and its monetary interest in completing the project.

Dated: June 1, 2015

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**PETITIONERS' PROVISIONAL CERTIFICATE
AS TO PARTIES, RULING, AND RELATED CASES**

In accordance with Circuit Rules 27(a)(4) and 28(a)(1), Petitioners EarthReports, Inc. (dba Patuxent Riverkeeper), Sierra Club, and Chesapeake Climate Action Network submit this provisional certificate as to parties, rulings, and related cases.

I. Parties, Intervenors, and *Amici* in Case No. 13-1014

A. Petitioners in Case No. 15-1127 are EarthReports, Inc. (dba Patuxent Riverkeeper), Sierra Club, and Chesapeake Climate Action Network.

B. The Federal Energy Regulatory Commission is the Respondent.

C. On May 29, 2015, Dominion Cove Point LNG, LP filed a consent motion for leave to intervene in support of Respondent in this case.

D. There are presently no *amici curiae*.

II. Petitioners' Circuit Rule 26.1 Disclosure Statement

A. EarthReports, Inc. (dba Patuxent Riverkeeper): EarthReports, Inc. has no parent companies, and there are no publicly held companies that have a 10 percent or greater ownership interest in EarthReports, Inc.

EarthReports, Inc., a corporation organized and existing under the laws of the State of Maryland, is a nonprofit organization dedicated to conserving, protecting, and replenishing the Patuxent River.

B. Sierra Club: Sierra Club has no parent companies, and there are no publicly held companies that have a 10 percent or greater ownership interest in Sierra Club.

Sierra Club, a corporation organized and existing under the laws of the State of California, is a national nonprofit organization dedicated to the protection and enjoyment of the environment.

C. Chesapeake Climate Action Network: Chesapeake Climate Action Network has no parent companies, and there are no publicly held companies that have a 10 percent or greater ownership interest in Chesapeake Climate Action Network.

Chesapeake Climate Action Network, a corporation organized and existing under the laws of the State of Maryland, is a nonprofit organization dedicated to fighting global warming and moving our country towards cleaner energy.

III. Rulings Under Review

Petitioners are challenging the following orders of the Federal Energy Regulatory Commission (the “Commission”):

A. The September 29, 2014 “Order Granting Section 3 and Section 7 Authorizations,” 148 FERC ¶ 61,244, entered in Commission Docket Dominion Cove Point LNG, LP, No. CP13-113-000; and

B. The May 4, 2015 “Order Denying Rehearing and Stay,” 151 FERC ¶ 61,095, entered in Commission Docket Dominion Cove Point LNG, LP, No. CP13-113-001.

IV. Related Cases

Petitioners are aware that at least the following cases involving substantially the same parties and the same or similar issues:

A. *Sierra Club & Galveston Baykeeper v. Federal Energy Regulatory Commission*, No. 14-1275 (D.C. Cir. filed Dec. 10, 2014).

B. *Sierra Club v. Federal Energy Regulatory Commission*, No. 14-1249 (D.C. Cir. filed Nov. 17, 2014).

C. *Sierra Club v. Federal Energy Regulatory Commission*, No. 15-1133 (D.C. Cir. filed May 11, 2015).

Dated: June 1, 2015

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jocelyn D'Ambrosio, hereby certify that I have served a true and correct copy of the foregoing Petitioners' Emergency Motion for Stay Pending Judicial Review and for Expedited Briefing and accompanying exhibits and Petitioners' Provisional Certificate as to Parties, Ruling, and Related Cases through the Court's CM/ECF system on all registered counsel this 1st day of June, 2015.

I also hereby certify that I sent the foregoing via Federal Express, overnight delivery to the address below:

Robert H. Solomon
Karin L. Larson
Lisa B. Luftig
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426

/s/ Jocelyn D'Ambrosio_____