UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

In the Matter of

MOUNTAIN VALLEY PIPELINE, LLC	**Docket Nos. CP16-10-000**
EQUITRANS, LP	**CP16-13-000**

REQUEST FOR REHEAHRING AND RECISION OF CERTIFICATES AND MOTION FOR STAY OF APPALACHIAN TRAIL CONSERVANCY, APPALACHIAN VOICES, CENTER FOR BIOLOGICAL DIVERSITY, CHESAPEAKE CLIMATE ACTION NETWORK, NATURAL RESOURCES DEFENSE COUNCIL, PROTECT OUR WATER, HERITAGE AND RIGHTS (POWHR), SIERRA CLUB, WEST VIRGINIA RIVERS COALITION, WILD VIRGINIA, BOLD ALLIANCE, ORUS ASHBY BERKLEY, CHARLES CHONG, REBECCA CHONG, JUDY HODGES, STEVEN HODGES, DONALD JONES, GORDON JONES, ELISABETH TOBEY, RONALD TOBEY, AND KEITH WILSON

Pursuant to section 19(a) of the Natural Gas Act ("NGA"), 15 U.S.C. §717r(a) and Rule 713 of the Federal Regulatory Energy Commission's ("FERC") Rules of Practice and Procedure, 18 C.F.R. § 385.713, Appalachian Mountain Advocates, on behalf of Appalachian Trail Conservancy, Appalachian Voices, Center for Biological Diversity, Chesapeake Climate Action Network, Natural Resources Defense Council, Protect Our Water, Heritage and Rights (POWHR), Sierra Club, West Virginia Rivers Coalition, and Wild Virginia, and Chris Johns, on behalf of Bold Alliance and landowners Orus Ashby Berkley, Charles Chong, Rebecca Chong, Judy Hodges, Steven Hodges, Donald Jones, Gordon Jones, Elisabeth Tobey, Ronald Tobey, and Keith Wilson, (collectively, "Intervenors") hereby request rehearing of FERC's "Order Issuing Certificates and Granting Abandonment Authority," issued October 13, 2017, in the above-captioned proceeding ("Certificate Order"). See Mountain Valley Pipeline, LLC, 161 FERC ¶ 61,043 (Oct. 13, 2017). FERC granted the Intervenors' respective motions to

intervene in this proceeding. *See id.* at ¶ 21. Thus, the Intervenors are "parties" to this proceeding, 18 C.F.R. § 385.214(c), and have standing to file this request for rehearing. See 15 U.S.C. § 717r(a); 18 C.F.R. § 385.713(b).

We request that the Certificate Order and deficient final environmental impact statement ("FEIS") be withdrawn and the environmental analysis and public convenience and necessity analysis be redone in a manner that complies with FERC's obligations pursuant to the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq., and the Natural Gas Act ("NGA"), 15 U.S.C. § 717 et seq.

STATEMENT OF RELEVANT FACTS

FERC's Certificate Order authorizes Mountain Valley Pipeline, LLC ("Mountain Valley") to construct the Mountain Valley Pipeline ("MVP" or "the Project"), a 42-inch diameter 303.5 mile, mostly greenfield pipeline that would carry up to 2,000,000 dekatherms (Dth) per day of gas from Wetzel County, West Virginia to Pittsylvania County, Virginia by means of three new compressor stations in West Virginia, and to perform unidentified future construction activities pursuant to a blanket certificate under Part 284, Subpart G of FERC's regulations. The Certificate Order also authorizes Equitrans, L.P. (Equitrans) to construct the Equitrans Expansion Projects (EEP), which involves construction of 7.87 miles of new pipeline and one new compressor station in Pennsylvania to facilitate the movement of up to 600,000 Dth per day of gas from southern Pennsylvania and northern West Virginia to proposed interconnections with the MVP in West Virginia. The Order grants both applicants' requested rates of return, including their requested 14 percent return on equity (ROE).

The corporate entities that own Mountain Valley are closely related to those that have contracted to ship gas on the MVP. Mountain Valley is a joint venture of five different companies: (1) MVP Holdco, LLC, a subsidiary of EQT Corporation; (2) US Marcellus Gas Infrastructure, LLC, a subsidiary of NextEra Energy Capital Holdings, Inc.; (3) WGL Midstream, Inc., a subsidiary of WGL Holdings, Inc.; (4) RGC Midstream, LLC, a subsidiary of RGC Resources, Inc.; and (5) Con Edison Gas Midstream, LLC, a subsidiary of Consolidated Edison, Inc.[1] The five shippers that have together contracted for the entirety of the MVP's capacity are: (1) EQT Energy, LLC (1.29 million Dth per day), a subsidiary of EQT Corporation; (2) USG Properties Marcellus Holdings, LLC (250,000 Dth per day), a subsidiary of NextEra Energy, Inc.; (3) WGL Midstream, Inc. (200,000 Dth per day); (4) Roanoke Gas Company (10,000 Dth per day), a subsidiary of RGC Resources, Inc.; and (5) Consolidated Edison of New York, Inc. (250,000 Dth per day).[2] Only two of those contracting parties, Roanoke Gas Company and Consolidate Edison of New York, representing roughly 13 percent of the MVP's capacity, are end users.[3] The rest of the shippers have entered into their contracts based on speculation that they will be able to sell the gas necessary to fill their contracted capacity to as yet unidentified end users.[4]

[1] Certificate Order ¶4 n.4.

[2] *Id.* ¶10.

[3] *Id.* ¶292 n.286.

[4] *See id.*, Dissent at 3–4.

Notice of Mountain Valley's and Equitrans' applications was published in the *Federal Register* on November 13, 2015.[5] On November 27, 2015, Intervenors Appalachian Voices, Chesapeake Climate Action Network, Sierra Club, and West Virginia Rivers Coalition submitted a Motion to Intervene and Protest, which included a request for an evidentiary hearing to resolve disputed issues of material fact regarding the need for and impacts of the projects.[6] Intervenor Bold Alliance filed a late motion to intervene on April 6, 2017.[7] Following a NEPA scoping process in which Intervenors participated,[8] on September 16, 2016, FERC published a draft environmental impact statement ("DEIS") that contained substantial gaps in information required to understand the impacts of the projects and permitted the applicants to submit significant missing information both during the course of and after the close of the DEIS public comment period.[9] On October 19, 2016, Intervenors requested that FERC issue a revised or supplemental DEIS that would permit the public to adequately understand and comment

[5] 80 Fed. Reg. 70,196.

[6] Motion to Intervene and Protest of Appalachian Mountain Advocates et al. in Dockets No. CP16-10 and CP16-13 (Accession No. 20151125-5098).

[7] Motion to Intervene Out-of-Time of Bold Alliance (April 6, 2017) (Accession No. 20170406-5743)

[8] Comments on FERC's Notice to Prepare an EIS for the Planned Mountain Valley Pipeline Project, FERC Docket No. PF15-3-000 (June 16, 2015) (Accesisn No. 20150617-5044)

[9] *See* FERC, Notice of Availability of the Draft Environmental Impact Statement for the proposed Mountain Valley Project and Equitrans Expansion Project re the Mountain Valley Pipeline LLC et al under CP16-10 et al. (September 16, 2016) (Accession No. 20160916-3014).

on the impacts of the proposed projects.[10] Following FERC's failure to grant that request, those intervenors filed final comments on the DEIS on December 22, 2016.[11] On February 3, 2017, Mountain Valley filed a Motion to Answer and Answer that included responses to Intervenors' DEIS comments.[12] On March 24, 2017, Intervenors filed a Motion for Leave to Answer and Answer to Mountain Valley's filing.[13] On September 25, 2017, Intervenor Bold Alliance filed a letter outlining the constitutional and statutory violations that would result from a grant of a certificate.[14] FERC granted all of the above motions in its October 13, 2017 Certificate Order.[15]

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[10] Request of Appalachian Mountain Advocates et al. for Revised or Supplemental DEIS in Dockets No. CP16-10 and CP16-13 (October 19, 2016) (Accession No. 20161019-5061).

[11] Comments of Appalachian Mountain Advocates et al. on the on the Draft Environmental Impact Statement for the Proposed Mountain Valley Pipeline and Equitrans Expansion Project (December 22, 2016) (Accession No. 20161223-5058) ("Appalachian Mountain Advocates DEIS Comments").

[12] Motion to Answer and Answer of Mountain Valley Pipeline, LLC to Comments on the Draft Environmental Impact Statement (February 3, 2017) (Accession No. 20170203-5263).

[13] Motion for Leave to Answer and Answer of the Appalachian Mountain Advocates et al. to the Answer of Mountain Valley Pipeline, LLC (March 24, 2017) (Accession No. 20170327-5025) ("Appalachian Mountain Advocates Answer").

[14] Comment of Bold Alliance re: Eminent Domain Issues (September 25, 2017) (Accession No. 20170925-5045). On September 5, 2017, the Bold Alliance and the Bold Educational Fund filed a lawsuit in federal district court against FERC, ACP and MVP challenging the constitutionality of the FERC's certificate process and authorization of use of eminent domain by private natural gas pipeline companies - both as a general matter and specific to the MVP and ACP Projects. Although Bold contends that the federal district court has jurisdiction to entertain all of its claims, as a precaution, it seeks rehearing at the Commission to avoid waiver of its right to challenge the certificate under Section 717f(h) if the federal court declines to hear its case as well as to preserve those issues that are outside the scope of the federal district court case.

[15] Certificate Order ¶26.

Together, MVP and Equitrans' ("the applicants") authorized activities ("the projects") will adversely affect significant sensitive environmental resources. A project of this magnitude has never been undertaken in the steep and challenging Appalachian mountain terrain that the Projects would traverse. Construction of the projects would cross 1,146 waterbodies, including more than 400 perennial waterbodies, and would disturb over 5,200 acres of soils that are classified as having the potential for severe water erosion.[16] About 32 percent of the MVP and 45 percent of the EEP will cross topography with steep (greater than a 15 percent grade) slopes.[17] About 67 percent of the MVP and all of the EEP will cross areas susceptible to landslides.[18] Additionally, the MVP will require construction through about 67 miles of fragile karst terrain.[19] Both projects will result in significant climate-altering greenhouse gas (GHG) emissions.[20] In addition to environmental impacts, the projects would have substantial impacts on landowners, hundreds of whom will have their property forcibly taken through the applicants' use of the eminent domain power granted by FERC's Certificate Order.[21]

CONCISE STATEMENT OF ALLEGED ERRORS

1. FERC violates the NGA by granting the certificate without meaningfully assessing the market demand for the projects. FERC's failure to consider

[16] Final Environmental Impact Statement for Mountain Valley Pipeline, LLC and Equitrans, LP's Mountain Valley Project and Equitrans Expansion Project under CP16-10 et al. (Accession No. 20170623-4000) ("FEIS") at 4-118, 5-2.

[17] Certificate Order ¶ 143.

[18] *Id.*

[19] *Id.* ¶151.

[20] *Id.* ¶¶274, 293.

[21] *Id.* ¶57.

substantial evidence in the record showing the lack of market demand for the MVP's capacity renders its finding that the project is required by the public convenience and necessity, 15 U.S.C. § 717f(c)(1)(A), unreasonable. FERC's decision to rely solely on the existence of precedent agreements runs counter to its Certificate Policy Statement. Certification of New Interstate Natural Gas Pipeline Facilities, 88 FERC ¶ 61,227, 61, 744, 61,747 (Sept. 15, 1999) ("Certificate Policy Statement"), *clarified*, 90 FERC ¶ 61,128 (Feb. 9, 2000), *further clarified*, 92 FERC ¶ 61,094, 61,373 (Jul. 28, 2000).

2. FERC violates the NGA by granting the certificate without acknowledging the impact of the affiliate nature of the precedent agreements on those agreements' ability to demonstrate need for the projects. FERC's refusal to "look behind" the affiliate precedent agreements renders its finding that the project is required by the public convenience and necessity, 15 U.S.C. § 717f(c)(1)(A), unreasonable. FERC's decision to ignore the risks of overbuilding presented by blind reliance on affiliate precedent agreements runs counter to its Certificate Policy Statement. Certification of New Interstate Natural Gas Pipeline Facilities, 88 FERC ¶ 61,227, 61,744 (Sept. 15, 1999) ("Certificate Policy Statement"), *clarified*, 90 FERC ¶ 61,128 (Feb. 9, 2000), *further clarified*, 92 FERC ¶ 61,094, 61,373 (Jul. 28, 2000).

3. FERC violates the NGA by failing to support its decision to approve an unreasonably high rate of return on equity of 14 percent with substantial evidence. FERC's blind reliance on past precedent, without any effort to evaluate the risk faced by the developers of this specific project, renders its finding that the project is required by the public convenience and necessity, 15 U.S.C. § 717f(c)(1)(A), unreasonable. *See Sierra Club v. FERC,* 867 F.3d 1357, 1378 (D.C. Cir. 2017).

4. FERC violates the NGA by not granting an evidentiary hearing to resolve disputed issues of material fact regarding the need for the project. Intervenors made allegations of fact, submitted expert analysis and other evidence to support their allegations, and demonstrated that their allegations were in dispute. Moreover, FERC's Order confirms that these allegations have not been, and should not be, resolved on the basis of the written record. *See* 15 U.S.C. § 717f(c)(1)(B); 18 C.F.R. § 385.502; *Cascade Nat. Gas Corp. v. FERC*, 955 F.2d 1412 (10th Cir. 1992).

5. FERC violates NEPA by failing to properly evaluate the purpose and need for the projects in its draft and final EIS. 40 C.F.R. § 1502.13. By relying entirely on the goals of the applicants to establish the purpose of the projects, FERC fails to "exercise a degree of skepticism in dealing with self-serving statements from a prime beneficiary of the project." *Simmons v. U.S. Army Corps of Eng's*, 120 F.3d 664, 669 (7th Cir. 1997) (quoting *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 209 (D.C. Cir. 1991) (Buckley, J., dissenting)).

6. FERC violates NEPA by failing to rigorously explore and objectively evaluate all reasonable alternatives to the projects, including reasonable alternatives not within its jurisdiction and including the "no action" alternative. 40 C.F.R. § 1502.14; *WildEarth Guardians v. Nat'l Park Serv.*, 703 F.3d 1178, 1184 (10th Cir. 2013); *Milwaukee Inner-City Congregations Allied for Hope v. Gottlieb*, 944 F.Supp.2d 656, 670 (W.D. Wis., 2013); *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 235 F.Supp.2d 1143, 1154 (W.D. Wash., 2002). FERC's dismissal of any alternatives that do not meet the applicants' desires improperly restricts its analysis to those "alternative means by which a particular applicant can reach his goals." *Simmons*, 120 F.3d at 669 (quoting *Van Abbema v. Fornell*, 807 F.2d 633, 638 (7th Cir. 1986); *see also Nat'l Parks & Cons. Ass'n v. Bureau of Land Mgmt.*, 606 F.3d 1058, 1072 (9th Cir. 2009). In particular, FERC's failure to rigorously analyze the ability of a "one corridor" alternative collocated with the concurrently-approved Atlantic Coast Pipeline to meet any demonstrated need for the projects violates NEPA. *See* Certificate Order, Dissent at 2–3.

7. FERC violates NEPA by failing to include sufficient information in its draft EIS to permit meaningful public review and comment. 40 C.F.R. § 1502.9(a). The DEIS was so lacking in information and analysis that the public (and FERC's sister federal agencies) could not properly assess the project's impacts or critique FERC's assessment thereof. FERC's deficient DEIS and its refusal to provide a revised or supplemental EIS for public review and comment thus violates NEPA's public participation requirements. *Burkey v. Ellis*, 483 F. Supp. 897, 915 (N.D. Ala. 1979); *Habitat Educ. Ctr. v. U.S. Forest Servs*., 680 F. Supp. 2d 996, 1005 (E.D. Wis. 2010) (emphasis added), *aff'd sub nom. Habitat Educ. Ctr., Inc. v. U.S. Forest Serv*., 673 F.3d 518 (7th Cir. 2012).

8. FERC violates NEPA by failing to adequately analyze the climate change impacts of the end use of the gas transported by the projects. FERC fails to acknowledge that the greenhouse gas emissions from the combustion of the gas are indirect effects of the projects. 40 C.F.R. § 1508.8(b); 40 C.F.R. § 1502.16(b); *Sierra Club v. FERC*, 867 F.3d 1357, 1371–74 (D.C. Cir. 2017). Further, FERC's discussion of cumulative impacts fails to satisfy NEPA because it does not constitute the requisite "hard look" at the significance of the impacts of the downstream greenhouse gas emissions on the environment, nor does it discuss the comparative impacts of other reasonable alternatives or practicable mitigation measures that could reduce the downstream emissions or their impacts. 40 C.F.R. § 1508.7; *Sierra Club*, 867 F.3d at 1375. Finally, FERC's analysis of impacts of the projects' downstream greenhouse gas emissions fails to satisfy NEPA because FERC relies on vague, unsubstantiated claims that impacts would be offset by displacement of emissions from burning coal. *Sierra Club*, 867 F.3d at 1375.

9. FERC violates NEPA by failing to take a "hard look" at the direct, indirect, and cumulative impacts of the projects on waterbodies and wetlands. FERC fails to adequately analyze the direct and indirect impacts because it relies on unsupported assumptions about the effectiveness of the applicants' proposed

mitigation measures to conclude that impacts to aquatic resources would not be significant. *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1214 (9th Cir. 1998); *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1381 (9th Cir. 1998). FERC's assessment of sedimentation impacts is further undermined by its failure to account for long-term increases in runoff and erosion as a result of land cover change within the pipeline right-of-way. *bertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). Finally, FERC's analysis of the cumulative impacts on aquatic resources of the projects in conjunction with other past, present, and reasonably foreseeable projects lacks sufficient rigor and detail to satisfy NEPA. 40 C.F.R. § 1508.7; *Natural Res. Def. Council v. Hodel*, 865 F.2d 288, 298-99 (D.C. Cir. 1988); *Res. Ltd., Inc. v. Robertson*, 35 F.3d 1300, 1306 (9th Cir. 1994).

10. FERC violates the NGA by granting certificates that are conditional on applicants obtaining future permits from state or local agencies. *See* 15 U.S.C. §717f(e). Legislative history and case law indicate that the NGA empowers FERC only to impose "conditions" on pipeline activity in the sense of "limitations," not to make certificates "conditional" in the sense of needing to satisfy prerequisites before pipeline activity can commence. *See N. Nat. Gas Co., Div. of InterNorth, Inc. v. F.E.R.C.*, 827 F.2d 779, 782 (D.C. Cir. 1987); *Panhandle E. Pipe Line Co. v. F.E.R.C.*, 613 F.2d 1120, 1131-32 (D.C. Cir. 1979); *Atl. Ref. Co. v. Pub. Serv. Comm'n of N.Y.*, 360 U.S. 378, 389, 392 (1959).

11. FERC violates the Fifth Amendment by granting certificates that are conditional on applicants obtaining future permits from state or local agencies. As soon as FERC issues a certificate, even a "conditional" one, the certificated pipeline entity can arguably start acquiring property by condemnation. 15 U.S.C. §717f(h). But if the entity still has additional permits to obtain, there is a chance it will fail to obtain those permits. If that happens, the entity will never be allowed to begin operations—and it will have taken private property for no reason (i.e., without a public necessity) in violation of the Fifth Amendment.

12. By allowing conditional-certificate holders to exercise eminent domain before they have obtained all necessary approvals, FERC interprets the NGA in a manner that violates the Constitution. FERC could obviate this problem by imposing conditions prohibiting applicants from exercising eminent domain until after they obtained all necessary approvals, *see Mid-Atlantic Express, LLC v. Baltimore Cty., Md.*, 410 Fed. App'x 653, 657 (4th Cir. 2011), and, under the doctrine of constitutional avoidance, FERC *should* do so. *See F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009).

13. FERC exceeds its statutory authority by granting blanket certificates. The grant of blanket authority covers projects that FERC presently knows, to a virtual certainty, will *not* be where MVP's application describes the pipeline as being. And, in connection with any of these activities, the certificate holder has effectively unrestricted authority to exercise eminent-domain power to force sales

of private property, including of properties outside the areas described in MVP's application. 15 U.S.C. §717f(h). This is incompatible with the statutory requirements imposed by Sections 7(c) and 7(e) of the NGA. FERC's authority does not extend to blanket approvals of unknown future extensions, expansions, rearrangements, or replacements, at least where such actions are not limited to the pipeline footprint actually proposed by an applicant and considered and approved by FERC. *See Williston Basin Interstate Pipeline Co. v. Exclusive Gas Storage Leasehold & Easement*, 524 F.3d 1090, 1099 (9th Cir. 2008).

14. FERC's practice of granting "blanket" certificates—at least those that authorize construction outside evaluated and approved project footprints—violates FERC's statutory mandate to consider the economic and environmental impacts of proposed pipeline projects. *See* 15 U.S.C. §717f(a).

15. Granting blanket certificates violates the NGA's notice-and-hearing requirements. 15 U.S.C. §717f(c)(1)(B). This is especially true for "future facility construction" contemplated but not specified by a certificate application.

16. Permitting private entities to exercise eminent domain for previously unconsidered project expansions or "rearrangements," as blanket certificates do, violates due-process requirements under the Fifth Amendment. *See Boerschig v. Trans-Pecos Pipeline, L.L.C.*, __ F.3d __, 2017 WL 4367151, at *5 (5th Cir. Oct. 3, 2017); *Columbia Gas Transmission, LLC v. 1.01 Acres, More or Less*, 768 F.3d 300, 328 (3d Cir. 2014) (Jordan, J., dissenting).

17. Granting blanket certificates that allow applicants to condemn property not specifically described in their existing applications violates constitutional separation of powers principles and the private nondelegation doctrine. *Boerschig v. Trans-Pecos Pipeline, L.L.C.*, __ F.3d __, 2017 WL 4367151, at *5 (5th Cir. Oct. 3, 2017); *Williston Basin Interstate Pipeline Co. v. Exclusive Gas Storage Leasehold & Easement*, 524 F.3d 1090, 1099 (9th Cir. 2008).

18. FERC violates the just-compensation clause of the Fifth Amendment by granting certificates (and therefore condemnation power) to entities that have not shown they have sufficient financial resources to guarantee payment of just compensation. *Sweet v. Rechel*, 159 U.S. 380, 400-02 (1895); *Wash. Metro. Area Transit Auth. v. One Parcel of Land in Mortgomery County*, 706 F.2d 1312, 1320-21 (4th Cir. 1983).

19. FERC violates the NGA by failing to make findings about applicants' ability to pay just compensation. 15 U.S.C. §717f(e) provides that an applicant can obtain a certificate only "if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter." One of the "acts" contemplated by "this chapter" of the NGA is eminent domain, *see* 15 U.S.C. §717f(h), and the only way "properly to do" eminent domain is to pay just compensation. Thus, FERC's failure to make a

finding that an applicant "is able and willing properly to" pay just compensation in a given certificate is fatal. *See Steere Tank Lines, Inc. v. I.C.C.*, 714 F.2d 1300, 1314 (5th Cir. 1983).

20. FERC violates the Constitution by failing to use its conditioning power to prevent applicants from "quick-taking" property, i.e., taking property before just compensation has been fully and finally determined in a judicial proceeding. *Cf. Mid-Atlantic Express, LLC v. Baltimore Cty., Md.*, 410 Fed. App'x 653, 657 (4th Cir. 2011); *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009).

21. FERC violates constitutional separation-of-powers doctrine by failing to use its conditioning power to prevent applicants from "quick-taking" property, i.e., taking property before just compensation has been fully and finally determined in a judicial proceeding. When judges allow quick-taking, they are effectively granting eminent-domain power, which is something only the legislative branch has the constitutional authority to do. *See Berman v. Parker*, 348 U.S. 26, 32 (1954). FERC could prevent that state of affairs with its conditioning power.

22. By failing to use its conditioning power to preclude applicants from quick-taking property, FERC facilitates due-process problems. When a pipeline company avails itself of the quick-take procedure in district court, the landowner has no opportunity to conduct discovery, obtain its own appraisal of just compensation, or avail itself of any of the other procedural protections inherent in traditional judicial proceedings. This violates the due-process guarantee of the Fifth Amendment. FERC could prevent that state of affairs with its conditioning power.

23. By failing to preclude applicants from quick-taking property, FERC violates the just-compensation clause of the Fifth Amendment. With the quick-take procedure, a pipeline company is able to take property based on only its own, self-serving appraisal of what just compensation will ultimately be. *See E. Tenn. Nat. Gas Co. v. Sage*, 361 F.3d 808, 823-27 (4th Cir. 2004). This poses constitutionally unacceptable risk that the landowner will not ultimately receive just compensation if it proves to be more than the pipeline company estimated. FERC could obviate that risk by prohibiting applicants from using "quick take."

24. FERC's refusal to consider challenges to the constitutionality of the Natural Gas Act and the exercise of eminent domain thereunder violates landowners' Fifth Amendment due-process rights. Although the appellate court that reviews a FERC order can consider such challenges, the damage is already done by the time it gets to, as certificated pipeline companies have often long since taken property and commenced construction, irreversibly altering the landowners' property.

25. FERC denied landowners constitutional due process by refusing them access to key documents. In granting MVP's conditional certificate, FERC relied on MVP's precedent agreements and Exhibit G flow diagrams to find project need. Despite landowners' repeated demands for disclosure, FERC denied them access to this

evidence, thus preventing them from meaningfully responding to or rebutting FERC's conclusions in the Certificate Order. *See Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985); *Minisink Residents for Envtl. Pres. v. FERC*, 762 F.3d 97, 115 (D.C. Cir. 2014); *Myersville Citizens for Rural Cmt. v. FERC,* 783 F.3d 1301 1328 (D.C. Cir. 2014). FERC cannot cure its violation of the intervenors' due-process rights by disclosing the documents after this rehearing request is filed, as by that time, the deadline for rehearing will have passed and landowners' arguments based on the previously undisclosed information will be untimely under §717f(a) of the NGA.

STATEMENT OF ISSUES

I. FERC's Finding of Public Convenience and Necessity Violates the Natural Gas Act

FERC violated the Natural Gas Act by failing to establish the public market demand for the gas proposed to be carried by the MVP and relying exclusively on Mountain Valley's precedent agreements with its corporate affiliates to establish need for and public benefits of the Project. Under Section 7(c) of the NGA, a proponent of an interstate natural gas pipeline must obtain a "certificate of public convenience and necessity" from FERC.[22] "The statute provides that a certificate shall be issued to any qualified applicant upon a finding that . . . the proposed service and construction is or will be *required* by the present or future *public convenience and necessity*."[23] Because such certificates confer federal eminent domain power upon the applicant, they may only be issued for projects that serve a "public use" in accord with the Fifth Amendment to the United States Constitution.[24] Those polestars of "public use" and "public convenience

[22] 15 U.S.C. § 717f(c)(1)(A); *Minisink Residents for Envtl. Preservation and Safety v. FERC*, 762 F.3d 97, 101 (D.C. Cir. 2014).

[23] *Minisink*, 762 F.3d at 101 (quoting 15 U.S.C. § 717f(e)) (internal quotation marks and ellipses omitted) (emphasis added).

[24] *See Kelo v. City of New London*, 545 U.S. 469 (2005).

and necessity" must at all times guide FERC's consideration of applications to construct new pipelines, notwithstanding FERC's past precedent or policy statements.[25] Here, substantial evidence supplied to FERC demonstrates that the precedent agreements between Mountain Valley and its owners' corporate affiliates were not sufficient to establish that the Project is required by the present or future convenience and necessity. FERC's Certificate Order thus violates the Natural Gas Act.

FERC uses a policy statement that it issued in 1999 to guide its certificate decisions.[26] On its face, FERC's 1999 Certificate Policy Statement represented a shift in FERC's evaluation of certificate applications away from narrow reliance on the existence of precedent agreements towards a more holistic analysis. Historically, FERC policy required applicants to show market support for a project through contractual commitments for at least 25 percent of the proposed pipeline's capacity.[27] But in 1999, FERC revised its policy, acknowledging that the percentage-of-capacity test was inadequate because, in part, "[t]he amount of capacity under contract . . . is not a sufficient indicator by itself of the need for a project."[28] The Commission further observed that "[u]sing contracts as the primary indicator of market support for the

[25] *See Pac. Gas & Elec. Co. v. FPC*, 506 F.2d 33, 38–39 (D.C. Cir. 1974) ("When the agency applies the policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued. An agency cannot escape its responsibility to present evidence and reasoning supporting its substantive rules by announcing binding precedent in the form of a general statement of policy." (internal citations omitted)).

[26] Certification of New Interstate Natural Gas Pipeline Facilities, 88 FERC ¶ 61,227, 61,747 (Sept. 15, 1999) ("Certificate Policy Statement"), *clarified*, 90 FERC ¶ 61,128 (Feb. 9, 2000), *further clarified*, 92 FERC ¶ 61,094, 61,373 (Jul. 28, 2000).

[27] Certificate Policy Statement at ¶ 61,743.

[28] *Id.* at ¶ 61,744.

proposed pipeline project also raises additional questions when the contracts are held by pipeline affiliates."[29] In other words, concerns that capacity contracts in and of themselves are insufficient to demonstrate need are exacerbated when those contracts exist between affiliated entities.

The 1999 policy statement sought to remedy problems caused by FERC's long-standing sole reliance on precedent agreements. To that end, it established a list of means by which the Commission could assess market benefit, one of the indicators of public benefit for a proposed project.[30] Those means included, but were 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."[31] In clarifying its policy, FERC explicitly stated that "as 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."[32]

Despite the fact that a central, stated purpose of the new policy was to reduce FERC sole reliance on precedent agreements, the agency stubbornly adheres to that outdated approach for the MVP. FERC here relied exclusively on the existence of precedent agreements with Mountain Valley's affiliated shippers to establish the market

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[29] *Id.*

[30] *See id.* at ¶ 61,747.

[31] *Id.*

[32] Order Clarifying Statement of Policy, 90 FERC ¶ 61,128, 61,390 (Feb. 9, 2000).

need for the Project.[33] Furthermore, FERC refused to consider the affiliate nature of the precedent when relying on them to establish the need for the project.[34] FERC's contention that "the Commission does not look behind precedent agreements to question the individual shippers' business decisions to enter into contracts"[35] is flatly wrong. The section of the policy statement to which FERC cites for that proposition is not discussing ***current*** policy as of 2017.[36] To the contrary, it cites to the portion of the policy discussing ***previous*** FERC policy—the very policy that the 1999 policy statement was written to amend.[37]

FERC thus violated the NGA when it ignored or improperly dismissed overwhelming record evidence showing that those contracts are not reliable indicators of a market need that could support a finding of public convenience and necessity. Intervenors and others submitted substantial evidence into the docket demonstrating that the precedent agreements are not reliable indicators of market demand. For instance, the record shows that the demand for natural gas in the regions Mountain Valley purports to

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[33] Certificate Order ¶41 ("Mountain Valley has entered into long-term, firm precedent agreements with five shippers for 2,000,000 Dth per day of firm transportation service – the project's full design capacity. . . . The shippers on the MVP and Equitrans Expansion Projects will supply gas to a variety of end users and ***those shippers have determined*** that there is a market for their gas. . . . We find that the contracts entered into by the shippers are the best evidence that additional gas will be needed in the markets that the MVP and Equitrans Expansion Projects are intended to serve." (emphasis added)); *see also id.* n.47 ("[W]e have relied on the existence of precedent agreements to find there is a need for the proposed projects.").

[34] *Id.* ¶45.

[35] *Id.* ¶45 n.55.

[36] *See* Certificate Policy Statement, 88 FERC at 61,744 (discussing the Commission's pre-1999 policy).

[37] *See id.*

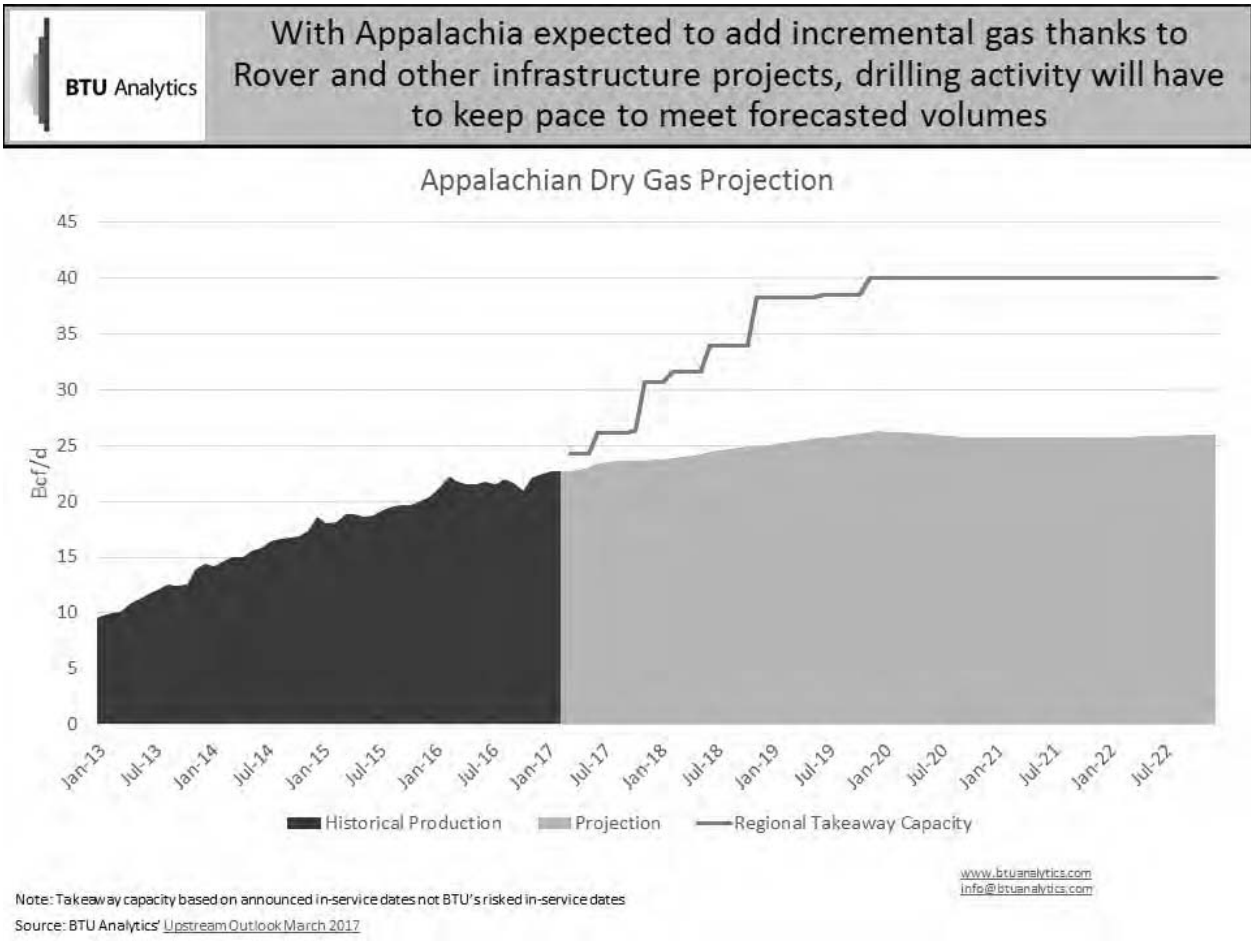
serve is leveling off at the same time that overall pipeline capacity is rapidly expanding, leading to a likelihood of either significant unused capacity or continued use of natural gas despite the existence of cheaper, cleaner alternatives, at the expense of ratepayers. The record also demonstrates that the self-dealing nature of the affiliate agreements undermines their ability to evidence market demand, reflecting instead a desire to take advantage of the high rates of return that FERC affords pipeline operators. FERC erred by granting the Certificate on the basis of the existence of those affiliate precedent agreements and by failing to hold an evidentiary hearing to determine the proper weight to be afforded those agreements, as Intervenors requested.

A. FERC Lacks Sufficient Evidence of Market Demand To Support a Finding of Public Convenience and Necessity

Industry analysts are convinced that we have a substantial surplus of pipeline capacity with existing pipelines, projects under construction, and applications in the regulatory queue.[38] The Energy Information Administration forecasts that residential use of natural gas will decline by 0.6% per year between now and 2040. Commercial and industrial uses are expected to increase 0.4% and 0.6% per year, respectively. Industrial consumption will be especially sensitive to the price of natural gas. Use of gas for electricity generation is predicted to grow at a rate of 0.5% per year.[39] Despite this small predicted increase in demand, and corresponding production levels in the Marcellus and Utica formation, pipeline takeaway capacity from the region is expanding rapidly:

[38] *See, e.g.,* June 30, 2017 Comments of Thomas Hadwin on behalf of Friends of the Central Shenandoah (Accession No. 20170630-5306) ("Hadwin Comments") at 6–8.

[39] *Id.* at 8.



Industry experts project that given the current drilling activity in the Appalachian Basin the pipeline capacity in the region will be over 50 percent greater than the production capacity, at least through 2022.[40] The excess of pipeline capacity in the Appalachian Basin provides ready access to markets and will equalize prices between production

[40] *Id.* at 5 (citing "Drilling Activity: How Much Does the Market Need?, Matthew Hoza, BTU Analytics, March 14, 2017); *see also id.* at 11 ("In the mid to long-term, incremental outbound capacity from Pennsylvania and Ohio is expected to exceed Marcellus production (i.e., pipeline constraints in Marcellus are a short-term phenomenon), assuming expected pipeline expansions go in service on time." (quoting Quadrennial Energy Review Analysis: Department of Energy, Office of Energy Policy and Systems Analysis. "Natural Gas Infrastructure Implications of Increased Demand from the Electric Sector." February 2015. Appendix B: Natural Gas)).

zones.[41] A study by Synapse Energy Economics found that "given existing pipeline capacity, existing natural gas storage, the expected reversal of the direction of flow on the existing Transco pipeline,[42] and the expected upgrade of an existing Columbia pipeline, the supply capacity of the Virginia-Carolinas region's existing natural gas infrastructure is more than sufficient to meet expected future peak demand."[43] Those findings are not controverted by the Wood Mackenzie demand study that Mountain Valley submitted, which was based on unreasonable assumptions about demand growth.[44] We are thus now facing an excess of pipeline capacity, significantly greater than the maximum production of the region.

As Commissioner LeFleur recognized in her dissent to the Certificate Order, Mountain Valley has only entered into agreements with end users for 13 percent of the MVP's capacity.[45] The specific need for the remaining capacity is unknown and based purely on speculation that the project shippers will be able to take advantage of "price

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[41] *Id.* at 6–7

[42] Since the release of that study, FERC approved the Transco reversal as part of the Atlantic Sunrise Project, Docket No. CP15-138.

[43] Synapse Energy Economics, Inc., *Are the Atlantic Coast Pipeline and the Mountain Valley Pipeline Necessary? An examination of the need for additional pipeline capacity into Virginia and Carolinas*, 1-1 (2016) (hereinafter, "Synapse Study"), attached as Exhibit B to Intervenor's DEIS Comments.

[44] *See* Appalachian Mountain Advocates Answer at 16–19. FERC acknowledged Intervenors' critique of the Wood Mackenzie report in its Order but did not address the merits of that critique, choosing instead to rely solely on the existence of the precedent agreements to support its finding of public convenience and necessity. Certificate Order ¶39–41.

[45] Certificate Order, Dissent at 3–4. As explained in more detail below and in the record, even those end user agreements do not support a finding of market demand due to their affiliate nature.

differentials in the Northeast, Mid-Atlantic, and Southeast markets."[46] Though several major pipeline projects were first conceived when a significant price advantage existed in the Appalachian basin because of the lack of takeaway pipelines, favorable price differentials for the MVP's gas are unlikely to persist given the significant amount of new takeaway capacity from the basin, the depletion of the most productive and thus profitable gas plays, and the comparatively high cost of transportation on the MVP.[47]

Given the risk imposed by the speculation that the project shippers will be able to find a market for the vast majority of the MVP's subscribed capacity, FERC needed to assess other indicators of market demand. It failed to do. As Commissioner LeFleur found, "evidence of the specific end use of the delivered gas within the context of regional needs is relevant evidence that should be considered as part of our overall needs determination."[48] She rightly faulted the other members of the Commission for narrowly focusing on the existence of the precedent agreements, despite the Certificate Policy Statement's recognition of the importance of other indicators of public benefits of a project.[49] FERC's failure to consider the substantial evidence showing a lack of any long-term market demand for the MVP's capacity renders its Certificate Order arbitrary and capricious and violates the Natural Gas Act's mandate that all approved projects be ***required*** by the public convenience and ***necessity***.

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[46] *Id.* at 4.

[47] Hadwin Comments at 5–6.

[48] Certificate Order, Dissent at 4.

[49] *Id.*

B. The Affiliate Nature of Mountain Valley's Precedent Agreements Undermines Their Ability to Support a Finding of Public Convenience and Necessity

FERC's refusal to give heightened scrutiny to the affiliate nature of the precedent agreements on which it relies undermines its conclusion that the Project serves the public convenience and necessity. FERC has previously acknowledged that "the potential for abuse of the pipeline-affiliate relationship exists whether the gas being transported is owned, brokered, or sold by a pipeline's affiliate. The Commission is concerned with a transaction conducted on a pipeline that benefits the pipeline or the corporate group of which it is a part. In such a transaction, there is an economic incentive for the pipeline to favor the transaction."[50] FERC has further acknowledged that "a franchised public utility and an affiliate may be able to transact in ways that transfer benefits from the captive customers of the franchised public utility to the affiliate and its shareholders."[51] Despite that, FERC here refused to look behind the affiliate precedent agreements.[52]

FERC's conclusions regarding the significance of affiliate precedent agreements are not supported by substantial evidence in the record. In contrast to arms-length agreements negotiated between independent market actors, agreements between corporate affiliates do not reflect true demand for new capacity, particularly where one or more of those affiliates is a public utility that can pass costs on to captive ratepayers. Where pipeline developers can push the risks of an investment onto captive customers,

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[50] FERC Order 497, Inquiry Into Alleged Anticompetitive Practices Related to Marketing Affiliates of Interstate Pipelines, 55 FR 22,139, 22,141 (June 14, 1988).

[51] *Cross-Subsidization Restrictions on Affiliate Transactions*, 122 FERC ¶ 61,155 at P 4 (2008).

[52] Certificate Order ¶45.

traditional market checks (*i.e.*, an investor's decision to spend large amounts of capital) become distorted.[53]

Both Roanoke Gas and Con Edison have signed 20-year firm transportation agreements for service on MVP. The costs of these firm transportation agreements are passed through to retail customers via an annual gas adjustment mechanism.[54] At the same time that these customers cover the cost of the pipeline investment, the affiliated pipeline developers (RGC Midstream LLC and Con Edison Gas Midstream LLC) enjoy rates of return in excess of risk—approximately in the 14% range.[55] The ultimate consequences of this financing structure are far reaching: "a pipeline capacity build-out induced by policies designed to spread the costs of new infrastructure on captive retail gas or electric ratepayers will almost surely become un-economic, undermine market drivers for more efficient solutions and impose unacceptable long term environmental and economic costs."[56] FERC's determination that any such risks would be obviated by state regulatory review[57] is thus not supported by the record and its decision "not to

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[53] *See* Appalachian Mountain Advocates DEIS Comments at 8–26.

[54] *See* Appalachian Mountain Advocates Answer at 7–9; *see also* Wilson et al., *Ratepayer Impacts of ConEd's 20-Year Shipping Agreement on the Mountain Valley Pipeline* (September 2017), appended as **Attachment A**.

[55] MVP Application at 37.

[56] Appalachian Mountain Advocates Answer at 8 (quoting Testimony of N. Jonathan Peress, Director of Energy Market Policy, Environmental Defense Fund, Before the Senate Energy and Natural Resources Committee, "Oil and Gas Pipeline Infrastructure and the Economic, Safety, Environmental, Permitting, Construction, and Maintenance Considerations Associated with that Infrastructure" at 4 (June 14, 2016)); *see also* Appalachian Mountain Advocates DEIS Comments at 13–20.

[57] Certificate Order ¶53.

second guess the business decisions of end users"[58] renders its finding of public convenience and necessity arbitrary and capricious and in violation of the NGA.

C. FERC's Unreasonably High Return on Equity Undermines the Precedent Agreements' Ability to Support a Finding of Public Convenience and Necessity

FERC lacked substantial evidence to support the high return on equity (ROE) of 14 percent that its Certificate Order permits Mountain Valley to recover. Mountain Valley's ROE has a substantial impact on the recourse rates that FERC allows it to charge and, consequently, the affiliated owner/shippers' incentive to build a new pipeline instead of utilizing existing infrastructure. Given the potential for unreasonably high rates of return to skew incentives towards building new, unnecessary pipelines, FERC should have given closer scrutiny to Mountain Valley's requested ROE. Instead, FERC's dismissal of that danger in its Certificate Order relies entirely on its past precedent and conclusory statements, without meaningfully assessing the appropriate ROE for this particular project.

FERC's high ROE for greenfield pipelines incentivizes overbuilding by offering returns in excess of what can be achieved through other market investments. As Intervenors and others have explained, the ROE that FERC provides for new pipeline construction is much higher than the returns available in comparable industries or elsewhere in the marketplace. For instance, the average return on equity granted by state public utility commissions to investor-owned electric utilities was 9.92 percent, while the projected rate of return for investors in U.S. stocks over the next five years is only around

[58] *Id.*

4 to 7 percent.[59] "The high returns on equity that pipelines are authorized to earn by FERC and the fact that, in practice, pipelines tend to earn even higher returns, mean that the pipeline business is an attractive place to invest capital. And because . . . there is no planning process for natural gas pipeline infrastructure, there is a high likelihood that more capital will be attracted into pipeline construction than is actually needed."[60] FERC failed to account for those market-skewing incentives when it approved Mountain Valley's requested ROE of 14 percent.

Furthermore, FERC lacked substantial evidence for its approval of the high ROE. The North Carolina Utilities Commission (NCUC), in comments on the Atlantic Coast Pipeline proceeding in which FERC approved an identical 14 percent return on equity, explained that although "in the past the Commission has merely accepted recourse rates based on cases citing previous cases, application of that policy would appear to conflict with the unambiguous statutory requirement that a filing entity demonstrate that its filing,

[59] Appalachian Mountain Advocates DEIS Comments at 17–18.

[60] C. Kunkel & T. Sanzillo, Inst. for Energy Econ. & Fin. Analysis, *Risks Associated with Natural Gas Pipeline Expansion in Appalachia* (2016) at 9, Exhibit C to Appalachian Mountain Advocates DEIS Comments. The attractiveness of FERC's unusually high rates of return is demonstrated by the fact that, following multiple extensions of its binding open seasons in which Mountain Valley failed to attract shippers to fill the MVP's capacity, precedent agreements were only able to be reached with entities when they became co-owners of the Pipeline. Appalachian Mountain Advocates DEIS Comments at 8–11. *See also* Hadwin Comments at 17–18 ("The Commission awards 50% higher returns for natural gas pipelines compared to the returns deemed to be "fair and reasonable" by other regulators (including the Commission's own rulings) for other similar utility projects such as power plants and transmission lines. The 15.77 percent rate of return authorized for the MVP is exorbitantly high in an era of low single digit interest rates and distorts investment decisions. No justification for a rate this high has been provided in this or any of the Commission's other proceedings. The Commission must provide such a justification on the record, or better yet, lower the returns to be in line with other similar types of projects.")

including the recourse rates, comports with the public convenience and necessity."[61] Indeed, the past precedent that FERC relies on to justify the 14 percent ROE does not itself include substantial evidence on which it could base a finding that the 14 percent ROE is reasonable.[62] Here, FERC's only justification for its excessive ROE is this same past precedent and unsupported statements regarding "the risk Mountain Valley faces as a new market entrant, constructing a new greenfield pipeline system."[63] FERC does not provide any market information to establish what Mountain Valley's true risk is nor does it assess how Mountain Valley's risk may be lower than that found in previous proceedings given the current low cost of capital.[64] FERC's failure is not remedied by its claim that Mountain Valley's rates may potentially be reassessed in the future[65] because once an unnecessary pipeline is approved and constructed based on the incentives provided by the unjustified ROE, the harm to Intervenors' interests will have largely already occurred. Regardless of any potential future adjustments, FERC's approval of the 14 percent ROE in the absence of substantial evidence provides a perverse incentive to

[61] NCUC, Comments in Support of Project and Protest of Proposed Recourse Rates of the North Carolina Utilities Commission, Docket No. CP15-554 (Accession No. 20151023-5301) at 5–6; *See also* Request for Rehearing of the North Carolina Utilities Commission and the New York State Public Service Commission, Docket No. CP15-138 (Accession No. 20170306-5163) at 16–21.

[62] *Id.* at 5–6, n.16.

[63] Certificate Order ¶82.

[64] *See* Hadwin Comments at 17 ("The 15.77 percent rate of return authorized for the MVP is exorbitantly high in an era of low single digit interest rates and distorts investment decisions.")

[65] *See* Certificate Order ¶83.

build an unnecessary greenfield pipeline and undermines its finding that the project is required by the public convenience and necessity.[66]

D. FERC Erred by Not Granting an Evidentiary Hearing to Resolve Disputed Issues of Material Fact Regarding the Need for the Project

Fundamentally, no matter how FERC attempts to justify its reliance on affiliate precedent agreements, nothing relieves the agency of its obligation to assess the weight of the evidence before it and to ensure that its findings are supported by substantial evidence. It is not the case that every precedent agreement submitted by every pipeline developer to FERC constitutes an equally valid representation of market demand. Even if some precedent statements may be sufficiently demonstrative of demand, others—namely, those between affiliates—may be at best weak indicators of demand and at worst, no indicator of demand at all. If FERC is going to rely on market need to demonstrate public benefit, it is incumbent on the agency to evaluate the validity of any purported indicator of market demand—especially affiliate precedent agreements. This includes considering other evidence in the record that calls into question the relationship between the precedent agreements and market need. The agency cannot turn a blind eye to the validity of the evidence presented simply because they come in the form of precedent agreements.

In their Motion to Intervene and Protest, certain Intervenors requested a "full evidentiary hearing to resolve contested issues of fact regarding the need for the MVP

[66] *See Sierra Club v. FERC,* 867 F.3d 1357, 1378 (D.C. Cir. 2017) ("We confess to being skeptical that a bare citation to precedent, derived from another case and another pipeline, qualifies as the requisite 'substantial evidence.' *See NCUC*, 42 F.3d at 664 (citing *Maine Pub. Serv. Co. v. FERC*, 964 F.2d 5, 9 (D.C. Cir. 1992), for the proposition that 'FERC's use of a particular percentage in a ratemaking calculation was not adequately justified by citation of a prior use of the same percentage without further reasoning or explanation')").

and balance of public benefits and adverse impacts of the MVP."[67] The Natural Gas Act states that FERC shall set "for hearing" each application for a certificate of public convenience and necessity.[68] This requirement "permits all interested parties to be heard and therefore facilitates full presentation of the facts necessary" for FERC's evaluation of the application.[69] FERC, however, often resolves disputed issues of fact based on the written record.[70] The disputed issues of material fact in this proceeding, however, are not suitable for resolution on the basis of the written record.

As demonstrated above and in their filings in this proceeding, Intervenors have raised substantial disputed issues regarding the demand for natural gas in the regions to be served by MVP, the ability of Mountain Valley's precedent agreements with affiliated shippers to demonstrate need for the project sufficient to support a finding of public convenience and necessity, and the ability of other reasonable alternatives to satisfy any such market need. Those issues are central to FERC's certificate decision. The presentation of conflicting testimony and cross examination by adverse parties is essential for FERC to effectively evaluate the credibility and reliability of the parties' evidence and witnesses. FERC's failure to grant an evidentiary hearing prevented it from adequately assessing the parties' conflicting contentions and rendered its Certificate Order arbitrary and capricious.

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[67] Motion to Intervene and Protest of Appalachian Mountain Advocates et al. at 1, 18, 53, 55, 58.

[68] 15 U.S.C. § 717f(c).

[69] *Cascade Nat. Gas Corp. v. FERC*, 955 F.2d 1412, 1425 (10th Cir. 1992) (quoting *United Gas Pipeline Co. v. McCombs*, 442 U.S. 529, 538 (1979)).

[70] *Id.* at 1426.

II. FERC's Environmental Impact Statement Violates the National Environmental Policy Act

The National Environmental Policy Act (NEPA) requires that federal agencies prepare a "detailed" environmental impact statement (EIS) for every "major federal action significantly affecting the quality of the human environment."[71] The EIS is an information dissemination tool, allowing federal agencies and the public to understand the environmental impacts before they are commenced and, critically, before resources are irretrievably committed.[72]

The EIS must include the full consideration of environmental consequences that may result from a proposed project, the alternative means that may be used to minimize those impacts, and the cumulative impact of the project with other foreseeable actions.[73] This process has been described by the courts as one designed to bring "clarity and transparency" to federal decisions affecting the environment.[74] Only if an EIS is "based on adequately compiled information, analyzed in a reasonable fashion . . . can the public

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[71] 42 U.S.C. § 4332(C); *see, e.g.*, *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 757 (2004).

[72] *See, e.g., Ariz. Cattle Growers' Ass'n v. Cartwright*, 29 F. Supp. 2d 1100, 1116 (D. Ariz. 1998) (quoting *Or. Envtl. Council v. Kunzman*, 817 F.2d 484, 492 (9th Cir. 1987)) (The NEPA requirement to issue an EIS serves two purposes: to "ensure[] that federal agencies have sufficiently detailed information to decide whether to proceed with an action in light of potential environmental consequences" and "to provide[] the public with information on the environmental impact of a proposed action and encourage[] public participation in the development of that information.").

[73] 40 C.F.R. § 1500.1; *see also Sierra Nevada Forest Prot. Campaign v. Weingardt*, 376 F. Supp. 2d 984, 990 (E.D. Cal. 2005) (These "mandatory" regulations "require that an agency give environmental information to the public and then provide an opportunity for informed comments to the agency.").

[74] *N.C. Wildlife Fed'n v. N.C. Dep't of Transp.*, 677 F.3d 596, 603 (4th Cir. 2012) (citing *Dep't of Transp. V. Pub. Citizen*, 541 U.S. 752, 756-57 (2004)).

be appropriately informed and have any confidence that the decisionmakers have in fact considered the relevant factors and not merely swept difficult problems under the rug."[75]

An EIS must provide a full and fair discussion and analysis of significant environmental information and impacts to foster informed decision-making and public participation.[76] This analysis is required to ensure important environmental consequences will not be "overlooked or underestimated."[77] A cursory reference to the impacts of an activity does "not satisfy the necessary 'hard look' at the project's environmental impact that is required by NEPA."[78] The adequacy and accuracy of this impacts analysis will guide the sufficiency of the following alternatives, mitigation, and cumulative impacts analyses.[79]

The alternatives analysis is the heart of the EIS.[80] This section mandates that the agency "rigorously explore and objectively evaluate all reasonable alternatives" in order to ensure the issues and choices are sufficiently defined and the agency and public have a clear basis for decisionmaking.[81] The scope of "reasonable alternatives" should be guided by the underlying purpose and needs of the project; however, it should not be constrained

[75] *Silva v. Lynn*, 482 F.2d 1282, 1285 (1st Cir. 1973).

[76] 40 C.F.R. § 1502.1.

[77] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

[78] *Sierra Club v. Austin*, 82 F. App'x 570, 572 (9th Cir. 2003).

[79] *Nat'l Audubon Soc'y v. Dep't of Navy*, 422 F.3d 174, 200 (4th Cir. 2005).

[80] 40 C.F.R. § 1502.14.

[81] *Id.* § 1502.14.

by "those alternative means by which a particular applicant can reach *his* goals."[82] Agencies must conduct a searching, independent review of the underlying purpose and need of a proposed project when considering alternatives and must demonstrate a degree of skepticism in evaluating the applicant's project statements.[83] With respect to the alternatives an agency must consider in determining the scope of an EIS, Council on Environmental Quality (CEQ) regulations require evaluation of a "no action" alternative representative of the status quo, other reasonable courses of action, and mitigation measures not in the proposed action. [84]

In order to ensure agencies take a "hard look" at the environmental impact of their actions, CEQ regulations require a discussion of mitigation measures throughout the EIS.[85] A sufficient mitigation analysis requires a detailed discussion of mitigation measures and a full consideration of each measure's effectiveness in minimizing the

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[82] *Van Abbema v. Fornell*, 807 F.2d 633, 638 (7th Cir. 1986) (emphasis added) (finding alternatives analysis inadequate where Corps failed to substantially consider use of existing facility because the applicant did not own or have access to the land); *see also Simmons v. U.S. Army Corps of Eng'rs*, 120 F.3d 664, 669 (7th Cir. 1997) (finding underlying purpose and need to be supplying water to locality, *not* building, or finding, a single reservoir to supply that water).

[83] *Webster v. U.S. Dep't of Agric.*, 685 F.3d 411, 423 (4th Cir. 2012); *Van Abbema,* 807 F.2d at 643 (vacating grant of permit and finding that when information is specifically and credibly challenged as inaccurate, the Corps has an independent duty to investigate the specific factual challenges made by plaintiffs).

[84] 40 C.F.R. § 1508.25(b).

[85] *See* 40 C.F.R. §§ 1502.14(f) (agency must discuss mitigation measures in discussing alternatives to proposed action), 1502.16(h) (agency must discuss mitigation in assessing consequences of the proposed action), 1508.25(b) (agency must discuss mitigation in defining scope of the EIS), 1505.2(c) (agency must discuss mitigation in explaining its ultimate decision); *Robertson*, 490 U.S. at 351–52 (recognizing that an agency must discuss mitigation when defining the scope of the EIS, discussing possible alternatives and impacts, and in explaining its final decision).

specifically identified project impacts. Courts have found a discussion of general best management practices to be inadequate where those BMPs were not evaluated in light of the unique concerns raised by the proposed project.[86] While courts do not require agencies to develop specific implementation and planning criteria for each measure, a mere listing of mitigation measures without supporting analytical data has consistently been found to be inadequate in meeting an agency's NEPA duties.[87]

NEPA regulations also require agencies to discuss the cumulative impacts of proposed management activities. Cumulative impacts analysis must consider together the impacts of the project and all other past, present, and reasonably foreseeable actions planned by other federal and state agencies and activities on private land.[88] "Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time."[89] Future impacts must be considered in the context of the current condition of the affected environment. Cumulative impacts analysis cannot be deferred to future studies at the project level.[90] NEPA "cannot be fully served if

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[86] *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1214 (9th Cir. 1998) (mitigation measures inadequate where BMPs designed to reduce erosion from logging on *unburned* areas but project proposed logging in severely burned areas).

[87] *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1381 (9th Cir. 1998) (Service's EIS inadequate where mitigation analysis lacked details of the proposed mitigation measures and consideration of each measure's level of effectiveness); *S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 588 F.3d 718, 727 (9th Cir. 2009) (finding EIS inadequate where BLM, due to uncertainty, failed to consider whether any of the listed mitigation measures would be effective in avoiding impact).

[88] 40 C.F.R. § 1508.7.

[89] *Id.*

[90] *Kern v. Or. Natural Res. Def. Council*, 284 F.3d 1062, 1075 (9th Cir. 2002) (citations omitted).

consideration of the cumulative effects of successive, interdependent steps is delayed until after the first step has already been taken."[91] The analysis of cumulative impacts should "equip a decisionmaker to make an informed decision about alternative courses of action" and should be "useful to a decisionmaker in deciding whether, or how, to alter the program to lessen cumulative impacts."[92] Agencies must analyze the "synergistic effects from implementation of the Plan as a whole."[93]

The foregoing NEPA analysis is required to ensure agency decisionmakers consider accurate, high quality information about environmental impacts and to make this information available to the public and encourage involvement in decisionmaking.[94] "[P]ublic scrutiny" is "essential to implementing NEPA," and a detailed EIS "serves as a springboard for public comment . . . ."[95] An agency action is arbitrary and capricious where the agency has "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the

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[91] *Thomas v. Peterson*, 753 F.2d 754, 760 (9th Cir. 1985); *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372 (9th Cir. 1998).

[92] *Natural Res. Def. Council v. Hodel*, 865 F.2d 288, 298-99 (D.C. Cir. 1988).

[93] *Res. Ltd., Inc. v. Robertson*, 35 F.3d 1300, 1306 (9th Cir. 1994).

[94] *See* 40 C.F.R. §§ 1500.1(b), 1500.2(b),(d); *see also Nat'l Audubon Soc'y*, 422 F.3d at 194 (agencies are required to disclose and address different scientific views, not sweep them under the rug); *Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 443, 446-48 (4th Cir. 1996); *Kettle Range Conservation Grp. v. U.S. Forest Serv.,* 148 F.Supp.2d 1107, 1127 (E.D. Wash. 2001) (agencies' plans to complete surveys "sometime in the future" are insufficient to demonstrate that the agency has taken a "hard look" at impacts).

[95] 40 C.F.R. § 1500.1(b); *N. Buckhead Civic Ass'n v. Skinner*, 903 F.2d 1533, 1540 (11th Cir. 1990).

product of agency expertise."[96] An uninformed, arbitrary and capricious decision to move forward with a proposed project is not consistent with the strict procedural duties mandated by NEPA. The Certificate Order and the EIS on which it rests do not meet these requirements, as discussed further below.

A. FERC's Failure to Meaningfully Evaluate the Need for the Project in the EIS Renders Its Alternatives Analysis Deficient

The CEQ regulations for implementing NEPA require that an EIS "specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action."[97] The CEQ regulations also require the Commission to consider and evaluate the "no action" alternative.[98] The alternatives analysis "is the heart of the environmental impact statement."[99]

A properly drafted purpose and need statement is critical to "inform the agency's review of alternatives to the proposed action and guide its final selection."[100] A purpose and need statement "will fail if it unreasonably narrows the agency's consideration of alternatives so that the out-come is preordained."[101] Where, as here, a federal agency is

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[96] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

[97] 40 C.F.R. § 1502.13; *see also* FERC NEPA regulations at 18 C.F.R. Part 380.

[98] 40 C.F.R. § 1502.14(d).

[99] 40 C.F.R. § 1502.14.

[100] *Protect Our Cmtys. Found. v. Jewell*, 825 F.3d 571, 579 (9th Cir. 2016).

[101] *Id*. (quoting *Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073, 1084 (9th Cir. 2013)); *see also Citizens Against Burlington v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991).

reviewing an applicant-sponsored project, it "cannot restrict its analysis to those 'alternative means by which a particular applicant can reach his goals.'"[102] An agency must "exercise a degree of skepticism in dealing with self-serving statements from a prime beneficiary of the project."[103]

Despite the clear requirement to "specify the purpose and need" for the MVP Project, the FEIS "does not address in detail the need or public benefits" of the MVP and EEP.[104] FERC stated in the FEIS that it would "more fully explain its opinion on project benefits and need in its Orders for the MVP and the EEP."[105] Without disclosing and discussing the need for the MVP Project, FERC fails to provide transparency in the decisionmaking process and thereby frustrates the public's opportunity to provide meaningful comments as part of the NEPA process. The public's right to weigh in on the assessment of need is particularly critical for a project such as MVP, which would impact both state and federal public lands and require the use of eminent domain for a private project over the objections of numerous landowners along the proposed route. In such instances, there must be even greater scrutiny of project need in the EIS.

The U.S. Environmental Protection Agency (EPA), in its comments on the draft EIS (DEIS) for the Project, explained why FERC's approach of putting off the need

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[102] *Simmons v. U.S. Army Corps of Eng's*, 120 F.3d 664, 669 (7th Cir. 1997) (*quoting Van Abbema v. Fornell*, 807 F.2d 633, 638 (7th Cir. 1986)); *see also Nat'l Parks & Cons. Ass'n v. Bureau of Land Mgmt.*, 606 F.3d 1058, 1072 (9th Cir. 2009).

[103] *Simmons*, 120 F.3d at 669 (7th Cir. 1997) (*quoting Citizens Against Burlington*, 938 F.2d at 209 (D.C. Cir. 1991) (Buckley, J., dissenting)).

[104] FEIS at 1-9.

[105] *Id*.

determination until *after* the NEPA process is improper. EPA stated that because the "purpose of NEPA is to inform decisionmaking, using relevant information and public engagement," the agency was "concerned that deferring evaluation of need may compromise the NEPA process." EPA recommended that "the EIS include a more thorough discussion of the purpose and need or public benefits of the project" and explained that "[i]ncluding this information in the EIS goes toward transparency and disclosure to the public, to afford the public the opportunity to provide comment; and to assess and compare alternatives' ability to meet project need."[106]

EPA explained that establishing need in the EIS is necessary for the NEPA alternatives analysis:

> Establishing a project need is critical to help determine alternatives that should be studied and the degree to which the proposed action or other alternatives may meet the stated purpose and need. EPA recommends FERC assess and compare alternatives' ability to meet project need to address issues on the possibility of overbuilding, unnecessary disruption of the environment, and unneeded exercise of eminent domain. Although the EIS contains limited information that peripherally speaks to need or public benefits, such as expanding capacity, increasing system reliability, efficiency, and operational flexibility, EPA recommends expanding this discussion to explain, for example, how much reliability or efficiency is being sought. FERC could then provide information on how proposed alternatives meet these needs by examining how much reliability or efficiency is provided. This gives a much stronger basis on which to evaluate alternatives.
>
> ***Establishing a project need is critical to help determine alternatives that should be studied and the degree to which the proposed action or other***

[106] EPA, *Comments on the Mountain Valley Project and Equitrans Expansion Project Draft Environmental Impacts Statement* (Dec. 20, 2016) ("EPA MVP DEIS Comments") at 2; *see also id.*, Enclosure-Technical Comments at 2 ("We recommend that FERC include available information in the EIS on the purpose and need or public benefits of the project, such as meeting unserved demand, eliminating bottlenecks, access to new supplies, lower costs to consumers, providing new interconnects that improve the interstate grid, providing competitive alternatives, increasing electric reliability, or advancing clean air objectives.").

> ***alternatives may meet the stated purpose and need. EPA is concerned that the purpose to provide transport ability of 2.4 Bcf/d natural gas may be narrow and limit the range of available alternatives.*** Specific dekatherm capacities are provided, although it is unclear how these units were determined or generated. In the absence of this type of supporting documentation (markets, rates, gas supply, existing facilities and service, long-term feasibility information, unserved demand, bottlenecks, problems with interstate grid, high consumer costs, etc), it is unclear if the stated purpose and need is too narrow thereby limiting the available range of alternatives. If the additional information supports a broader purpose and need statement, a broader range of alternatives could be considered in the EIS. For example, alternatives which include a lesser diameter pipe, a different capacity, different corridor, share use of existing infrastructure or right-of-way (ROW), etc.[107, 108]

FERC's failure to assess the public's need for the Project in the EIS prevented it from giving adequate consideration to the "no action" alternative.[109] FERC briefly discusses the "need" for the MVP project in Section 1.2.3.1, but only in terms of the goals of the project proponent. FERC mentions that Mountain Valley has entered into five precedent agreements and that the project is fully subscribed.[110] However, the EIS

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[107] EPA MVP DEIS Comments, Enclosure-Technical Comments at 2 (emphasis added).

[108] FERC has made similar statements in other recent DEIS documents for major greenfield pipelines. *See, e.g.*, Draft Environmental Impact Statement for the Atlantic Sunrise Project (Docket No. CP15-138-000) at 1-2 ("While this EIS briefly describes Transco's stated purpose, it will not determine whether the need for the Project exists, because this will later be determined by the Commission."). EPA there similarly expressed its concern that "project need will not be vetted in the [Atlantic Sunrise] EIS, but outside of the NEPA process by FERC." *See* Exhibit 1 of Intervenor's Oct. 19, 2016 Letter submitted in the MVP/EEP dockets (Accession No. 20161019-5061). Without assessing the need for the project *in the FEIS*, FERC undermines the development of alternatives to the proposed project, which is a "critical component of the NEPA process." EPA noted that without this information in the DEIS, FERC failed to "provide transparency in the decision-making process," thereby frustrating the public's "opportunity to provide comment" on the DEIS. *Id.*

[109] *See* FEIS at 3-4 (devoting five sentences to discussion of the "no action" alternative).

[110] FEIS at 1-10. These agreements constitute the basis for FERC's ultimate need determination, *i.e.*, the finding of public convenience and necessity in the Certificate Order. Certificate Order, ¶¶33–64.

omits several critical facts regarding the timing, terms, and circumstances surrounding the precedent agreements underpinning the MVP project. These concerns—further detailed herein—call into question whether a bona fide market need exists for the project.[111] In addition to the self-dealing concerns raised by the affiliate precedent agreements, others have pointed out that supposed market need for the MVP is on shaky ground. For example, the West Virginia Supreme Court in a November 2016 decision refuted MVP's claim that the project will "provide opportunities to expand the use of natural gas and economic growth along the Project route in West Virginia…"[112] The West Virginia Supreme Court's findings demonstrate that any benefits to West Virginia customers are illusory, finding that "there currently is no definitive evidence that any West Virginia consumers or non-MVP affiliated natural gas producers would benefit from MVP's pipeline" and "MVP has been unable to identify even a single West Virginia consumer, or a West Virginia natural gas producer who is not affiliated with MVP, who will derive a benefit from MVP's pipeline."[113] The FEIS should have considered these issues and more fully addressed the "no action" alternative.

By not assessing the need for the MVP Project in the NEPA process beyond citing the existence of the subscription contracts, FERC undermined not only its consideration of the "no action" alternative, but also the development and assessment of other potential reasonable alternatives. Without meaningfully evaluating factors that indicate the public's

[111] In its final Certificate Order, FERC did not make the findings of actual market need, instead relying on the existence of the precedent agreements, as discussed in more detail herein.

[112] MVP Application at 12.

[113] *Mountain Valley Pipeline, LLC v. McCurdy*, Case No. 15-0919 (W. Va. 2016), *available at* http://www.courtswv.gov/supreme-court/docs/fall2016/15-0919.pdf.

need for the project, such as "markets, rates, gas supply, existing facilities and service, long-term feasibility information, unserved demand, bottlenecks, problems with interstate grid, high consumer costs, etc.,"[114] FERC could not determine if a differently configured project could meet any actual public need for the gas to be carried on the MVP. Had FERC determined the need for the projects in the EIS, it would have been able to evaluate whether other alternatives, such as "a lesser diameter pipe, a different capacity, different corridor, shared use of existing infrastructure or right-of-way (ROW), etc.,"[115] would have been able to satisfy that need. Further, FERC could have assessed whether non-pipeline alternatives, such as energy efficiency or renewable energy sources—which are readily available, dropping in cost, and easily integrated into the grid—could meet any demonstrated demand for additional power generation.[116]

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[114] EPA MVP DEIS Comments, Enclosure-Technical Comments at 2.

[115] *Id.*; *see also* Appalachian Mountain Advocates Motion to Intervene and Protest at 42-55.

[116] *See* Appalachian Mountain Advocates DEIS Comments at 28; Appalachian Mountain Advocates Motion to Intervene and Protest at 43-50. FERC 's refusal to consider such alternatives as "outside the scope" of its authority, Certificate Order ¶ 43, does not comport with NEPA. CEQ's regulations require agencies to "[r]igorously explore and objectively evaluate ***all*** reasonable alternatives," including "reasonable alternatives not within the jurisdiction of the lead agency." 40 C.F.R. § 1502.14(a), (c) (emphasis added). It is well-established that Section 1502.14(c) is "intended to prompt agencies to consider otherwise appropriate alternatives that the agency lacks jurisdiction to authorize." *WildEarth Guardians v. Nat'l Park Serv.*, 703 F.3d 1178, 1184 (10th Cir. 2013). "An agency's refusal to consider an alternative that would require some action beyond that of its congressional authorization is counter to NEPA's intent to provide options for both agencies and Congress." *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 235 F.Supp.2d 1143, 1154 (W.D. Wash., 2002); see *also Milwaukee Inner-City Congregations Allied for Hope v. Gottlieb*, 944 F.Supp.2d 656, 670 (W.D. Wis., 2013) ("agencies cannot simply assume that incorporating some form of [non-jurisdictional action] into the project to avoid or minimize adverse social and economic harm is out of the question").

In particular, FERC should have given greater attention to the alternative whereby any need for the MVP could have been satisfied through construction in the corridor of the concurrently-approved Atlantic Coast Pipeline ("ACP") Project.[117] FERC only gave cursory attention to such alternatives in the FEIS and dismissed them based on its conclusions that the "co-location" options did not provide feasible means by which both applicants could transport their entire desired volumes of gas.[118] Had FERC assessed the true market need for the projects, it likely would have found that any actual public demand for the projects could have been met through construction along a single pipeline corridor, thereby drastically reducing the combined impacts of both projects.

FERC's failure to more fully assess the feasibility of a "single corridor" alternative for the MVP and ACP led Commissioner LeFleur to dissent from the Commission's Certificate Order.[119] As Commissioner LeFluer noted, "ACP and MVP are proposed to be built in the same region with certain segments located in close geographic proximity. . . . Both projects appear to be receiving gas from the same location, and both deliver gas that can reach some common destination markets."[120] After describing the "single corridor" alternatives,[121] she concluded that "these alternatives demonstrate that the regional needs that these pipelines address may be met through alternative approaches

[117] FERC Docket No. CP15-554 and CP15-555.

[118] FEIS at 3-14–3-16.

[119] Certificate Order, Dissent at 2–3.

[120] *Id.*

[121] The EIS for the ACP evaluated an alternative where the capacity for both pipelines would be met in a single corridor primarily along the ACP alignment. *Id.* at 3.

that have significantly fewer environmental impacts."[122] Had FERC meaningfully considered the true public need for the MVP in the EIS, it could have found that the single corridor alternative satisfied that need and avoided substantial adverse impacts to the environment and human communities.[123] Its failure to do so renders the EIS deficient.

B. FERC's Draft EIS Fails to Provide Adequate Information to Permit Meaningful Public Involvement

FERC's DEIS for the MVP was missing so much relevant environmental information that it precluded meaningful public participation in the NEPA process. As described in detail below, FERC published the DEIS without including critical information about landslide hazards, water resources impacts, karst impacts, harm to cultural resources, harm to listed species, and other critical topics of interest to the public. A substantial amount of information was added into the record, some of which was addressed in the FEIS,[124] after the conclusion of the public comment period, depriving the public of any input. This failure appropriately drew sharp criticism from EPA and multiple agencies within the Department of the Interior, all of which observed that an FEIS may not be used – as FERC has done – to complete analysis that should have been presented in the DEIS. FERC's failure to provide an opportunity for meaningful public involvement in the NEPA process renders its EIS, and the Certificate Order that relies on that EIS, deficient.

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[122] *Id.*

[123] *See* Appalachian Mountain Advocates Motion to Intervene and Protest at 52–53.

[124] As Intervenors explain in this request and in earlier comments in the docket, FERC's FEIS did not by any means address all of the deficiencies in the DEIS, either in terms of the information presented or the analysis thereof.

1. Complete information in a draft EIS is essential to fulfilling the purpose of NEPA

The opportunity for public input concerning environmental impacts is a core goal and value of NEPA. Thus, FERC's failure to include adequate information to enable full public comment on the Project's impacts undermines one of the statute's primary goals.[125] NEPA's EIS requirement, and in particular its draft EIS requirement, is the means by which the public input goal is fulfilled. The EIS process "guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision."[126] Information must be provided in a timely manner to ensure that the public can meaningfully participate in the decisionmaking process.[127] Thus, as the CEQ's regulations and case law make clear, a draft EIS that fails to provide the public a meaningful opportunity to review and understand the agency's proposal, methodology, and analysis of potential environmental impacts violates NEPA.[128]

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[125] These failures are in addition to the failure to establish need for the project in the EIS, but rather to only make the need determination in the Certificate Order. The procedures of the Natural Gas Act cannot replace the full and fair public participation in the decisionmaking process that NEPA mandates and FERC's lack of a well-considered need statement in the EIS hindered the public's ability to meaningfully comment on the need for the project as part of the NEPA process.

[126] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

[127] *League of Wilderness Defenders/Blue Mountain Biodiversity Project v. Connaughton*, 752 F.3d 755, 761 (9th Cir. 2014) ("Informed public participation in reviewing environmental impacts is essential to the proper functioning of NEPA.").

[128] *See e.g.*, *California ex rel. Lockyer v. U.S. Forest Service*, 465 F. Supp. 2d 942, 948-50 (N.D. Cal. 2006); *see also Idaho ex rel. Kempthorne v. U.S. Forest Service*, 142 F. Supp. 2d 1248, 1261 (D. Idaho 2001) ("NEPA requires full disclosure of all relevant information before there is meaningful public debate and oversight.").

Accordingly, an agency performing NEPA review cannot fulfill the statute's requirements by belatedly including essential information in an FEIS that was omitted from the DEIS. When an agency publishes a draft EIS, it "must fulfill and satisfy to the fullest extent possible the requirements established for final statements in section 102(2)(C) of the Act."[129] "If a draft statement is so inadequate as to preclude meaningful analysis, the agency *shall* prepare and circulate a revised draft of the appropriate portion."[130] "The agency shall make every effort to disclose and discuss at appropriate points in the draft statement all major points of view on the environmental impacts of the alternatives including the proposed action."[131] Courts have explained that, when performing an EIS, an agency "should take to the public the full facts in its draft EIS ***and not change them after the comment period*** unless, of course, the project itself is changed."[132] Data and analysis supporting the agency's decision must be included in the draft EIS, as opposed to supplied in the final EIS following public comments because "***the purpose of the final EIS is to respond to comments rather than to complete the environmental analysis (which should have been completed before the draft was released)***."[133]

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[129] 40 C.F.R. § 1502.9(a).

[130] *Id*. (emphasis added).

[131] *Id*.

[132] *Burkey v. Ellis*, 483 F. Supp. 897, 915 (N.D. Ala. 1979) (emphasis added).

[133] *Habitat Educ. Ctr. v. U.S. Forest Servs*., 680 F. Supp. 2d 996, 1005 (E.D. Wis. 2010) (emphasis added), *aff'd sub nom. Habitat Educ. Ctr., Inc. v. U.S. Forest Serv*., 673 F.3d 518 (7th Cir. 2012).

While it is true, as FERC notes in its Certificate Order, that one "purpose of a draft EIS is to elicit suggestions for change,"[134] very little of the information missing from the DEIS but added to the FEIS pertains to suggested Project changes. FERC simply failed to include substantial information pertinent to the project as proposed in the DEIS and, to a large degree, as approved by FERC. This information ***could have been*** included in the DEIS for the Project as proposed had FERC and the applicant simply taken the necessary time to gather and analyze it. Instead, FERC chose to rush through the NEPA process in an effort to meet the applicant's self-imposed deadlines for service, resulting in a DEIS that did not contain adequate information to permit the public to reasonably assess and comment on the impacts of the project.

2. The DEIS omitted extensive significant information

The DEIS lacked essential information regarding a wide variety of environmental impacts of concern to the public. The DEIS acknowledged the absence of information, and recommended that applicants submit it either by the end of the DEIS comment period or before construction begins.[135] This purported solution – which the applicant adopted, submitting thousands of pages of additional information – did not and could not fix the fundamental problem that the public had no opportunity to comment on anything that was not in the DEIS.

[134] Certificate Order ¶¶132–43 (*citing City of Grapevine v. DOT*, 17 F.3d 1502, 1507 (D.C. Cir. 1994)).

[135] *See* DEIS at 5-20 – 5-24; *See also* Certificate Order Appendix C ¶¶12–38 (requiring additional information to be submitted prior to commencing construction).

The applicant did not provide information on some of the most crucial and concerning impacts – *e.g.,* landslide risk, wetland fill, spill risk, noise pollution, sensitive species, and harm to cultural resources – until after issuance of the FEIS:

- A plan for the avoidance of active mines, or copies of agreements with coal companies regarding compensation for loss of coal resources;

- A revised Landslide Mitigation Plan that includes:
  - An analysis of the potential landslide hazards at the GCSZ, Peters Mountain, Sinking Creek Mountain, and Brush Mountain based on the results of investigations conducted by Schultz and Southworth (1989), and further identified and discussed in USGS Bulletin 1839-E;
  - An identification of landslide hazards where the pipeline routes through areas comprised of both steep slopes and red shale bedrock of the Conemaugh, Monongahela, Dunkard, and Mauch Chunk Groups;
  - An analysis of a potential debris flow zone within the Jefferson National Forest from MP 195.5 along the Kimballton Branch to the junction of Stoney Creek; and
  - Minor route adjustments as a method to avoid areas of potential slides and debris flows;

- Results of MVP's fracture trace/lineament analysis;

- Site-specific plans, including details regarding materials to be used and installation methods, for the use of permanent culverts and permanent fill in waterbodies and wetlands for access roads, including a detailed analysis of all reasonable alternatives to the use of culverts and permanent fill;

- HDD feasibility and geotechnical studies for the alternative alignments identified for the Pigg River crossing at MP 286.8 and the Blackwater River crossing at MP 262.8;

- Contingency plans outlining measures that would be taken to minimize and mitigate potential impacts on public surface water supplies with intakes within 3 miles downstream of the crossing of the MVP pipeline, and ZCC within 0.25-mile of the pipeline;

- Results of all remaining environmental surveys (water resources, wetlands, cultural resources, and threatened and endangered species) for all cathodic protection groundbeds;

- Evidence of landowner concurrence with the site-specific residential construction plans for all locations where construction work areas would be within 10 feet of a residence, as indicated in bold in table 4.8.2-1;

- Documentation of further coordination with TNC and VDCR of regarding the Mill Creek Springs Natural Area Preserve, including any impact avoidance, minimization, or mitigation measures developed;

- HDD noise mitigation plan to reduce the projected noise level increase attributable to the proposed drilling operations at the NSAs;

- The location of all water wells, springs, swallets, and other drinking water sources within 150 feet (500 feet in karst terrain) of the pipeline and aboveground facilities;

- All outstanding biological surveys for federally listed species (*i.e.*, Ellett Valley millipede, bog turtle, and running buffalo clover); and

- Remaining cultural resources survey reports, site evaluation reports, avoidance plans, or treatment plans.[136]

The applicant produced extensive additional information at the close of the DEIS comment period, such that the public was precluded as a practical matter from reviewing and commenting on it:

- Documentation of continued coordination with the Forest Service and other Appalachian Trail stakeholders regarding the newly adopted pipeline crossing, including visual simulations modeling both "leaf-on" and "leaf-off" scenarios at the crossing;

- Results of on-site surveys for the Mount Tabor Route Alternative to assess constructability and identify karst features that shall be adopted if the alternative is adopted into the proposed pipeline route;

- Additional information on the proposed route variations involving the tracts identified in table 3.5.3-1 of the DEIS;

- A complete list of any locations not already found acceptable by FERC staff where the pipeline route or access road parallels a waterbody within 15 feet or travels linearly within the waterbody channel;

- Plans and maps that illustrate how permanent impacts on wetlands would be avoided at the WB Interconnect;

[136] DEIS at 5-20 – 5-24.

- Site-specific justifications for each of the wetlands for which MVP requests a right-of-way greater than 75 feet;
- A plan that describes how long-term and permanent impacts on migratory bird habitat would be minimized, with an emphasis on high quality and/or larger intact core interior forest areas;
- The current status of easement negotiations for the Redhook Compressor Station and alternative sites and analysis if those negotiations have been unsuccessful; and
- Information regarding the potential construction feasibility of the Cline Route Alternative, including more detailed analysis of potential issues associated with either an open-cut or road crossing at Raccoon Creek and Raccoon Run Road.[137]

In addition to the deficiencies listed above, FERC's DEIS (as well its FEIS) failed to include sufficient information regarding impacts to wildlife protected by the Endangered Species Act (ESA),[138] such as the Roanoke logperch and Indiana and northern long-eared bats. Critically, FERC issued the DEIS, and later the FEIS, prior to substantially completing the ESA Section 7 consultation process with U.S. Fish and Wildlife Service (FWS). It is only through that process that the full impacts to listed species are determined. Disclosure of the impacts revealed through the consultation process in the DEIS was vital because the public does not have an opportunity for comment on the development of a Biological Assessment or Biological Opinion.[139]

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[137] DEIS at 5-20 – 5-24.

[138] 16 U.S.C. 1531 et seq.

[139] While FERC contends that the Threatened and Endangered Species section of the DEIS "essentially summarizes our BA," this is insufficient to overcome the failure to provide sufficient information on impacts to listed species in the DEIS. Further, the information provided in the DEIS did not even come close to fulfilling the requirements of a BA, which must not only identify the species that may be impacted, but for each species must describe the current habitat conditions and status trends, and how the action

Inclusion of this information in the DEIS is particularly important to determining and inviting input on cumulative impacts to listed species, because the analyses resulting from the consultation process will only assess the direct impacts of the project. FERC's failure to gather and reveal this information in the DEIS thus violated both the spirit and the letter of 40 C.F.R. § 1502.25(a), which requires that, "[t]o the fullest extent possible, agencies shall prepare draft environmental impact statements concurrently with and integrated with environmental impact analysis and related surveys and studies required by . . . the Endangered Species Act."

The information described above clearly belonged in the DEIS, and could have been included had FERC taken the time to do so. The DEIS lacked not only the information itself, but also FERC's analysis of that information that would permit the public to level a meaningful critique of the agency's position. The agency thus did not "make every effort to disclose and discuss at appropriate points ***in the draft statement*** all major points of view on the environmental impacts of the alternatives including the proposed action."[140] By publishing the DEIS without this information, FERC failed to "guarantee[ ] that the relevant information will be made available to the larger audience

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may affect those species. The FWS Guidance for the development of BAs further states that this must be supported with documentation that indicates "what, when and how the protected resource will be exposed to and how such individuals or habitats are likely to respond to this exposure." None of this information has been provided in the DEIS. Moreover, if FERC is able to "summarize" its BA, it is entirely unclear why the actual BA was not provided along with the DEIS, as required by 40 C.F.R. § 1502.25(a), so that the public could provide comment.

[140] 40 C.F.R. § 1502.9(a) (emphasis added).

that may also play a role in both the decisionmaking process and the implementation of that decision."[141]

As explained in the previous section, the fact that some (but by no means all) of the missing information was included in the FEIS does not remedy the infirmity of FERC's NEPA process. In the absence of a complete DEIS in the first instance, only the issuance of a revised DEIS that thoroughly analyzes the missing information could have satisfied NEPA's public comment requirements, which "[encourage] public participation in the development of information ***during the decision making process***."[142] Simply adding this missing information to the FEIS is insufficient, as it does not allow the same degree of meaningful public participation.[143] FERC thus failed to fulfill its NEPA duty by issuing a draft EIS that was incomplete; and by not issuing a revised, complete DEIS in response to the numerous comments highlighting the DEIS's informational deficiencies.

3. Sister federal agencies strongly criticized FERC's omissions from the DEIS

FERC failure to include adequate information provoked stern criticism from EPA and the multiple agencies within the Department of the Interior (DOI). Those agencies made clear that FERC's deficient record severely undercut the informational and public

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[141] Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989).

[142] *Half Moon Bay Fishermans' Mktg. Ass'n v. Carlucci*, 857 F.2d 505, 508 (9th Cir. 1988) (emphasis added).

[143] *Id*. (*citing California v. Block*, 690 F.2d 753, 770-71 (9th Cir. 1982)) ("It is only at the stage when the draft EIS is circulated that the public and outside agencies have the opportunity to evaluate and comment on the proposal…No such right exists upon issuance of a final EIS."); 40 C.F.R. § 1500.1(b).

participation purposes of NEPA. The problem appears to be endemic at FERC, as EPA has repeatedly criticized FERC's deficient NEPA records in the past.

EPA stated as follows regarding the informational deficiencies in its DEIS comments:

> Much of the data and analysis [regarding impacts to the environment and public health] remain incomplete; including endangered species surveys, wetland, and stream resources, landslide vulnerabilities, karst topography. . . . The DEIS references and relies heavily on construction, management, restoration and mitigation plans (plans listed in Table 2.4-1) many of which are not included in the EIS. . . . Without having access to these and other information, EPA finds the information provided insufficient to determine if impacts, particularly to surface water and aquatic life, are temporary and minimal.[144]

EPA explained how this lack of critical information in the DEIS undermines the required public participation opportunities in the NEPA process:

> EPA understands that FERC has requested the applicants file materials at various points after the release of the DEIS. Although this information has been or will be posted to the docket which is publicly accessible, EPA is concerned that without official notification, the public may not have had an opportunity to fully comment on this material. It is not apparent within the EIS how FERC intends to include public participation and comment on these subsequent filings. . . . ***Without this process clearly articulated, it appears that the EIS is a 'rolling' document providing just a snapshot in time. The creates a significant challenge for stakeholders and members of the public to follow the documentation provided, or know which material is most current in order to provide the most relevant comments***.[145]

Likewise, DOI, including the National Park Service (NPS), Bureau of Land Management (BLM) and United States Geological Survey (USGS), faulted FERC for failing to include adequate information to support meaningful public comment on the

[144] EPA, *Comments on the Mountain valley project and Equitrans Expansion project draft Environmental Impacts Statement* (Dec. 20, 2016) ("EPA MVP DEIS Comments") at 3.

[145] *Id.* at 2 (emphasis added).

DEIS. DOI explained that "bureau review has resulted in the conclusion that the current DEIS lacks sufficient information to perform adequate analysis of impacts to DOI resources."[146] NPS stated that the extensive missing information rendered release of the DEIS premature:

> ***[T]he DEIS was released for public comment prematurely and without the information necessary to complete a meaningful analysis of impacts.*** NPS noted numerous instances throughout the DEIS describing additional important information that FERC ordered the applicant to provide before the DEIS comment period ended. This information was critical to analyzing the impacts of the proposed MVP pipeline. Three large supplemental filings were made on October, 14, 21, and 28, 2016. We believe some of the FERC ordered information is still outstanding. This late provision of critical information in effect significantly shortened the comment period and made commenting on this project a significant challenge. Information submissions to the FERC docket without additional public notification require an exceptional level of diligence to ensure that all materials are found and included in one's analysis.
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> . . .
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> The schedules set for EIS development and public comment should align with CEQ regulations stating that, "The draft EIS must fulfill and satisfy to the fullest extent possible the requirements established for final statements in section 102(2)(C) of the Act. If a draft statement is so inadequate as to preclude meaningful analysis, the agency shall prepare and circulate a revised draft of the appropriate portion." ***The DEIS should include all updates from the applicant that are necessary for a meaningful analysis prior to opening up the comment period. The approach of this project has not allowed for adequate public input as it circumvents the timeframes to review information provided and makes it extremely challenging to understand what is proposed, what the potential impacts are, and how the various alternatives compare against each other.***
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> This lack of information also precludes a meaningful analysis of cumulative impacts.[147]

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[146] DOI, *Comments on the Federal Energy Regulatory Commission (FERC) Draft Environmental Impact Statement (DEIS) for the Proposed Mountain Valley Project (MVP) by the Mountain Valley Pipeline Company, LLC and proposed Equitrans Expansion Project by the Equitrans LP* (Dec. 22, 2016) at 1.

[147] *Id.* at 2–3 (emphasis added).

The Bureau of Land Management echoed those concerns, stating that

> the DEIS for MVP lacks the information and analysis necessary under the National Environmental Policy Act for BLM to adequately consider the project's effects. Because the DEIS lacks information, it precludes meaningful analysis of the potential impacts discussed herein. As explained in the attached comments, the analyses of alternatives, cumulative effects, and cultural, visual, aquatic, geological, and biological resources are deficient because information has not been provided, was provided after the release of the DEIS, or was not incorporated in the DEIS.[148]

BLM concluded that

> The DEIS fails to analyze much of the information listed above because the applicant did not provide it despite multiple requests, the applicant provided the information after the close of the comment period, or the process had not been completed before the release of the DEIS. As noted above, in some cases, the applicant had been advised of the need for this information over a year before FERC released the DEIS. In order to give cooperating agencies and the public an opportunity to meaningfully consider and comment on such new information, we are considering submitting a formal request to FERC to complete a Revised Supplemental Draft Environmental Impact Statement.[149]

This is not the first time FERC has failed to include significant essential information in a draft EIS for a proposed pipeline. EPA has repeatedly called out FERC for this same failing with respect to other pipeline projects:

- *Constitution Pipeline*. In draft EIS comments regarding the Constitution Pipeline, EPA stated that a substantial amount of information was omitted from the DEIS, including information regarding impacts to geology and soils, waterbodies, wetlands, wildlife and vegetation, air emissions, and cumulative impacts.[150] EPA

[148] *Id.* at 13.

[149] *Id.* at 16.

[150] EPA, *Comments on the Constitution Pipeline DEIS* at 3-9 (Apr. 9, 2014) (Docket No. CP13-499-000, Accession No. 20140409-5120).

repeatedly explained that the lack of information prevented other agencies and the public from meaningfully participating in the NEPA process.[151]

- *Atlantic Sunrise Pipeline.* In comments regarding the Atlantic Sunrise Pipeline draft EIS, EPA stated it was "concerned about the amount of detailed information that has yet to be filed and is not evaluated in the DEIS."[152] This missing information included "surveys for land, rare, species, historic resources, water supplies, air modeling, mitigation measures to manage and dispose of contaminated groundwater, proposed mitigation measures for source water protection areas, geotechnical feasibility studies for HDD crossing locations and mitigation measures to minimize drilling risks, and a detailed aquatic resource compensatory mitigation plan.[153] EPA explained that this information is both "relevant and critical to evaluation of potential impacts" and that "a fully informed decision may not be made without this information."[154] EPA also stressed that this missing information needs to be "disseminated and appropriately evaluated with the resource agencies and public stakeholder participation

[151] *See, e.g.*, *id*. at 3 (The lack of information "negates the ability of agency specialists and the public to review the analysis and comment on it.").

[152] EPA Atlantic Sunrise Comments at 2.

[153] *Id*.

[154] *Id*.

prior to the issuance of any certificates by FERC."[155] EPA specifically recommends that FERC do this "through the use of a revised DEIS."[156]

- *Sabal Trail pipeline.* In draft EIS comments regarding the Sabal Trail Pipeline, EPA said that it had "very significant concerns over the FERC's process and full and objective compliance with the NEPA regulations at 40 CFR Part 1500."[157] EPA even suggested that FERC "appear[ed] to be justifying decisions made prior to implementing the NEPA process."[158]
- *PennEast pipeline.* In draft EIS comments regarding the PennEast pipeline, EPA had "significant concerns regarding the alternatives analysis, a number of important topics for which *information is incomplete*, and the direct, indirect and cumulative impacts of the proposed action on the environment and public health, including impacts to terrestrial resources, including interior forests, aquatic resources, and rare, threatened and endangered species."[159] EPA emphasized that "[a] significant amount of information is omitted from the DEIS and is proposed to be filed by the project proponent at a future date."[160] EPA

[155] *Id*.

[156] *Id*.

[157] EPA, *Comments on the Southeast Market Pipeline Project DEIS* at 1 (Oct. 26, 2015) (Docket No. CP15-17-000, Accession No. 20151102-0219).

[158] *Id*. at 9.

[159] EPA, *Comments on the PennEast Pipeline DEIS*, at 1 (Sept. 16, 2016) (Docket No. CP15-558-000, Accession No. 20160916-0013) (emphasis added).

[160] *Id*. at 3.

> stressed that "[f]ailing to consider this information in the DEIS leads to gaps in the data and lack of potentially important information for the decision maker."[161] As it did in comments on the Atlantic Sunrise DEIS, EPA specifically requested that FERC prepare a "revised DEIS" for the PennEast Pipeline to account for these significant deficiencies.

It is thus clear that FERC's omissions of critical information from the DEIS is not a one-time error, but a consistent practice. FERC's failure to include sufficient information and analysis in the DEIS to support meaningful public involvement in the NEPA process renders its EIS deficient.

C. FERC Failed to Adequately Analyze the Project's Climate Impacts

FERC failed to adequately analyze the climate change impacts of the end use of the gas transported by the Project, as required by NEPA. NEPA requires agencies to assess not only the direct effects of a proposed action, but also the indirect and cumulative effects. Indirect effects are "caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable."[162] "Indirect effects are defined broadly, to 'include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.'"[163] Cumulative impacts are "impact[s] on the environment which result[] from the incremental impact of

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[161] *Id*.

[162] 40 C.F.R. § 1508.8(b).

[163] *Natural Res. Def. Council v. U.S. Army Corps of Eng'rs*, 339 F. Supp. 2d 386, 404 (S.D.N.Y. 2005) (quoting 40 C.F.R. § 1508.8(b)).

the action when added to other past, present, and reasonably foreseeable future actions."[164]

The Court of Appeals for the D.C. Circuit's recent decision in *Sierra Club v. FERC*[165] recognizes a bar for assessing indirect and cumulative impacts under NEPA that FERC failed to meet here. In *Sierra Club*, the court agreed with the petitioners that FERC must meaningfully assess the downstream greenhouse gas ("GHG") emissions and climate impacts of natural gas pipelines. The D.C. Circuit vacated the orders under review and remanded the matter to FERC for the preparation of an EIS that is consistent with its opinion. Similarly, as in *Sierra Club*, FERC's environmental review of the MVP failed to assess and disclose the Project's climate impacts.

The *Sierra Club* court explained that "[a]n agency conducting a NEPA review must consider not only the direct effects, but also the *indirect* environmental effects, of the project under consideration."[166] Greenhouse gas emissions from end use of natural gas are causally related and reasonably foreseeable indirect effects of permitting a pipeline intended to deliver that natural gas.[167] Burning of the gas transported by a pipeline thus "is not just 'reasonably foreseeable,' it is the project's entire purpose."[168] The court explained that not only could FERC foresee the likely emissions from combustion of gas carried on the pipeline, it also had authority to mitigate those

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[164] 40 C.F.R. § 1508.7.

[165] *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017).

[166] *Id.* at 1371 (citing 40 C.F.R. § 1502.16(b)) (emphasis in original).

[167] *Id.* at 1371–74.

[168] *Id.* at 1372.

emissions.[169] Accordingly, the "EIS … needed to include a discussion of the significance of this indirect effect … as well as the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions."[170] The Court found that FERC's EIS did not satisfy NEPA because it failed to adequately assess downstream greenhouse-gas effects.

NEPA requires a more searching analysis than merely disclosing the amount of pollution. Rather, FERC must examine the "ecological[,]… economic, [and] social" impacts of those emissions, including an assessment of their "significance." 40 C.F.R. §§ 1508.8(b), 1502.16(a)-(b). In the MVP FEIS, FERC declined to consider downstream GHG emissions as indirect effects of the project.[171] In addressing cumulative impacts, FERC includes only one short paragraph to attempt to disclose the actual estimation of the downstream GHG emissions that would result from burning the gas that the Project would carry.[172] Although FERC attempted to estimate downstream GHG emissions,[173] it

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[169] *Id.* at 1373–74.

[170] *Id.* at 1374.

[171] FEIS at §4.11.3 (discussing only GHG emissions from construction of Project and operation of compressor stations); *id.* at 516 ("The downstream use of natural gas in the market areas . . . is beyond the scope of this EIS.").

[172] FEIS at 4-620; *see also* Certificate Order ¶¶287–96.

[173] Intervenors have previously highlighted problems with FERC's estimate, methodology, and analysis. *See, e.g.*, Appalachian Mountain Advocates DEIS Comment at 91–93; Sierra Club VA Chapter DEIS Comment at 8. Among the deficiencies identified there, which Intervenors incorporate into this Request, are FERC's failure to: use the most up-to-date values for methane global warming potential (GWP); disclose the methodologies used to calculate GHG emissions; quantify projected upstream and downstream direct and indirect GHG emissions where possible and conducting a strong qualitative assessment if quantitative analysis is not possible; fully analyze all of the direct, indirect, and cumulative GHG emissions resulting from the MVP project and using this analysis to compare alternatives and develop mitigation measures to address

failed to provide an analysis of the ecological, economic, and social impacts of those emissions, including an assessment of their significance that would meaningfully inform the public or decision-makers about the indirect impact of those emissions– including their scope, significance, and potential mitigation and alternatives.[174]. Here, FERC failed to perform this analysis.[175] Instead, FERC articulated unsubstantiated assertions about why it cannot determine the projects' incremental physical impacts on the environment

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such emissions; and assess the impacts of the quantified direct, indirect, and cumulative GHG emissions resulting from the full lifecycle of the MVP and EEP projects.

[174] *See Sierra Club*, 867 F.3d at 1375 (quantification not sufficient).

[175] The omission is notwithstanding FERC's acknowledgement of the dire consequences of climate change. In the FEIS, FERC listed some typical climate change impacts generally expected to burden the Project's geographic areas, such as flooding, heat waves, and sea level rise. FEIS at 4-618. Petitioners note, in addition, that while listing these anticipated regional climate change impacts is insufficient for evaluating the *Project's* climate impacts, FERC failed even in this regard by inexplicably omitting some of the severe impacts that it has cited in past environmental reviews. For example, in the EIS for the Atlantic Sunrise Project (issued in December 2016), FERC wrote that the U.S. Global Change Research Program's 2014 climate change report noted that the "observations of environmental impacts that may be attributed to climate change in the Northeast region" include: 1) "areas that currently experience ozone pollution problems are projected to experience an increase in the number of days that fail to meet the federal air quality standards," 2) "an increase in health risks and costs for vulnerable populations due to projected additional heat stress and poor air quality," 3) rising sea levels that will "stress[] infrastructure (e.g. communications, energy, transportation, water, and wastewater)," 4) "heat stress negatively affect crop yields; invasive weeds are projected to become more aggressive," 5) "an increase in carrier habitat and human exposure to vector-borne diseases (e.g. Lyme disease or West Nile)." Atlantic Sunrise Project Final EIS at 4-317. While the MVP EIS similarly purports to list "observations of environmental impacts that may be attributed to climate change in the Northeast" region per the same U.S. Global Change Research Program report, FEIS at 4-618, FERC has inexplicably omitted or downplayed (e.g., by reducing specificity and describing the risks in more general terms) these enumerated impacts that were included in the Atlantic Sunrise Project EIS just six months earlier. Similarly, while the invalidated Sabal Trail EIS lists ten bullet points detailing impacts that the USGCRP report notes may be attributed to climate change in the Southeast region, Sabal Trail EIS at 3-296 to 3-297, the MVP EIS lists only three bullet points for the Southeast region, FEIS at 4-618.

caused by climate change .[176] Specifically, the FEIS concludes that FERC "cannot determine whether the projects' contribution to cumulative impacts on climate change would be significant."[177] FERC makes no real effort to assess significance, instead merely stating that it cannot do so because it "cannot determine the projects' incremental physical impacts on the environment caused by climate change…."[178] FERC repeats much of the same rationale in its Certificate Order.[179]

The *Sierra Club* court firmly rejected this rationale and found that FERC was required to do more to estimate incremental climate impacts. In the EIS that the D.C. Circuit invalidated in *Sierra Club*, FERC had similarly maintained that its hands were tied because "there is no standard methodology to determine how the proposed [pipelines'] incremental contribution to GHGs would translate into physical effects on the global environment."[180] The D.C. Circuit stated unequivocally that the EIS "needed to include a discussion of the 'significance' of this indirect effect."[181] It continued, stating that "quantification would permit the agency to compare the emissions from this project to emissions from other projects, to total emissions from the state or the region, or to regional or national emissions-control goals. Without such comparisons, it is difficult to see how FERC could engage in 'informed decision making' with respect to the

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[176] *See* FEIS at 4-620.

[177] FEIS at 4-620

[178] *Id*.

[179] *See* Certificate Order ¶¶293–96.

[180] Sabal Trail FEIS at 3-297.

[181] *Sierra Club*, 867 F.3d at 1374 (citing 40 C.F.R. § 1502.16(b).

greenhouse-gas effects of this project, or how 'informed public comment' could be possible."[182] The MVP EIS thus also "needed to include a discussion of the 'significance' of this indirect effect, *see* 40 C.F.R. § 1502.16(b), as well as 'the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions,' *see WildEarth Guardians*, 738 F.3d at 309 (quoting 40 C.F.R. § 1508.7)."[183]. Here, FERC simply provided a flawed estimate of combustion emissions with no corresponding analysis or discussion of its significance.

FERC's inadequate analysis also impermissibly downplayed the Project's downstream GHG emissions by stating that "burning natural gas emits less CO_2 compared to other fuel sources (e.g., fuel oil or coal)."[184] The D.C. Circuit rejected this approach in *Sierra Club*:

> The effects an EIS is required to cover "include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial." 40 C.F.R. § 1508.8. In other words, when an agency thinks the good consequences of a project will outweigh the bad, the agency still needs to discuss both the good and the bad. In any case, the EIS itself acknowledges that only "portions" of the pipelines' capacity will be employed to reduce coal consumption. *See* J.A. 916. An agency decisionmaker reviewing this EIS would thus have no way of knowing whether total emissions, on net, will be reduced or increased by this project, or what the degree of reduction or increase will be. In this respect, then, *the EIS fails to fulfill its primary purpose*.[185]

The MVP EIS suffers from a similar defect, stating that "[b]ecause coal is widely used as an alternative to natural gas in the region in which the projects would be located, it is

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[182] 867 F.3d at 1374.

[183] *Id.*; Certificate Order ¶295.

[184] FEIS at 4-620.

[185] *Sierra Club*, 867 F.3d at 1375 (emphasis added).

anticipated that the projects would result in the displacement of *some* coal use, thereby *potentially* offsetting *some* regional GHG emissions."[186] As with the invalidated Sabal Trail EIS, the MVP EIS makes no attempt to assess whether total emissions would be reduced or increased, or the degree of reduction or increase.[187]

The *Sierra Club* court further instructed FERC to explain its refusal to use the social cost of carbon methodology to assess project-specific impacts:

> The EIS explained that there is no standard methodology for making this sort of prediction.... FERC has argued in a previous EIS that the Social Cost of Carbon is not useful for NEPA purposes.... We do not decide whether those arguments are applicable in this case as well, because FERC did not include them in the EIS that is now before us. On remand, FERC should explain in the EIS, as an aid to the relevant decisionmakers, whether the position on the Social Cost of Carbon that the agency took in *EarthReports* still holds, and why. [188]

Here, FERC failed to provide this explanation in the MVP EIS. In its Certificate Order, issued outside the NEPA process, FERC claims that the social cost of carbon is not appropriate for project-level NEPA review.[189] FERC, however, allows that the tool "may be useful for rulemakings or comparing regulatory alternatives using cost-benefit analyses where the same discount rate is consistently applied." FERC does not explain why this could not be used to compare the "social cost" of the Project's emissions with those of reasonable alternatives, while keeping the discount rate constant. Neither the

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[186] FEIS at 4-620 (emphasis added).

[187] *Sierra Club*, 867 F.3d at *1374* (explaining that "some educated assumptions are inevitable in the NEPA process").

[188] *Sierra Club*, 867 F.3d at 1375; *see also* Appalachian Mountain Advocates DEIS Comment at 96 (to assess impacts of the Project's GHG emissions, FERC "should have utilized available tools such as the 'social cost of carbon'").

[189] Certificate Order ¶296.

FEIS nor the Certificate Order contains a comparison of the downstream GHG emission of the Project to the emissions of any reasonable alternatives.[190] FERC thus undermines the FEIS's alternatives analysis, which is the "is the heart of the environmental impact statement."[191]

As a consequence of FERC's failure to engage in a serious analysis of downstream greenhouse gas emissions, including their significance, the cumulative impacts analysis also fails.[192] The FEIS simply states that end-use "emissions would increase the atmospheric concentration of GHGs, in combination with past and future emissions from all other sources, and contribute incrementally to climate change that produces the impacts previously described."[193] This unsupported statement fails to constitute an adequate analysis of the MVP's incremental impact when added to other past, present, and reasonably foreseeable future actions – including existing, currently

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[190] The deficiency in the FEIS is not remedied by FERC's cursory comparisons of the Project's downstream GHG emissions to regional or national emissions levels in the Certificate Order. *See* Certificate Order ¶294. EPA has criticized FERC for comparing the estimated emissions of another major interstate gas pipeline, the Leach Xpress Project, "to state GHG emission levels." EPA explained that "[c]omparing one project's direct and indirect emissions to aggregated totals is not an appropriate way to consider the impact of emissions." EPA, *Comments on the Leach Xpress Pipeline DEIS*, at 7 (June 6, 2016) (Docket No. CP15-514-000, Accession No. 20160613-5177).

[191] 40 C.F.R. § 1502.14.

[192] FERC also makes conflicting statements regarding cumulative impacts. *Compare* MVP EIS at 4-617 ("The cumulative impact analysis described below does not focus on a specific cumulative impact area because climate change is a global phenomenon.") to *id*. at 4-618 ("Although climate change is a global concern, for this cumulative analysis, we will focus on the cumulative impacts of climate change in the Northeast (includes Pennsylvania and West Virginia) and Southeast (includes Virginia) regions."). Ultimately, the MVP EIS fails to examine the *Project's* direct, indirect, or cumulative impact on either a regional or global scale.

[193] *Id.* at 4-620.

proposed, and reasonably foreseeable regional natural gas infrastructure. FERC does not quantify the project's downstream GHG emissions in combination with other past, present, and reasonably foreseeable future projects in the region, despite many of those projects being directly under FERC's review. The EIS impermissibly downplays the cumulative climate impacts of the gas infrastructure build-out now occurring in Pennsylvania, West Virginia, Virginia, and other surrounding states, which could result in the transport of gas to other regions. For example, the FEIS does not quantify the combined GHG emissions caused by the FERC-jurisdictional natural gas interstate transportation projects listed in section 4.13.1.2.[194] FERC must consider the broader impacts of the proposed pipelines, including the cumulative impacts of the natural gas extraction system, well pads, more pipelines, and access roads, which are all an inevitable result of this project. FERC's failure to meaningfully assess the significance of the total direct, indirect, and cumulative emissions resulting from the project, including upstream and downstream emissions combined with emissions from past, present, and reasonably foreseeable future projects in the region, renders its FEIS deficient under NEPA.

Additionally, as a consequence of its failure to take a hard look at the downstream GHG and climate impacts, FERC also failed to adequately seek public input regarding possible mitigation measures.[195] In order to satisfy NEPA's mandate of informed decision-making, FERC must meaningfully consider and analyze impacts from

[194] FEIS at 4-595– 4-598

[195] *See Sierra Club,* 867 F.3d at 1374. To the extent FERC relies on the existence of air permitting requirements to excuse its shoddy analysis (*see, e.g*., MVP EIS at 4-488, 4-492, 4-499), that is improper because "the existence of permit requirements overseen by another federal agency or state permitting authority cannot substitute for a proper NEPA analysis." *Id.* at 1375 (citing *Calvert Cliffs' Coordinating Comm. v. Atomic Energy Comm'n*, 449 F.2d 1109, 1122-23 (D.C. Cir. 1971)).

downstream combustion – and assesses mitigation measures and feasible alternatives accordingly (including the no-action alternative, and alternatives involving renewable energy and energy efficiency).[196] FERC's unsupported statements in the MVP EIS undermined the ability of the public and decision-makers to fully compare alternatives and develop mitigation measures. FERC must fully analyze all of the direct, indirect, and cumulative GHG emissions resulting from the project and use this analysis to compare alternatives and develop mitigation measures to address such emissions.[197]

D. FERC's Conclusion in the EIS That Impacts to Aquatic Resources Will Be Adequately Minimized and Will Not Have Significant Impacts Is Not Supported

FERC's EIS failed to take a "hard look" at the direct and indirect effects of the Project on waterbodies and wetlands. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). Construction of the MVP and EEP would cross 1,146 waterbodies, including 407 perennial waterbodies, and would disturb over 5,200 acres of soils that are classified as having the potential for severe water erosion.[198] The vast majority of those waterbodies provide habitat for aquatic life and support fisheries.[199] The MVP would clear a 150 foot wide corridor along the length of the pipeline route during construction, which would "remove[] the protective cover and expose[] the soil to the effects of wind

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[196] *See Sierra Club,* 867 F.3d at 1374–75; *see also* Appalachian Mountain Advocates DEIS Comment at 95 (FERC must fully evaluate lifecycle GHG emissions impacts and "compare alternatives and develop mitigation measures to address such emissions") (internal citation omitted). FERC has authority to deny or approve a project with conditions . *See* 15 U.S.C. § 717f;*see also* Sierra Club VA Chapter DEIS Comment at 16 (listing conditions that FERC could impose in the certificate to mitigate climate impacts).

[197] *See, generally*, Appalachian Mountain Advocates' DEIS Comments.

[198] FEIS at 4-118, 5-2.

[199] *Id.* at 4-212–4-216.

and rain, which increases the potential for soil erosion and sedimentation."[200] Additionally, the project would convert a significant amount of forested land to herbaceous cover in the 50-foot wide permanent right-of-way, much of which follows steep slopes with highly erodible soils. The impacts of the MVP and EEP will occur in the same region and, indeed, often in the same watershed, as impacts from numerous other recently approved natural gas pipelines.

FERC acknowledges that "[i]mpacts on waterbodies could occur as a result of construction activities in stream channels and on adjacent banks."[201] Those impacts include "local modifications of aquatic habitat involving sedimentation, increased turbidity, and decreased dissolved oxygen concentrations."[202] Additionally, FERC states that the

> clearing and grading of stream banks could expose soil to erosional forces and would reduce riparian vegetation along the cleared section of the waterbody. The use of heavy equipment for construction could cause compaction of near-surface soils, an effect that could result in increased runoff into surface waters in the immediate vicinity of the proposed construction right-of-way. Increased surface runoff could transport sediment into surface waters, resulting in increased turbidity levels and increased sedimentation rates in the receiving waterbody. Disturbances to stream channels and stream banks could also increase the likelihood of scour after construction.[203]

Those impacts would harm the aquatic organisms that rely on the affected streams for their survival. As FERC states,

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[200] *Id.* at 4-81.

[201] *Id.* at 4-136.

[202] *Id*.

[203] *Id*. at 4-137.

> [i]ncreased sedimentation and turbidity resulting from in-stream and adjacent construction activities would displace and impact fisheries and aquatic resources. Sedimentation could smother fish eggs and other benthic biota and alter stream bottom characteristics, such as converting sand, gravel, or rock substrate to silt or mud. These habitat alterations could reduce juvenile fish survival, spawning habitat, and benthic community diversity and health. Increased turbidity could also temporarily reduce dissolved oxygen levels in the water column and reduce respiratory functions in stream biota. Turbid conditions could also reduce the ability for biota to find food sources or avoid prey.[204]

Despite generally acknowledging these impacts, FERC nonetheless concludes that "[n]o long-term or significant impacts on surface waters are anticipated as a result of the projects" and that "[t]emporary impacts would be avoided or minimized" primarily because the applicants will use dry open-cut crossing methods and will adhere to Best Management Practices when performing clearing and grading in riparian areas.[205] Following from that conclusion, FERC finds that "constructing and operating the MVP and the EEP would not significantly impact fisheries and aquatic resources."[206]

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[204] *Id.* at 4-216–4-217. *See also id.* at 4-221 ("Sedimentation resulting from the construction, restoration, and operation portions of the MVP would likely be transported into downstream waterbodies . . . .").

[205] *Id.* at 4-149. *See also id.* at 4-143 ("Mountain Valley would minimize impacts on first-order streams by adhering to its Procedures and its project-specific *Erosion and Sediment Control Plans* and *Stormwater Pollution Prevention Plans* for West Virginia and Virginia including mitigation measures such as reducing the construction corridor, implementing dry-crossing methods, limiting the timeframe allowed to complete the crossing, restoring bank and contours, and limiting the maintained areas of the right-of-way in the riparian zone.")

[206] *Id.* at 4-224. In reaching that conclusion in the FEIS, FERC relies in part on the West Virginia Department of Environmental Protection's (WVDEP) March 23, 2017 issuance of a Clean Water Act Section 401 water quality certification and the conditions contained therein. *Id.*; *see also id.* at 4-138, 5-4. That certification, however, was vacated by the U.S. Court of Appeals for the Fourth Circuit in response to a challenge by some of the Intervenor groups. On remand, WVDEP elected to waive its authority under CWA Section 401, thereby eliminating any of the claimed protections. *See* WVDEP, Notice to FERC of Section 401 Waiver (November 1, 2017) (Accession No. 20171106-0009). FERC's reliance on WVDEP's certification is thus arbitrary and capricious.

The EIS's conclusion that the projects would not have significant adverse impacts on fisheries and aquatic resources is flawed for several reasons. First, FERC unjustifiably relies on the use of Best Management Practices to conclude that clearing and trenching within the relevant watersheds during pipeline construction will not significantly contribute to sedimentation and related impacts of turbidity. FERC provides no evidence to justify its conclusion that those measures would successfully minimize sedimentation impacts, and past experience with similar projects demonstrates that they would be inadequate. Second, FERC completely fails to account for the increased sedimentation that would result from the conversion of mature forest to herbaceous cover within the 50-foot wide permanent right-of-way along much of the pipeline route. As expert analysis submitted to FERC confirms, that land use change would cause significant increases in sedimentation.[207] Finally, FERC failed to adequately analyze the cumulative water quality impacts of the projects when combined with other past, present, and reasonably foreseeable future actions. FERC's failure to analyze those impacts renders its conclusion that the projects would not significantly impact aquatic resources unsupportable. Because of those shortcomings, FERC's DEIS does not comply with NEPA.

1. FERC's conclusion that mitigation measures will adequately minimize impacts to aquatic resources is not supported

FERC must support with substantial evidence its conclusion that proposed mitigation measures would protect water resources during construction and operation of the projects. *See New York v. U.S. Nuclear Reg. Comm'n*, 589 F.3d 551, 555 (2d Cir.

[207] *See* Appalachian Mountain Advocates DEIS Comments, Exhibit D (*Mountain Valley Pipeline Sediment Modeling Methodology*, Prepared for Appalachian Mountain Advocates by Jason Clingerman and Evan Hansen of Downstream Strategies, LLC) (hereinafter "Downstream Strategies Report").

2009). Insufficient mitigation measures, even if longstanding in their use, are still insufficient. *See Summit Petroleum Corp. v. U.S. E.P.A.*, 690 F.3d 733, 746 (6th Cir. 2012). FERC's failure to support its conclusions regarding the efficacy of sediment control measures renders the EIS deficient.

The proposed projects would impact aquatic life due to increased sedimentation not just from the stream crossings themselves, but also from the runoff from the significant land disturbance that would occur in the watersheds upstream from the crossings during construction. As mentioned above, construction of the MVP would disturb over 5,200 acres of soils that are classified as having the potential for severe water erosion.[208] Moreover, much of the proposed pipeline route follows very steep slopes, with the MVP crossing 22.3 miles of slopes between 15 and 30 percent grade and 75.4 miles of slopes greater than 30 percent, many of which exceed 60 percent.[209] Through the course of construction, "clearing and grading would remove trees, shrubs, brush, roots, and large rocks from the construction work area" and heavy machinery would be used to dig a trench to a depth of 5.5 feet to 9 feet for the MVP and 5 feet to 6 feet for the EEP.[210] Such disturbance would undoubtedly lead to increased sedimentation in waterbodies downstream from the disturbed area.[211]

Despite the steep slopes and highly erodible soils that would be traversed by the MVP, FERC concludes that erosion and sedimentation from these areas would not result

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[208] FEIS at 5-2.

[209] *Id.* at 2-49, Appendix K-2.

[210] *Id.* at 2-37, 2-38.

[211] *See, e.g.,* Appalachian Mountain Advocates DEIS Comments at 44–49.

in significant impacts because the applicants would adhere to their Erosion and Sedimentation Plans.[212] The FEIS does not, however, in any way evaluate the effectiveness of, or even discuss in any detail, the measures included in those plans. Indeed, the plans are not included in the FEIS. FERC appears to simply assume that the plans would successfully minimize sedimentation impacts. FERC's conclusion is thus unsupported and, indeed, conflicts with available evidence of the impacts of pipeline construction through areas of steep slopes and highly erodible soils.

Studies show that erosion and sedimentation controls for pipelines have been known to fail under heavy rain events and sedimentation risk is higher under steeper conditions and near bodies of water.[213] Intervenors provided FERC with numerous examples of significant sedimentation impacts that have occurred during pipeline construction despite the use of industry-standard erosion and sedimentation controls nearly identical to those on which FERC relies.[214] Since the close of the DEIS Comment period, there have been other major incidents of sediment pollution occurring on FERC-approved Section 7 pipelines despite the presence of those same conditions.[215] None of those incidents involved construction of a pipeline as large as the MVP traversing such steep and highly-erodible areas.

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[212] *See, e.g.,* FEIS at 5-2; Certificate Order at ¶185.

[213] *See, .e.g.,* Appalachian Mountain Advocates DEIS Comments at 45, n.148.

[214] *Id.* at 46–49.

[215] *See, e.g.,* Shane Hoover, "Ohio sues Rover Pipeline over spills," TimesReporter.com (Nov. 3, 2017 (explaining that the Ohio EPA has sued the developers of the FERC-approved Rover pipeline and sought $2.3 million dollars in civil penalties and restitution for water quality violations in more than a dozen counties, including violations associated with discharge of sediment-laden runoff)), *available at* http://www.timesreporter.com/news/20171103/ohio-sues-rover-pipeline-over-spills.

FERC has simply not demonstrated that the plans and mitigation measures on which MVP relies will successfully minimize impacts to aquatic resources. The body of the FEIS itself does not provide any analysis of the efficacy of the proposed BMPs or mitigation.[216] Indeed, reviews of those plans and associated analyses by Intervenors and others indicate that they will not reduce sedimentation impacts to the extent claimed by MVP and FERC.[217]

For example, the U.S. Forest Service in its comments on the draft EIS explained that "[i]t is unacceptable to say everything will be mitigated through the [erosion and sediment control] Plan. Literature has shown proven [sic] that BMPs have limited success, even when properly installed and maintained. This is a challenging project over

[216] *See* FEIS Appendix AA CO105-18 (responding to Intervenors' comment on this issue by citing the entirety of FEIS sections 4.2 and 4.3).

[217] *See, e.g.,* Appalachian Mountain Advocates DEIS Comments at 49 n.159 (citing Kirk Bowers, P.E., *Draft Environmental Impact Statement review comments on behalf of the Virginia Chapter of the Sierra Club* (hereinafter "Bowers Report") at 5–7); *see also* Virginia Department of Game and Inland Fisheries, Letter re Mountain Valley Pipeline FEIS (July 20, 2017) (Accession No. 20170721-5055) at 3 ("[W]hile we recognize the applicant's experience with pipeline construction and attendant sediment and erosion controls, and we recognize that some site-specific construction details are best resolved during post-NEPA permit review, we are nonetheless concerned regarding potential for serious events including slope failures, instream sedimentation, washout of fill materials, and compromise or contamination of sensitive biological or hydrogeological features such as trout streams, Endangered or Threatened Species Waters, major stream crossings, publically-owned conservation lands, or sensitive karst resources. Construction accidents, unanticipated geological conditions, or severe weather can, and have, precipitated catastrophic impacts upon sensitive fish and wildlife resources in the past: it is the applicant's responsibility to ensure that they not only are prepared to minimize adverse environmental impacts under anticipated construction conditions, but that they have seriously considered and prepared for 'unanticipated' severe weather or other project conditions that may be encountered. These contingency plans should be submitted for public review as part of the NEP NFERC project review process.").

rugged terrain."[218] At the request of the Forest Service, MVP performed a *Hydrologic Analysis of Sedimentation* for the portion of the pipeline crossing the Jefferson National Forest, which FERC uncritically adopted in the FEIS.[219] That document's conclusion that erosion and sedimentation control measures are likely to be 79% effective[220] is unsupported and arbitrary, as evidenced by the Forest Service's previous statements. In commenting on MVP's Biological Evaluation under the Endangered Species Act, the Forest Service explained that

> the hydrological analysis clearly demonstrates the wide variety of effectiveness, even citing as low as 10% (EPA 1993). Yet the assumption chosen for the practice factor is very high. p=0.21 such that containment is 79%. Since many of the literature citations are laboratory based and proper installation is widely understood in the industry to be a limiting factor for effectiveness in the field, I believe *this is a vast overestimate of containment*. It is more appropriate to err on the side of the worst case scenario, rather than the best case (equal to or less than 48% containment). As such, for this section (and similar sections) in the BE and Table 4, erosion containment is likely over-estimated and sedimentation underestimated.[221]

In addition to flaws in FERC and MVP's assumptions about the effectiveness of the Project's BMPs, major flaws remain in the plans themselves that FERC has not addressed. For example, MVP's erosion and stormwater control plans for Virginia are

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[218] United States Forest Service Comments on the Draft Environmental Impacts Statement (December 20, 2016) (Accession No. 20161221-5281) at 7.

[219] FEIS at Appendix O-3; *id.* at 4-146, 4-221. FERC did not explain why a similar analysis, which is clearly feasible, was not performed for the portions of the pipeline not on national forest land. Such an analysis, if properly performed, is critical to assessing the sedimentation impacts of the project. Further, Because this report was not included in the DEIS, Intervenors did not have a formal opportunity to comment on the substance of the report, or the appropriateness of FERC's reliance thereon.

[220] FEIS at Appendix O3-13

[221] Forest Service Comment on Biological Evaluation at 2 (Apr. 24, 2017) (Accession No. 201704245097).

still pending before the Virginia Department of Environmental Quality. A review of those plans performed for DEQ by EEE Consulting, Inc. ("3e") shows that the plans are currently woefully inadequate. In a July 10, 2017 letter to DEQ, 3e stated that it had determined that the "plans submitted do not constitute a complete plan package with sufficient information to move forward to the plan review phase."[222] 3e found MVP's submission severely lacking in numerous ways. For example, the review found that MVP's "Water Quality calculations are not consistent with the Virginia Stormwater Management Act (§ 62.144.15:24), the Virginia Stormwater Management Program Regulations (9VAC25-870), nor the guidance documentation for the Virginia Runoff Reduction Method (VRRM) Compliance Spreadsheet (Guidance Memo No. 16-2001);"[223] that MVP's "Water Quantity calculations are not consistent with the Virginia Stormwater Management Act (§ 62. 144.15:24) and the Virginia Stormwater Management Program Regulations (9VAC25-870);"[224] that MVP failed to "demonstrate that the permanent water bars are releasing drainage in a sheet flow condition or they are released into an adequate conveyance;"[225] that MVP failed to demonstrate the effectiveness of its proposed water bars;[226] that MVP failed to provide plan "sheets for all stream crossings which provides [sic] a detailed explanation and location of all control

[222] EEE Consulting, Inc. Letter, appended as **Attachment B**, at 1.

[223] *Id.* at 2.

[224] *Id.*

[225] *Id.* at 3.

[226] *Id.* at 4.

measures that will be implemented to protect the water quality of the stream;"[227] that MVP failed to demonstrate how streams will be protected from sediment tracked onto timber mats by construction equipment and vehicles;[228] that MVP failed to include any additional erosion and sediment control measures to reduce impacts in "sensitive environmental resource areas;"[229] that MVP's proposed three mile open trench length "is over 30 times the current allowable limit;"[230] and that MVP's proposed "exemption/deviation request to VADEQ Standard 3.09 for Temporary Diversion Dikes to utilize silt fence to 'minimize upslope runoff' and 'to control the velocity of upslope runoff, and allow for infiltration' . . . does not meet the intent or the specifications relating to the design and function of silt fence."[231] These criticisms of the severe inadequacies of the plans submitted by MVP to the VADEQ undermine FERC's conclusions that the mitigation measures contained therein will prevent significant impacts to aquatic resources.

2. FERC failed to consider increased sedimentation from land cover change in sensitive areas

In addition to unreasonably relying on unproven best management practices, FERC's EIS also entirely fails to account for the increase in sedimentation that would result from the conversion of upland forest to herbaceous cover within vulnerable segments of the pipeline right-of-way. Although FERC to some extent evaluates the

[227] *Id.* at 5.

[228] *Id.*

[229] *Id.*

[230] *Id.*at 6.

[231] *Id.*

temporary impacts from in-stream crossings and construction-related clearing of riparian vegetation at the site of crossings, it does not consider the permanent changes in runoff and sedimentation associated with land cover change.

"Fragmented forests have been directly linked to lower water quality and condition (Lee et al. 2009, Shandas and Alberti 2009) and infrastructure development including pipelines and access roads are known to increase fine sedimentation due to reduced vegetation and associated habitat fragmentation (Entrekin et al. 2011, Drohan et al. 2012, Wood et al. 2016)."[232] Intervenors in their comments on FERC's draft EIS included a report by consulting firm Downstream Strategies that analyzed the sedimentation impacts of the long-term land cover change associated with clearing and maintenance of the permanent right-of-way.[233] The authors used computer models to predict the change in annual sedimentation post-construction that would result from conversion of land cover from forest to the herbaceous cover that would need to be maintained in the permanent pipeline right-of-way. Although the study found that streams in watersheds with low slopes and stable soils would not experience significant, long-term increases in sedimentation, the opposite was true for "high risk" areas, *i.e.*, those with steep slopes and highly erodible soils.[234] In the high risk modeling scenario,

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[232] Appalachian Mountain Advocates DEIS Comments at 50 (citing expert report by Dr. Douglas Becker, "Potential Effects of Forest Fragmentation from the Proposed Mountain Valley Pipeline on Forest Birds")

[233] *See* Mountain Valley Pipeline Sediment Modeling Methodology, Prepared for Appalachian Mountain Advocates by Jason Clingerman and Evan Hansen of Downstream Strategies, LLC, (hereinafter "Downstream Strategies Report"), attached as Exhibit D to Appalachian Mountain Advocates DEIS Comments.

[234] As explained above, a significant portion of the proposed route of the MVP is characterized by the steep slopes and highly erodible soils that would contribute to such long-term impacts.

sedimentation increased by 15 percent due to the permanent land use change associated with keeping the right-of-way clear.[235] Such an increase would threaten aquatic life in streams that are already experiencing stress from other activities such as mining, development, and oil and gas extraction.

Furthermore, that 15 percent figure likely underestimates the long-term increase in sedimentation in steep slope areas. Downstream Strategies' methodology assumes that the right-of-way would be converted to a land cover with equal sediment attenuating properties as "hay/pasture."[236] However, once steep slopes, particularly those with shallow soils, are disturbed, they are unlikely to regain plant cover equivalent to hay/pasture. Despite efforts to revegetate steep, mountainous slopes after construction, slopes between 33% and 50% have a poor chance of revegetating, and slopes over 50% have an improbable chance of revegetating.[237] The MVP would traverse 75.4 miles of slopes greater than 30 percent.[238] These findings undermine FERC's conclusion that the Project would not have any long-term impacts to aquatic resources. In order to satisfy NEPA's mandate that agencies take a "hard look" at the impacts of proposed actions, FERC should have analyze the potential for long-term increases in sedimentation associated with the permanent maintenance of the pipeline right-of-way, particularly in sensitive areas with steep slopes and highly erodible soils. Its failure to do so renders the EIS deficient.

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[235] Downstream Strategies Report at 3.

[236] *Id.* at 2

[237] Bowers Report at 3.

[238] FEIS at 2-49, Appendix K-2.

3. FERC did not sufficiently assess the cumulative impacts to water quality

The FEIS's cumulative impacts assessment is wholly inadequate and fails to meet the requirements of NEPA. It lists certain projects "in the geographic scope of analysis considered for cumulative impacts,"[239] including a number of FERC-jurisdictional projects, and states that "some of these other projects could result in impacts on surface waters."[240] Yet, the FEIS makes no effort to meaningfully assess the combined impacts of all of these projects, instead merely listing the number of wetlands and waterbodies crossed by each.[241] Further, FERC's conclusion that the "the cumulative effect on surface waterbody resources would be minor"[242] is based on the same flawed assumptions that undermine its assessment of the projects' direct and indirect impacts to water resources, namely, that any impacts will be largely minimized through the use of unproven BMPs.[243]

FERC acknowledges that the projects identified in one watershed will combine to disturb approximately eleven percent of the land area, which it uses as a "proxy for overall land disturbance for purposes of this analysis with implications for sedimentation and turbidity due to runoff," but offers no analysis of how that disturbance would impact

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[239] FEIS, Appendix W.

[240] *Id.* at 4-605.

[241] *Id.*, Appendix W.

[242] *Id.* at 4-605.

[243] *Id.* That conclusion is particularly unsupported in regard to the impacts of non-jurisdictional facilities, which FERC merely presumes "would likely be required to install and maintain BMPs similar to those proposed by the MVP and the EEP as required by federal, state, and local permitting requirements so as to minimize impacts on waterbodies," with no further support. *Id.*

water quality, either in the short or long term.[244] As EPA explained in its comments on the DEIS, "[b]eyond presenting the percent of each watershed affected by other identified projects and by the proposed MVP, it does not appear that cumulative impacts were analyzed at the watershed or otherwise specified geographic scope."[245] EPA faulted FERC for failing to utilize available methodologies that can translate "thresholds/percent disturbance" to estimates of water quality degradation, objecting that "[w]ithout any context the statements made [in the EIS] have little meaning."[246] FERC's unreasonable reliance on unproven (and, for non-jurisdictional projects, potentially non-existent) BMPs and its failure to otherwise meaningfully assess the impacts of other projects within the geographic scope of the MVP and EEP prevents its cumulative impacts analysis from satisfying NEPA's "hard look" requirement.

III. FERC's Grant of a Conditional Certificate is Statutorily and Constitutionally Flawed

A. Granting Conditional Certificates Like the Certificate Order Violates the NGA

15 U.S.C. § 717f(e) provides that "the Commission shall have the power to attach to the issuance of the certificate . . . such reasonable . . . conditions as the public convenience and necessity may require." FERC often uses this language to grant

[244] *Id.*

[245] EPA MVP DEIS Comments, Enclosure-Technical Comments at 28; *see also id.* at 30 ("EPA is concerned about cumulative impacts to aquatic resources and water quality. . . . We recommend that the cumulative impact analysis of surface water be expanded, including cumulative impacts to water quality, headwater streams, high quality and/or sensitive aquatic resources. Aquatic resources have the potential to be cumulatively impacted by many factors, including waterbody crossings, change in recharge patterns, clearing, erosion, landslides, and other geohazards, blasting, and water withdraws for hydrostatic testing.").

[246] *Id.*

certificates before a project is fully permitted by all relevant authorities. In other words, some FERC certificates are "conditional on" the applicant's eventually obtaining those permits. But legislative history and case law indicate that this is the wrong way to interpret FERC's conditioning power under §717f(e). These sources indicate that the statute empowers FERC to impose "conditions" on pipeline activity in the sense of "limitations," not to make certificates "conditional" in the sense of needing to satisfy prerequisites before pipeline activity can commence.

An analogy illustrates the difference between conditions as prerequisites and conditions as limitations. Suppose a teenager wants to use her parents' car. The parents can impose two sorts of "conditions":

- "You can use the car if you finish your homework first." This sort of "condition" is a *prerequisite* to using the car.
- "You can use the car, but you must be home by 10 P.M." This sort of "condition" is a *limitation* on the use of the car.

When FERC grants a "conditional" certificate before an applicant has obtained all necessary permits, it is acting like the parents in the first (prerequisite) sense. In contrast, when FERC grants a "conditional" certificate by imposing restrictions on how a fully permitted applicant can operate, FERC is acting like the parents in the second (limitation) sense.

The problem with granting "conditional" certificates in the prerequisite sense is that Congress never intended "conditions" in § 717f(e) to be interpreted that way. Rather, it intended "conditions" to mean "conditions *on the terms of the proposed service*

itself"—i.e., *limitations*, not prerequisites.[247] Historically, the cases considering §717f(e) "conditioning power" concern "rates and contractual provisions for the services to be certificated," not whether those services can begin acquiring property via condemnation before they are fully permitted.[248]

The Supreme Court has observed that the "conditions" clause in "Section 7(e) vests in the Commission control over the conditions *under which gas may be initially dedicated to interstate use*" so that "the consuming public may be protected while the justness and reasonableness of the price fixed by the parties is being determined under other sections of the Act."[249] "Section 7 procedures in such situations thus act to hold the line awaiting adjudication of a just and reasonable rate."[250] This purpose is clearly one of imposing limitations on pipeline activity, not of allowing pipelines to commence operations before they are fully permitted. "[T]he Commission may not use its §7 conditioning power to do indirectly . . . things that it cannot do at all."[251]

Despite these considerations, some district courts have issued opinions and orders that seem to bless FERC's use of "conditional" certificates in the prerequisite sense.[252]

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[247] *N. Nat. Gas Co., Div. of InterNorth, Inc. v. F.E.R.C.*, 827 F.2d 779, 782 (D.C. Cir. 1987) (emphasis added).

[248] *Panhandle E. Pipe Line Co. v. F.E.R.C.*, 613 F.2d 1120, 1131-32 (D.C. Cir. 1979).

[249] *Atl. Ref. Co. v. Pub. Serv. Comm'n of N.Y.*, 360 U.S. 378, 389, 392 (1959) (emphasis added).

[250] *Id*. at 392.

[251] *Am. Gas Ass'n v. F.E.R.C.*, 912 F.2d 1496, 1510 (D.C. Cir. 1990).

[252] *See, e.g.*, *Transcon. Gas Pipe Line Co., LLC v. Permanent Easement for 2.14 Acres*, No. CV 17-1725, 2017 WL 3624250, at *6 (E.D. Pa. Aug. 23, 2017); *Constitution Pipeline Co., LLC v. Permanent Easement for 0.42 Acres*, No. 114-CV-2057, 2015 WL 12556145, at *2 (N.D.N.Y. Apr. 17, 2015).

FERC should not rely on those opinions and orders to justify the practice. First, none of those opinions and orders considered the argument made here—namely, that Congress intended "conditions" in § 717f(e) to mean "limitations" rather than "prerequisites." Rather, the opinions and orders were only considering the argument that pipelines companies could not commence eminent-domain activities until certain conditions (prerequisites) were met. Second, and more important, those opinions and orders came from district courts, which have extremely limited jurisdiction to review Commission orders.[253] Lack of jurisdiction appeared to be the primary driver behind district courts' refusal to second-guess Commission practices.[254] FERC itself, however, can of course consider whether its conditional-certificate practices are consistent with congressional intent[255]—which, as explained above, they are not.

B. Granting Conditional Certificates Like The Certificate Order Violates the Fifth Amendment.

Issuing certificates before applicants are fully permitted creates problems not just under the NGA but also under the Fifth Amendment. As soon as FERC issues a certificate, even a "conditional" one, the certificated pipeline entity can arguably start acquiring property by condemnation.[256] But if the entity still has additional permits to

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[253] *See Transcon. Gas Pipe Line Co.*, 2017 WL 3624250 at *3 ("District Courts . . . are limited to jurisdiction to order condemnation of property in accord with a facially valid certificate. Questions of the propriety or validity of the certificate must first be brought to FERC upon an application for rehearing and the Commissioner's action thereafter may be reviewed by a United States Court of Appeals.") (internal punctuation and citation omitted).

[254] *See id*.

[255] *Id*.

[256] 15 U.S.C. § 717f(h).

obtain, there is a chance it will fail to obtain those permits. If that happens, the entity will never be allowed to begin operations—and it will have taken private property for no reason (i.e., without a public necessity) in violation of the Fifth Amendment.

This concern—that an applicant with a conditional certificate may never become fully permitted—is not merely theoretical here. The applicant is far from obtaining all necessary permits, including: final authorizations by the Forest Service and Department of the Interior for permission to cross federal lands; authorization from the U.S. Army Corps of Engineers for all stream and wetland crossings; and multiple Clean Water Act authorizations from the Commonwealth of Virginia. All of those permits require compliance with substantive standards that cannot be presumed by the FERC's grant of a certificate of convenience and necessity.

With such uncertainty that the MVP project will ever commence construction, let alone complete construction and begin transporting gas, there is simply no public necessity for it to begin taking private property. Yet FERC's grant of a "conditional" certificate empowers the applicant to do just that—at least according to the applicant, which, in district court, has already cited its conditional certificate in seeking summary judgment on its right to begin condemning property.[257]

C. By Allowing Conditional-Certificate Holders to Exercise Eminent Domain Before They Have Obtained All Necessary Approvals, FERC Interprets the NGA in a Manner That Violates the Constitution

[257] *Mountain Valley Pipeline, LLC v. An Easement to Construct and Maintain a 42-inch Gas Transmission Line Across Properties in the Counties of Nicholas, Greenbrier, Monroe, Summers, Braxton, Harrison, Lewis, Webster, and Wetzel, West Virginia et al.*, Civ. No. 2:17-cv-04214 (S.D. W. Va.); *Mountain Valley Pipeline, LLC v. Easements to Construct, Operate, and Maintain a Natural Gas Pipeline Over Tracts of Land in Giles County, Craig County, Montgomery County, Roanoke County, Franklin County, and Pittsylvania County, Virginia et al.*, Civ. No. 7:17cv492-EKD (W.D. Va.).

The NGA provides that once FERC issues a certificate, the applicant is immediately invested with the power of eminent domain. 15 U.S.C. § 717f(h). As explained above, it is constitutionally problematic to extend this rule to conditional certificate holders that have not yet obtained all necessary state and federal approvals. FERC could obviate these problems by imposing conditions (of the "limitation" variety) prohibiting applicants from exercising eminent domain until after they obtained all necessary approvals.[258] Indeed, under the doctrine of constitutional avoidance, FERC *should* do so.[259] But it does not, running afoul of that doctrine.

IV. FERC's Grant of a Blanket Certificate Is Statutorily and Constitutionally Flawed

A. Granting Blanket Certificates Like The Certificate Order Exceeds FERC's Statutory Authority

The Certificate Order cannot stand as issued for additional reasons. The eminent-domain authority it purports to confer exceeds statutory limits insofar as it grants the applicant's request for "a blanket certificate under Part 157, Subpart F of FERC's regulations to perform certain routine construction activities and operations," including "future facility construction, operation, and abandonment."[260]

The blanket authority that the certificate purports to confer under FERC's regulations is impermissibly broad. Without any need for further FERC approval, the

[258] *See Mid-Atlantic Express, LLC v. Baltimore Cty., Md.*, 410 Fed. App'x 653, 657 (4th Cir. 2011) (holding that, as a certificate condition, Commission could validly prohibit applicant from exercising eminent domain).

[259] *See F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009).

[260] Certificate Order ¶1, 6.

certificate holder is allowed, subject only to a per-project cost limitation just shy of $12 million, to do any of the following, among other "automatically authorized" acts:

- "acquire, construct, replace, or operate any eligible facility," defined to mean any facility within FERC's statutory jurisdiction "that is necessary to provide service within existing certificated levels," subject to certain narrow exceptions;[261]
- "make miscellaneous rearrangements of any facility," including "relocation of existing facilities" for various reasons including highway construction, erosion, or "encroachment of residential, commercial, or industrial areas[;]"[262]
- "acquire, construct, replace, modify, or operate any delivery point[;]"[263]
- "acquire, construct, modify, replace, and operate facilities for the remediation and maintenance of an existing underground storage facility[;]"[264] and
- "acquire, construct and operate natural gas pipeline and compression facilities . . . for the testing or development of underground reservoirs for the possible storage of gas[.]"[265]

The "facilities" to which these activities apply include both "auxiliary" ones installed to "obtain[] more efficient or more economical operation" and replacements—but only to the extent that such "auxiliary" or replacement facilities are *not* located within the certificated pipeline right-of-way or an already authorized facility site.[266] That is, the grant of blanket authority is expressly—almost exclusively—directed toward projects about which the most FERC presently knows, to a virtual certainty, will *not* be where the applicant describes the pipeline as being. And, in connection with any of these activities,

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[261] 18 C.F.R. §§ 157.208(a), 157.202(b)(2)(i).

[262] *Id.* §§ 157.208(a), 157.202(b)(6).

[263] *Id.* § 157.211(a)(1).

[264] *Id.* § 157.213(a).

[265] *Id.* § 157.215.

[266] *See id.* § 157.202(b)(3).

the certificate holder has effectively unrestricted authority to exercise eminent-domain power to force sales of private property, including of properties outside the areas described in the applicant's application.[267]

Practically speaking, this authority gives the applicant free rein to use eminent-domain authority to acquire and construct pipeline facilities well outside the footprint considered and approved by FERC. So long as the applicant spends only $11.8 million on construction for any given "project,"[268] it need never again ask permission from FERC to add small-diameter lateral or gathering lines, delivery or receipt points, or interconnection facilities, no matter where they are located. Likewise, the applicant, under the guise of "replacement" or even "rearrangement," can move even segments of its main line to different property than the project footprint FERC has approved. And whenever it does so, the applicant can seize whatever property it wants from nearby landowners through eminent domain, without any oversight by FERC.

Such a remarkable degree of laissez-faire is incompatible with the statutory requirements imposed by the NGA. Section 7(c) of the NGA bars "the construction or expansion of any facilities" for the transportation or sale of natural gas, or the acquisition or operation of any such facilities or extensions, unless FERC issues a certificate specifically "authorizing such acts or operations."[269] Moreover, FERC's authority to

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[267] 15 U.S.C. § 717f(h).

[268] Under 18 C.F.R. § 157.202(b)(8)'s narrow definition of "project cost," only "the total actual cost of constructing the jurisdictional portions of a project" is taken into account, thereby excluding both the costs of eminent-domain property acquisition and any nonjurisdictional portions of a project in determining whether an activity is automatically authorized. Moreover, Commission practice demonstrates that even this limited restraint is merely nominal, as the cost cap can be, and regularly is, waived.

[269] 15 U.S.C. § 717f(c)(1)(A).

grant a certificate under Section 7(c) is limited to approval of an "operation, sale, service, extension, or acquisition *covered by the application*"—that is, the activity in question must have actually been "proposed" by the applicant and so considered by FERC.[270] Approval of particular activities is further restricted to those that, upon FERC's finding, are or "will be required by the present or future public convenience and necessity."[271]

In light of those application and finding requirements, FERC's authority does not extend to blanket approvals of unknown future extensions, expansions, rearrangements, or replacements, at least where such actions are not limited to the pipeline footprint actually proposed by an applicant and considered and approved by FERC. [272]

B. Granting Blanket Certificates Violates FERC's Statutory Mandate to Evaluate the Economic and Environmental Impacts of Proposed Projects

FERC has a statutory mandate to evaluate the economic and environmental impacts of proposed pipeline projects.[273] By definition, however, whenever FERC grants a "blanket" certificate that authorizes construction outside a project footprint FERC has expressly evaluated and approved, FERC is authorizing the applicant to undertake construction that FERC has not evaluated for economic and environmental impact. FERC's practice of granting "blanket" certificates—at least those that authorize

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[270] *Id.* § 717f(e) (emphasis added).

[271] *Id.*

[272] *See Williston Basin Interstate Pipeline Co. v. Exclusive Gas Storage Leasehold & Easement*, 524 F.3d 1090, 1099 (9th Cir. 2008) ("[A] CPCN holder's power of eminent domain 'extends only to the property located within the geographic area designated on the map or maps attached to the application for the certificate.'" (quoting *Columbia Gas Transmission Corp. v. Exclusive Gas Storage Easement*, 578 F.Supp. 930, 932 (N.D. Ohio 1984), *aff'd*, 776 F.2d 125 (6th Cir. 1985))).

[273] *See* 15 U.S.C. § 717f(a) (projects must be in the public interest).

construction outside evaluated and approved project footprints—violates FERC's statutory mandate to consider the economic and environmental impacts of proposed pipeline projects.

C. Granting Blanket Certificates Violates the NGA's Notice-and-Hearing Requirements

Except in cases of emergency, an application for authority to engage in acts requiring a certificate of public convenience and necessity requires FERC to "set the matter for hearing" and to give "reasonable notice of the hearing . . . to all interested persons."[274] That requirement—and the statutory due-process rights conferred on "interested persons"—is impermissibly evaded by the purported grant of "blanket authorization" for "future facility construction" contemplated but not specified by a certificate application.

D. Permitting the Blanket Certificates Here Would Violate the Due Process Clause of the Fifth Amendment

The fact that blanket authorization also allows private exercise of the sovereign power of eminent domain for previously unconsidered project expansions or "rearrangements" creates significant constitutional concerns. As the Fifth Circuit recently explained, "when private parties have the unrestrained ability to decide whether another citizen's property rights can be restricted, any resulting deprivation happens without 'process of law.'"[275] That is why, "when the power of eminent domain is partially delegated to a private company, that delegation must be as limited as possible to protect

[274] 15 U.S.C. § 717f(c)(1)(B).

[275] *Boerschig v. Trans-Pecos Pipeline, L.L.C.*, __ F.3d __, 2017 WL 4367151, at *5 (5th Cir. Oct. 3, 2017).

landowners from abusive takings under the Fifth Amendment."[276] FERC's overly broad blanket-certificate practices violate this principle.

E. Granting the Blanket Certificates Here Would Violate the Constitutional Separation of Powers, Including by Violating the Private Nondelegation Doctrine

By statute, "[a] natural gas company may not condemn additional property that is not specifically described in its existing CPCN, even if the natural gas company seeks to acquire such property in order to operate and maintain an existing [pipeline] facility."[277] That limit must be rigorously enforced, because the failure to do so transmogrifies the NGA's partial delegation of eminent-domain power to a private entity into an unchecked abdication of sovereign authority. As the Supreme Court explained long ago, "[a] distinction exists" between provisions that "authorize officials to exercise the sovereign's power of eminent domain on behalf of the sovereign itself" and "statutes which grant to others, such as public utilities, a right to exercise the power of eminent domain on behalf of themselves."[278] The latter type, such as Section 7(h) of the NGA, "are, in their very nature, *grants of limited powers*."[279]

Because the certificate's "blanket authorization," coupled with Section 7(h)'s conferral of eminent-domain authority, grants to a private entity precisely the type of

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[276] *Columbia Gas Transmission, LLC v. 1.01 Acres, More or Less*, 768 F.3d 300, 328 (3d Cir. 2014) (Jordan, J., dissenting); *accord United States v. Certain Parcels of Land*, 215 F.2d 140, 148 (3d Cir. 1954) ("the eminent domain power delegated to private groups has always been more closely limited than that inherent in sovereignty").

[277] *Williston Basin*, 524 F.3d at 1099.

[278] *United States v. Carmack*, 329 U.S. 230, 243 n.13 (1946).

[279] *Id.* (emphasis added).

"unrestrained ability to decide" to take another citizen's property that the private nondelegation doctrine condemns,[280] the certificate cannot stand as issued.

V. Conditional and Blanket Certificates Both Violate Fifth-Amendment Just-Compensation Requirements

The Takings Clause requires the payment of "just compensation" when private property is taken for public use.[281] Because the duty to pay just compensation is "inseparable from the exercise of the right of eminent domain," any act granting condemnation power "must provide for compensation" with absolute certainty.[282]

It is not enough for a statute simply to say that just compensation will be paid. Rather, "the owner is entitled to reasonable, certain, and adequate provision before his occupancy is disturbed."[283] Proving "adequate provision" of just compensation requires showing that "the means for securing indemnity [are] such that the owner will be put to no risk or unreasonable delay."[284] And a statute that "attempts to authorize the appropriation of public property for public uses, without making adequate provision for compensation, is unconstitutional and void and does not justify an entry on the land of the owner without his consent."[285]

To satisfy the Takings Clause, "compensation must be either ascertained and paid to [the landowner] before his property is thus appropriated, or an appropriate remedy

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[280] *Boerschig*, 2017 WL 4367151 at *5.

[281] U.S. CONST. amend. V.

[282] *Sweet v. Rechel*, 159 U.S. 380, 400-01 (1895) (citation omitted).

[283] *Id*. at 403.

[284] *Id.* at 401 (citation omitted).

[285] *Id.* at 402 (citation omitted).

must be provided, ***and upon an adequate fund***, whereby he may obtain compensation through the courts of justice."[286] In other words, if the taker wants to take the property before compensation is finally decided by the court, the taker must have an "adequate fund" for the payment of compensation awards.

Different rules apply to government takers and private entities in proving an "adequate fund" for just-compensation awards. When the taker is a governmental entity, the pledge of "the public faith and credit" is enough to ensure just compensation.[287] But when, as here, the taker is a private entity, the taker "has neither sovereign authority nor the backing of the U.S. Treasury to assure adequate provision of payment."[288] Thus, a private taker must do more than just promise to pay to "satisf[y] the constitutional requirements" of the "'just compensation' guarantee."[289] In *Washington Metropolitan Area Transit Authority v. One Parcel of Land*, the taker met that burden by showing that it (1) "ha[d] the ability to be sued" and (2) owned "very substantial assets" such that "just compensation [was], to a virtual certainty, guaranteed."[290]

Here, the applicant has not met that test. While the applicant may be sued, it has not shown that it has such "substantial assets" that just compensation is guaranteed "to a

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[286] *Id.* at 406 (emphasis added).

[287] *Wash. Metro. Area Transit Auth. v. One Parcel of Land in Mortgomery County*, 706 F.2d 1312, 1320-21 (4th Cir. 1983).

[288] *Transwestern Pipeline Co. v. 17.19 Acres of Prop. Located in Maricopa County*, 550 F.3d 770, 775 (9th Cir. 2008).

[289] *Id.* at 1321.

[290] *Id.; see also E. Tenn. Nat. Gas Co. v. Sage*, 361 F.3d 808, 824 (4th Cir. 2004) (finding adequate assurance that landowners would receive just compensation because taker's parent company reported earnings of $1.17 billion from its natural-gas transmission division in year before taking).

virtual certainty."[291] FERC never required such a showing before delegating eminent-domain power to the applicant, which means there is no record of the applicant's assets—whether encumbered or unencumbered—in FERC's docket.

Moreover, there is ample reason to worry that the applicant lacks sufficient assets to guarantee just compensation. The applicant is a Delaware limited-liability company and is a special-purpose, joint-venture entity set up in 2015 for the sole purpose of this particular pipeline project.[292] As FERC recognizes in its Order, the applicant "does not currently own or operate any interstate pipeline facilities" and has "no existing customers."[293]

As FERC further recognizes, "greenfield pipelines undertaken by a new entrant in the market" like the applicant "face higher business risks than existing pipelines proposing incremental expansion projects."[294] Even disregarding its greenfield status, the applicant is inherently at risk of going bust because it is a private company. Indeed, its owner-operator has already admitted in an SEC filing that the applicant "has insufficient equity to finance its activities during the construction stage of the project."[295]

Given all this, the landowners facing condemnation by this fledgling venture do not have "adequate provision" or an "adequate fund" to ensure that "just compensation is,

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[291] *Id.*

[292] Amended and Restated Certificate of Formation of Mountain Valley Pipeline, LLC (filed Mar. 11, 2015), appended as **Attachment C**.

[293] Certificate Order at 2, 11.

[294] Certificate Order at 35.

[295] EQT Midstream Partners, LP 2016 Annual Report (Form 10-K) at 78, appended as **Attachment D**.

to a virtual certainty, guaranteed."[296] The applicant cannot overcome this problem by arguing that potential earnings from the project "would probably be sufficient to meet and extinguish claims for damages for lands taken."[297] As the Supreme Court has explained, such arguments and expectations "f[all] short of the constitutional requirement that the owner of property shall have prompt and certain compensation, without being subjected to undue risk or unreasonable delay."[298] Because the applicant has not proven it has an "adequate fund" to pay just-compensation awards, FERC cannot allow the applicant to exercise the power of eminent domain under a certificate of convenience and necessity.

VI. FERC Violates the NGA by Failing to Make Findings About Applicants' Ability to Pay Just Compensation

Questions about whether an applicant will ultimately be able to pay just compensation do not implicate only the Fifth Amendment; they implicate the NGA, too. 15 U.S.C. § 717f(e) provides that an applicant can obtain a certificate only "if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter." One of the "acts" contemplated by "this chapter" of the NGA is eminent domain,[299] and the only way "properly to do" eminent domain is to pay just compensation. Thus, to comply with 15

[296] *Wash. Metro.*, 706 F.2d at 1320-21.

[297] *Sweet*, 159 U.S. at 402.

[298] *Id.*

[299] *See* 15 U.S.C. § 717f(h).

U.S.C. § 717f(e), FERC must make a finding that an applicant "is able and willing properly to" pay just compensation. Its failure to do so in a given certificate is fatal.[300]

VII. "Quick-Take" Under the Natural Gas Act is Unconstitutional

A. By Failing to Preclude Applicants From "Quick-Taking" Property, FERC Interprets the NGA in a Manner That Violates the Constitution

Once FERC issues a certificate, the applicant is immediately invested with the power of eminent domain.[301] But to begin actually taking property, it must first file suit in federal district court.[302] By statute, "[t]he practice and procedure in any action or proceeding for that purpose" is supposed to "conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated."[303] In reality, though, district courts in the Fourth Circuit (where these takings will occur) have created a "quick-take" procedure whereby they allow pipelines to take property through an abridged procedure that mirrors the rule of civil procedure that governs injunctions (Rule 65).[304]

As explained in the following sections, the judicially-created quick-take procedure causes constitutional problems. FERC could obviate these problems by imposing conditions (of the "limitation" variety) prohibiting applicants from using the

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[300] *See Steere Tank Lines, Inc. v. I.C.C.*, 714 F.2d 1300, 1314 (5th Cir. 1983) ("[T]he absence of required findings is fatal to the validity of an administrative decision regardless of whether there may be in the record evidence to support proper findings.") ((internal punctuation and citation omitted).

[301] 15 U.S.C. § 717f(h).

[302] *Id*.

[303] *Id*.

[304] *See E. Tennessee Nat. Gas Co. v. Sage*, 361 F.3d 808, 822 (4th Cir. 2004).

quick-take procedure.[305] Indeed, under the doctrine of constitutional avoidance, FERC *should* do so.[306] But it does not, running afoul of that doctrine.

B. By Failing to Preclude Applicants From "Quick-Taking" Property, FERC's Order Violates Constitutional Separation-of-Powers Doctrine.

Only Congress has the power to delegate eminent-domain authority; the Judicial Branch cannot do it, and neither can the Executive Branch.[307] Pursuant to that power Congress has expressly imbued governmental agencies with quick-take power,[308] and has occasionally granted to power to nongovernmental entities. But, critically, the NGA contains no such quick-take provision for private pipeline companies.

Even so, certificate holders have frequently—and oftentimes successfully—invoked their FERC certificates as a ground for courts to authorize "quick-take" (rather than "straight") condemnations. This invocation is not baseless, as the certificates implicitly bless quick-take by authorizing construction to begin once all project permits have issued—even if a final judicial determination of just compensation has not yet occurred.

FERC could prevent this state of affairs by imposing conditions expressly limiting the applicant's exercise of eminent domain until after the court system has finally determined the proper amount of just compensation for the affected properties.

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[305] *Cf. Mid-Atlantic Express, LLC v. Baltimore Cty., Md.*, 410 Fed. App'x 653, 657 (4th Cir. 2011) (holding that, as a certificate condition, Commission could validly prohibit applicant from exercising eminent domain).

[306] *See F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009).

[307] *Berman v. Parker*, 348 U.S. 26, 32 (1954).

[308] *See* 40 U.S.C. § 3114.

C. By Failing to Preclude Applicants From "Quick-Taking" Property, FERC Facilitates Due-Process Problems

When a pipeline company avails itself of the quick-take procedure, the landowner has no opportunity to conduct discovery, obtain its own appraisal of just compensation, or avail itself of any of the other procedural protections inherent in traditional judicial proceedings. This violates the due-process guarantee of the Fifth Amendment. Again, FERC could prevent this due-process violation by prohibiting applicants from utilizing quick take.

D. By Failing to Preclude Applicants From "Quick-Taking" Property, FERC Violates the Just Compensation Clause of the Fifth Amendment

As explained above, every time a private, for-profit entity takes property, there is a real risk that it will ultimately be unable to pay just compensation.[309] (As also explained above, that risk is especially apparent in this case.) That risk is mitigated when the entity does not take property until after (1) a full and final judicial determination of just compensation and (2) a guarantee of payment (deposit or bond) based on that figure. That is what happens in a "straight" condemnation proceeding.[310] But with the quick-take procedure, a pipeline company is able to take property based on only its own, self-serving appraisal of what just compensation will ultimately be.[311] This poses constitutionally unacceptable risk that the landowner will not ultimately receive just compensation if it

[309] In contrast, there is no such risk when the federal government takes property, which is why the federal government's quick-take power (40 U.S.C. § 3114) is constitutionally unproblematic.

[310] *See Sage*, 361 F.3d at 821.

[311] *See id*. at 823-27 (citing FED. R. CIV. P. 71.1).

proves to be more than the pipeline company estimated.[312] Again, FERC could obviate that risk by prohibiting applicants from using "quick take," which Congress has not authorized under the NGA.

VIII. FERC's Refusal to Consider Constitutional Challenges Violates Landowners' Fifth Amendment Due-Process Rights

FERC contends that review under Section 7r does not extend to determinations of the constitutionality of the Natural Gas Act and the exercise of eminent domain thereunder. FERC claims that such matters are outside the scope of its jurisdiction.[313] As a result, unless allowed to raise such arguments in a separate suit (i.e., in federal district court), landowners cannot raise constitutional challenges to proposed pipeline projects in FERC. Further, if FERC lacks jurisdiction to adjudicate such claims, it seems unlikely the federal appellate courts could review arguments that were not properly before FERC. And even if the appellate courts could review such arguments, the damage would have already been done by the time the appellate courts get the case, as certificated pipeline companies have often long since taken property and commenced construction, irreversibly altering the landowners' property. By denying landowners any opportunity to raise constitutional challenges until after their property is already taken and irreversibly altered, FERC denies those landowners the due process of law required by the Fifth Amendment.

IX. FERC Denied Landowners Due Process By Refusing Them Access to Key Documents

[312] *See Sweet*, 159 U.S. at 400-04.

[313] *See* Certificate Order at 61.

In granting the Certificate Order FERC relied on privileged and confidential information submitted by the applicant in its application—specifically, the applicant's precedent agreements and Exhibit G flow diagrams—to find project need.[314] Despite landowners' repeated demands for disclosure, FERC denied them access to this evidence, thus preventing them from meaningfully responding to or rebutting FERC's conclusions in the Certificate Order.

The precedent agreements and Exhibit G diagrams were clearly critical to FERC's assessment of project need. FERC's Certificate Order characterizes the precedent agreements as "the best evidence" of project need and relies on them heavily, over the dissent of Commissioner LaFleur, to justify a grant of the certificate. Similarly, the Exhibit G diagrams are central to FERC's analysis because (1) they can be used to independently verify need and (2) they reflect capacity with and without the proposed facilities in place, the utilization of each component of the facility, and the maximum allowable operating pressure (MAOP) of each line, which in turn informs whether each line can accommodate additional capacity.[315] In past cases, experts have used Exhibit G diagrams to show that a pipeline has been segmented,[316] is overbuilt,[317] that system

[314] The precedent agreements were included in the application heavily redacted, while the Exhibit G filings did not appear on FERC's public docket at all.

[315] *See* 18 C.F.R. §157.14 (a)(8) (describing Exhibit G requirements).

[316] *Algonquin Gas Transmission,* 154 FERC ¶61,048 at 68 (referring to expert findings of segmentation based on Exhibit G diagrams).

[317] *See* Tennessee Gas Pipeline, 158 FERC ¶ 61,110 (2017) at 37 (noting that expert, relying on Exhibit G diagrams, found that 36-inch pipeline could be reduced to 16 inches); *Algonquin Gas Transmission*, 154 FERC ¶ 61,048 (2016) at 68 (referencing expert report concluding, based on Exhibit G Diagrams that pipeline is overbuilt to compensate for anticipated expansion), Comments of Delaware Riverkeeper Network,

alternatives are feasible,[318] or that, contrary to the project sponsor's claims, the gas was bound for export.[319]

In May 2017, shortly after intervening in the proceeding, the Bold Alliance filed with FERC's FOIA and CEII Office a CEII Request to obtain the applicant's Exhibit G diagrams and precedent agreements. Bold Alliance explained that it was an intervenor in the proceeding and that it sought the Exhibit G diagrams and precedent agreements to enable it to meaningfully participate in the certificate proceeding on behalf of its landowner members. Yet neither FERC nor the applicant ever produced the Exhibit G diagrams.

Bold's inability to obtain the CEII information is not for lack of trying. In May 2017, counsel for Bold sent at least five emails to staff inquiring about the status of its CEII requests, and spent several hours discussing its requests with staff during four phone conversations during that period. With no success, Bold complained about staff's non-disclosure directly to FERC by letter dated September 27, 2017.

Bold Alliance's lack of access to the Exhibit G diagrams severely compromised its ability to meaningfully participate in the proceeding. FERC presumably relied on Exhibit G diagrams to evaluate and subsequently reject as infeasible several project alternatives, including the MVP–ACP single-pipeline option endorsed by

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Millennium Eastern Upgrade, CP16-486 (March 26, 2017) (Accession No. 20170329-5228) (submitting expert testimony showing that proposed pipeline is unnecessary).

[318] *See Millennium Pipeline*, 141 F.E.R.C. ¶ 61,198 at 77 (2012)(agreeing with expert finding based on Exhibit G diagrams that system alternative is viable).

[319] *Dominion Gas LLC,* 148 FERC ¶ 61,244 at 255 (2014) (acknowledging expert's analysis based on Exhibit G that facilities that company claimed would not support gas export showed that facility would support delivery to Cove Point).

Commissioner LaFleur in her dissent. Without access to the Exhibit G diagrams, the intervenors cannot meaningfully challenge the Certificate Order or rebut FERC's conclusions. Additionally, FERC relied on precedent agreements in the Certificate Order, referring to them multiple times and characterizing them as "the best evidence" of need.

The opportunity to review and timely rebut evidence in support of a decision that will result in deprivation of property rights is a "fundamental requirement of due process."[320] With opportunity to respond to evidence upon which FERC relied in making a decision, due process is satisfied.[321]

FERC has not satisfied those minimal due-process requirements here. Because intervenors, including Bold Alliance, were denied access to Exhibit G diagrams submitted by the applicants, they can neither evaluate nor verify the information contained in the applicant's submissions or meaningfully challenge FERC's conclusions that the undisclosed documents undergird. This proceeding stands in stark contrast those challenged in *Minisink* and *Myersville Citizens*, where the court found no due-process violations because the impacted parties had access to all record evidence filed by the applicants and relied on by FERC—including confidential filings—and an opportunity to rebut the evidence in advance of the deadline for rehearing.

Moreover, FERC cannot cure its violation of the intervenors' due-process rights by disclosing the Exhibit G diagrams after this rehearing request is filed. By that time, the deadline for rehearing will have passed, and Bold's arguments based on the previously

[320] *See Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985).

[321] *See Minisink Residents for Envtl. Pres. v. FERC*, 762 F.3d 97, 115 (D.C. Cir. 2014); *Myersville Citizens for Rural Cmt. v. FERC,* 783 F.3d 1301 1328 (D.C. Cir. 2014).

undisclosed information will be untimely under § 717f(a) of the NGA. The only way for FERC to rectify these due-process violations is to stay the proceeding and either vacate the certificate entirely or reopen the record to allow for full and timely consideration of the intervenors' arguments.

MOTION FOR STAY

In addition to their request for rehearing, Intervenors also hereby expressly move FERC to issue a stay of the Certificate Order pending resolution of Intervenors' request for rehearing. FERC has the authority to issue such a stay under 5 U.S.C. § 705, and should do so where "justice so requires."[322] Intervenors recognize that FERC has announced that its "general policy is to refrain from granting stay to ensure definiteness and finality in our proceedings."[323] FERC, however, routinely argues that its orders are not final but are subject to modification at any time prior to conclusion of the rehearing process.[324] To prevent impacts during the pendency of the rehearing process that are indeed final with respect to Intervenors' members, FERC should stay the Certificate Order based on the three factors that it considers in determining whether justice requires a stay. Those factors are "(1) whether the party requesting the stay will suffer irreparable injury without a stay, (2) whether issuing a stay may substantially harm other parties; and

[322] Intervenors note that because their request for rehearing is paired with a motion for stay, the request for rehearing is not a "stand alone" request and, therefore, FERC has not delegated authority to the Secretary to toll the time for action on Intervenors' request for rehearing. *See* 60 Fed. Reg. 62,326, 62,327 (Dec. 6, 1995).

[323] 154 FERC ¶ 61,092 at P. 9.

[324] *See, e.g.,* Order Denying Stay of Atlantic Sunrise project, 160 FERC ¶ 61,042 P. 18.

(3) whether a stay is in the public interest."[325] FERC has repeatedly stated that "[e]conomic loss, without more, does not constitute irreparable harm."[326]

The totality of the circumstances surrounding the Mountain Valley Pipeline require a stay in the interest of justice. Absent a stay, irreparable harm will befall the forests and streams along the MVP right-of-way, including to forests and streams treasured, owned, and managed by Intervenors' members. Moreover, any harm from a stay to the applicant would merely be economic, and the public interest favors a stay.

I. Construction of the MVP Will Cause Irreparable Harm to the Environment, Intervenors, and their Members

Construction of the MVP would result in permanent, irreparable harm. As its 303.5-mile long path snakes up and over the Appalachian mountains and through forests and streams, the MVP will require a 125-foot wide construction right-of-way and a 50-foot permanent right of way.[327] Construction would disturb approximately 5,119.6 acres of land, and leave 1846.1 acres in the permanent right-of-way.[328] During overland construction, the applicant will survey the right-of-way, clear it of vegetation, and grade it.[329] Heavy machinery will traverse the corridor, digging a trench up to nine-feet deep in which to bury the 3.5 diameter pipe.[330] At waterbody crossings, the applicant will

[325] 154 FERC ¶ 61,263 at P. 4.

[326] 154 FERC ¶ 61,092 at P. 10 (citing *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

[327] FEIS at 2-23 to 2-24.

[328] *Id.* at 2-21.

[329] *Id.* at 2-37.

[330] *Id.* at 2-38.

dewater a work area within the stream and dig a trench in the streambed.[331] The applicant will bury the pipeline at a depth of two to four feet below the streambed, depending on whether consolidated rock is encountered.[332] If the applicant cannot reach easement agreements with the owners of the properties on which it intends to build the pipeline, it will seize the easements it needs through the power of eminent domain under 15 U.S.C. § 717f(h).[333] The deforestation, effects on surface and groundwaters, visual impacts, and condemnation of private property through eminent domain that would result from right-of-way construction constitute irreparable harm justifying a stay of the Certificate Order.

A. Timbering the MVP Right-of-Way During Construction, and Maintaining the Easement During Operation, Will Fragment Important Core Forests and Irreparably Harm The Environment, Intervenors, and Their Members

FERC concluded in its FEIS that, "in considering the total acres of forest affected, the quality and use of forest for wildlife habitat, and the time required for full restoration in temporary workspaces, . . . the projects would have significant impacts on forest.[334] The MVP will cross about 235 miles of forest and its construction will affect 4,435.1 acres of upland forest.[335] Nearly 2,500 of those disturbed acres, or approximately 55%, are in Large Core (greater than 500 acres) contiguous interior forest areas in West Virginia, and approximately 58 acres of impacted forests are High to Outstanding quality

[331] *Id.* at 2-43 to 2-44.

[332] *Id.* at 2-43.

[333] *Id.* at 4-309.

[334] *Id.* at 5-6.

[335] *Id.* at 4-178, 5-5.

forest in Virginia.[336] That would result in the "conversion of about 17,194 acres of interior forest in West Virginia and 5,579 acres of interior forest in Virginia into edge habitat."[337] FERC also concluded that "[t]he clearing of vegetation would affect forest interiors, increase edge effects, and increase the potential for the introduction and spread of noxious and invasive plant species."[338]

Detailing the environmental consequences of deforesting the pipeline corridor, FERC explained:

> Trees would be cut across the entire construction right-of-way. The permanent 50-foot-wide operational pipeline easement would be kept clear of trees in uplands. In forested areas, the operational right-of-way would result in the permanent conversion of forest to scrub-shrub lands and grasslands. This conversion would affect interior forests where the removal of trees would fragment forests and create new edges. Following construction, temporary workspaces would be allowed to regenerate. However, in forest the regeneration of trees would take many years, resulting in a long-term effect on forested vegetation.[339]

Regarding the effects of the large-scale forest fragmentation that would result from the construction and operation of the MVP, FERC stated

> Constructing the MVP and EEP would create a new, cleared corridor in areas of interior forest where the rights-of-way would not be collocated with existing linear corridors. Clearing or fragmentation of interior forests creates more edge habitat and smaller forested tracts, which can impact characteristics of vegetation communities including their suitability for wildlife.
>
> The removal of interior forest in order to create the necessary rights-of-way would result in the conversion of forest area to a different vegetation type. This would contribute to forest fragmentation and the creation of

[336] *Id.* at 5-5.

[337] *Id.*

[338] *Id.* at 4-177.

[339] *Id.* at 4-177.

> forest edges. The pipeline right-of-way through forest would result in the removal of habitat for interior species. The creation of a new corridor and forest edges could impact micro-climate factors such as wind, humidity, and solar exposure which could lead to a change in species composition. Forest edges also play a role in ecosystem functions, including the dispersal of plants and wildlife, the spreading of fire, movement of wildlife, and vegetation composition and structure. The new pipelines rights-of-way could also introduce non-native invasive species.
>
> As previously noted, edge effects are estimate to extend from the edge of the open spaces up to 300 feet into the forested areas, on both sides of the right-of-way. Within this distance, forest impacts could include a change in available habitat for some species due to an increase in light and temperature levels on the forest floor and the subsequent reduction in soil moisture; such changes may result in habitat that would no longer be suitable for species that require these specific habitat conditions, such as salamanders and many types of plants. An alteration of habitat could affect the fitness of some species and increase competition both within and between species, possibly resulting in an overall change to the structure of the forest community.[340]

Because of its long-term and large-scale effects on forests, FERC has concluded that the MVP would have a significant and long-term effect on the forests through which it will cut.[341] Those significant effects alone constitute sufficient irreparable harm to require a stay of the Certificate Order pending FERC's rehearing.

Petitioners' members will suffer irreparable harm if construction in the MVP right-of-way is permitted prior to rehearing by FERC or judicial review. James Gore is a member of Sierra Club and owns two parcels of land on which the MVP right-of-way is located.[342] One of the parcels—a 116-acre tract of land—is mostly forested.[343] As Mr.

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[340] *Id.* at 4-181 to 4-182.

[341] *Id.* at 4-191, 5-6.

[342] Declaration of James Gore at ¶¶ 2–3. All declarations discussed in this motion are appended, in the order in which they are introduced, as **Attachment E**.

[343] *Id.* at ¶ 6.

Gore explains in his declaration, "[t]he forest on that parcel is part of an inventoried interior core forest of greater than 500 acres, identified as WV Core-20 on page 4-167 of the Final Environmental Impact Statement," and "[s]everal hundred feet of the MVP right-of-way will cut through mature, large core forest on the 116-acre parcel."[344] In other words, Mr. Gore's forest will be among the acres converted from large, interior core forest into edge habitat.

Such a conversion would visit irreparable harm on Mr. Gore. He and his cotenants had intended to preserve those forests without timbering, and use the forest for game hunting, wildlife observation, and forest product gathering.[345] The irreparable harm would result from both construction and operation of the MVP. In Mr. Gore's words

> Timbering the MVP right-of-way on my property would result in a permanent scar through these forests that have meant so much to me throughout my life. Timbering land that I had intended to remain unspoiled will diminish my enjoyment of my time in the woods. Timber on the construction easement will not mature in my lifetime (I am 73 years old), so it might as well be forever. Moreover, if the permanent right-of-way is timbered, and the Certificate does not survive judicial review, then that land too will not produce mature forest within my lifetime.
>
> I am concerned that timbering the MVP right-of-way and the resulting fracturing of the forest will harm the wildlife that I hunt and the non-game wildlife that I enjoy seeing while in the woods. Those concerns diminish my enjoyment of living here.
>
> Accordingly, timbering on my property will cause harm to my property, recreational, and aesthetic interest in those forests that will not be remedied in my lifetime.[346]

[344] *Id.* at ¶¶ 6–7.

[345] *Id.* at ¶ 8, 10.

[346] *Id.* at ¶¶ 11–14.

The irreparable harm that would befall Mr. Gore and his forests is precisely the type of harm that a stay "when justice so requires" is designed to prevent.

Mr. Gore is not alone among Intervenors' members. Charles Chong and his wife Rebecca Eneix-Chong are members of West Virginia Rivers Coalition and co-own approximately 220 acres in Harrison County, West Virginia, on which the MVP right-of-way would be constructed.[347] The MVP right-of-way will cross thousands of linear feet of forest on the ridge above their home, threatening them with increased risk of flooding and destroying their goal to "leave the forest undisturbed and to allow it to grow naturally."[348] They estimate that the MVP right-of-way will destroy more than 13% of their forests.[349] Mr. Chong explains that "[t]he construction of this pipeline will be a violation, in the worst sense of the word, of our property and our persons."[350] Ms. Eneix-Chong describes her farm as "my faith and my friend," stating that "[t]his land, this piece of earth sustains me. It is my soul, and now the MVP right-of-way slaughters both."[351]

Sierra Club member Robert Jarrell owns a 90.5-acre parcel of land in Summers County, West Virginia, that he purchased to fulfill his lifelong dream of retiring to a mountainside in West Virginia.[352] Approximately 65 acres of Mr. Jarrell's property is forested, and the MVP right-of-way runs over 3,000 feet of his property, almost

[347] Declaration of Charles Chong at ¶¶ 2–3; Declaration of Rebecca Eneix-Chong at ¶¶ 2–3.

[348] Chong Declaration at ¶ 7; Eneix-Chong Declaration at ¶ 7.

[349] Chong Declaration at ¶ 8; Eneix-Chong Declaration at ¶ 8.

[350] Chong Declaration at ¶ 9.

[351] Eneix-Chong Declaration at ¶ 9.

[352] Declaration of Robert Marcus Jarrell at ¶ 2–3.

exclusively in the forested portion.[353] Mr. Jarrell is "absolutely sick about the imminent construction of the MVP on [his] property," which will diminish his enjoyment of his time on his forested ridgeline he describes as "the most peaceful place."[354]

In sum, the deforestation of more than 4,400 hundred acres of forests and the conversion of more than 17,000 acres of interior core forest to edge habitat will bring about irreparable harm to the forests along the MVP right-of-way and to Intervenors' members. That is precisely the type of harm that justifies a stay pending rehearing. Intervenors' showing here is more than just a "mere recitation that it has an issue regarding deforestation [that] fails to show how irreparable harm will occur absent a stay."[355] Rather, it is an injury "both certain and great" that would be "actual and not theoretical."[356] FERC conceded that the impacts of the MVP on forests will be long-term and significant.[357] Such harm is cognizable irreparable harm the supports issuance of a stay.[358]

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[353] *Id.* at 3–4.

[354] Id. at ¶ 6.

[355] 112 FERC ¶ 61,172 at P. 13 (2005).

[356] *Wisconsin Gas Co.*, 758 F.2d at 674.

[357] FEIS at 4-191, 5-6.

[358] *See, e.g.*, *Amoco Prod. v. Village of Gambell*, 480 U.S. 531, 545 (1987) ("Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable."); *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (finding timbering and loss of use of enjoyment of forested areas to constitute irreparable harm); *Cronin v. U.S. Dep't of Agriculture*, 919 F.2d 439, 445 (7th Cir. 1990) (recognizing timbering as an irreparable harm); *Environmental Defense Fund v. Tenn. Valley Authority*, 468 F.2d 1164, 1183–84 (6th Cir. 1972) (holding that cutting and burning of timber is the type of "permanent defacing [of] the natural environment" to constitute irreparable harm supporting an injunction); *Sierra Club v. Bosworth*, Civ. No. C-04-02588-CRB, 2005 WL

B. Construction and Operation of the MVP Will Cause Irreparable Harm to Surface and Ground-Waters, Intervenors, and Their Members

Construction and operation of the MVP also threatens imminent harm to the environment, Intervenors, and their members through its effects on surface- and ground-waters. The MVP right-of-way requires 1,108 waterbody crossings.[359] The MVP right-of-way also crosses vast swaths of karst terrain, and "[k]arst areas are susceptible to a greater range of environmental impact because of the highly developed subterranean network and associated fragile ecosystems."[360]

Moreover, surface waters will receive sedimentation from construction and operation of the MVP as a result of stream crossings and construction in areas adjacent to streams.[361] FERC downplayed these impacts, relying in large part on best management practices ("BMPs").[362] But the erosion and sediment controls that are part and parcel of those BMPs will not and cannot prevent all sedimentation effects.[363]

As FERC acknowledged in the FEIS, "construction of the MVP would disturb about 5,053 acres of soils that are classified as having the potential for severe water erosion."[364] FERC also recognized that "[a]bout 152 miles (77 percent) of the MVP

3096149 at *11 (N.D. Cal. Nov. 14, 2005) ("Timber cutting that has an environmental impact always has a strong potential of causing irreparable harm justifying preliminary relief.").

[359] FEIS at ES-6.

[360] *Id.* at 4-105 & 4-93.

[361] *Id.* at 4-136 to 4-137.

[362] *Id.* at 4-149.

[363] *See* Section II.D, *supra*.

[364] *Id.* at 5-2.

pipeline route in West Virginia is considered to have a high incidence of and high susceptibility to landslides. In Virginia, about 51 miles (48 percent) of the proposed alignment has a high incidence of and high susceptibility to landslides . . . ."[365] FERC further concluded that soil compaction from construction could "increase[] surface runoff into surface waters in the immediate vicinity of the proposed construction right-of-way . . . resulting in increased turbidity levels and increased sedimentation rates in the receiving waterbody."[366] Accordingly, the risk of sedimentation from construction and operation of the MVP is high.

But, as presented by MVP's own consultant, even "assum[ing] strict adherence to the FERC 2013 Upland Erosion Control, Revegetation, and Maintenance Plan and the Project Erosion and Sediment Control Plan during construction," many miles of stream segments downstream of the MVP right-of-way would experience an increase in sediment loads of 10 percent or greater.[367] Importantly, MVP's consultant only quantified sedimentation for a small subset of the streams affected by construction and operation of the pipeline and its quantification significantly underestimates impacts because of its unreasonable and unsupported assumptions regarding the efficacy of MVP's proposed erosion and sediment control practices.[368] There is no reason to assume

[365] *Id.* at 4-28.

[366] *Id.* at 4-137.

[367] FEIS App. O-3 at O3-28, O3-24. As Intervenors explained above, that estimate is likely significantly low because of the unreasonable, unsupported assumptions regarding the efficacy of MVP's proposed erosion and sediment control practices.

[368] *See* Section II.D.1, *supra*.

that this type of significant effect would be limited to the subset of streams assessed by MVP.

The construction and operation of the MVP also threatens the Greenbrier River with sedimentation, blasting, and interference with recreation at the location at which it would cross that important stream. As FERC acknowledged in its FEIS, "[t]he Greenbrier River supports many types of recreational activities, including fishing and boating. Additionally, scenic trails and roadways follow beside the river."[369] FERC also acknowledged that "[p]eople participating in recreational activities on the river or along the [Greenbrier River] banks may be affected during construction."[370] The clearing of the MVP right-of-way will affect the view from the Greenbrier River Crossing.[371] The Greenbrier River is listed in the Nationwide River Inventory because of its status as a "free-flowing river segment in the United States that possess[es] outstandingly remarkable natural or cultural values, which are considered to be of national significance."[372] Indeed, the Greenbrier River potentially qualifies as a national wild, scenic, or recreational river.[373] Additionally, the Greenbrier River is protected under the Natural Streams Preservation Act of West Virginia and is a Section 10 water under the Rivers and Harbors Act.[374]

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[369] FEIS at 4-281.

[370] *Id.* at 4-317.

[371] *Id.* at 4-323.

[372] *Id.* at 4-126.

[373] *Id.*

[374] *Id.* at 4-127.

Intervenors' members will experience the above-described irreparable injuries in a personal way. Sierra Club member Maury Johnson owns property in Monroe County, West Virginia, across which the MVP right-of-way will be constructed.[375] Mr. Johnson's property contains karst-like geography, and surface and groundwater hydrologic connections to the extent that his drinking water is threatened by the construction and operation of the MVP.[376] MVP's surveyors gave Mr. Johnson the sense that it would be hard for the pipeline to be constructed and operated without affecting the water on his property.[377]

Construction and operation of the MVP right-of-way also threatens the surface waters of Sierra Club member James Gore,[378] as well as West Virginia Rivers Coalition members Charles Chong and Rebecca Eneix-Chong.[379] That imminent threat of irreparable harm supports a stay of the Certificate Order.

Finally, Sierra Club member Tammy Capaldo owns the property on the south side of the Greenbrier River at the location that the MVP right-of-way crosses the river.[380] Ms. Capaldo purchased that property to fulfill her lifelong dream of living on the Greenbrier River because of her connection to that river.[381] She uses her property for

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[375] Declaration of Maury Johnson at ¶¶ 2–3.

[376] *Id.* at ¶ 7–8.

[377] *Id.* at ¶ 8.

[378] Gore Declaration at ¶¶ 4–5.

[379] Chong Declaration at ¶¶ 3–6; Eneix-Chong Declaration at ¶¶ 3–6.

[380] Declaration of Tammy Capaldo at ¶¶ 1–36.

[381] *Id.* at ¶ 4–6.

recreation, and the construction of the MVP right-of-way will severely harm that use, if not eliminate it entirely.[382] Indeed, she may have to abandon her dream of living on the property full-time.[383]

In sum, the environmental damage that will result from construction and operation of the MVP right-of-way on water resources near and in its path threatens irreparable harm to streams, Intervenors, and their members. That sort of irreparable harm is sufficient to support a stay of the Certificate Order.[384]

C. The Impacts on Visual Resources Will Cause Irreparable Harm to Intervenors' Members

As FERC conceded in the FEIS, "the pipeline corridor itself may be a significant visual feature, especially in mountainous terrain with multiple viewpoints."[385] In a discussion of the visual impacts of the MVP in the Jefferson National Forest, which is similar to terrain and landscape to much of Monroe County, FERC stated

> Where visible in foreground and middleground distance zones (up to 4 miles) and where the project would be on moderate to steep slopes, the project during the construction period and after would either dominate or begin to dominate the characteristic landscape depending on the angle and aspect of view, the relative size of the project within the overall viewshed from the viewer's location, and the duration of view (in a moving car, hiking, stopping at an overlook). Where visible in the background distance zone, the project could begin to dominate the characteristic landscape, particularly in fall, winter and spring seasons when air quality is typically clear, and also when the corridor becomes covered in frost or snow. The clearing of trees from the right-of-way would have a long-term

[382] *Id.* at ¶¶ 17–22.

[383] *Id.* at ¶ 18.

[384] *See, e.g.*, *Sierra Club v. U.S. Forest Serv.*, 843 F.2d 1190, 1194–95 (9th Cir. 1988) (concluding that harm related to stream sedimentation from logging was sufficient to support preliminary injunction).

[385] FEIS at 4-321.

> impact on the visual resources because of the time it takes for trees to mature and reinstate the textures and colors of trees and reduce the visibility of the lines along each edge of the construction corridor.[386]

These long term visual effects will permanently harm the scenic nature of the rural areas through which the MVP right-of-way will pass.

Intervenors members will suffer irreparable harm to their recreational and aesthetic interests as a result of the visual impacts of construction of the MVP. For example, Sierra Club member Naomi Cohen lives in Monroe County, West Virginia, and frequently hikes to the Hanging Rock Observatory on Peters Mountain in Monroe County.[387] Based on her knowledge of the area and her review of maps of the MVP right- of-way, Ms. Cohen "has little doubt that the construction of the pipeline, as well as the right-of-way that remains after construction, will interrupt the magical view from the Observatory and several other vistas along the Allegheny Trail that I hike, including at Neel's Rocks and Cole's Cabin."[388] Ms. Cohen describes the harm that would befall her from the visual impacts of right-of-way construction this way:

> As of right now, the view from the Observatory is superior in many way to other vistas in this region to which I hike because of the absence of the sight of human impacts, beyond farming, such as utility rights-of-way. I am disturbed by the knowledge that my view from the Observatory and the Allegheny Trail will be marred by a wide swath of deforested land, in the form of the Mountain Valley Pipeline right-of-way marching and snaking over the ridges and through the forests of Monroe County.
>
> . . . If the Mountain Valley Pipeline were constructed as proposed, the view of its right-of-way through Monroe County and into Virginia would diminish my enjoyment of my hikes along the Allegheny Trail and of my time at the Hanging Rock Observatory. I anticipate that the peace,

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[386] *Id.* at 4-335.

[387] Declaration of Naomi Cohen at ¶¶ 1–13.

[388] *Id.* at ¶ 9.

> inspiration, and rejuvenation that I find there would be marred by frustration, sadness, and sorrow.[389]

The harm to Ms. Cohen's and other hikers' recreational and aesthetic interests is irreparable because it cannot be remedied by money and because of its long-lasting, if not permanent, character.[390] Accordingly, the visual impacts of the MVP justify a stay of the Certificate Order.

D. The Applicants Use of Eminent Domain Based on the Certificate Order Will Irreparably Harm Intervenors' Members Absent a Stay

Absent a stay of the Certificate Order, Intervenors' members are threatened with irreparable injury resulting from condemnation proceedings to seize easements across their land that may be based on an unlawful Certificate Order.[391] The applicant has commenced condemnation actions in federal district court in the United States District Court for the Southern District of West Virginia and in the United States District Court for the West District of Virginia.[392] In both actions, MVP has moved for summary judgment and for preliminary injunctions for early possession to begin construction of the MVP right-of-way prior to the conclusion of those actions. Consequently, defendants in

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[389] *Id.* at ¶¶ 10–11.

[390] *Amoco Prod.*, 480 U.S. at 545; *Anglers of the AU Sable v. U.S. Forest Serv.*, 402 F. Supp. 2d 826, 838 (E.D. Mich. 2005) (finding irreparable harm based in part on visual impacts).

[391] 15 U.S.C. § 717f(h).

[392] *Mountain Valley Pipeline, LLC v. An Easement to Construct and Maintain a 42-inch Gas Transmission Line Across Properties in the Counties of Nicholas, Greenbrier, Monroe, Summers, Braxton, Harrison, Lewis, Webster, and Wetzel, West Virginia et al.*, Civ. No. 2:17-cv-04214 (S.D. W. Va.); *Mountain Valley Pipeline, LLC v. Easements to Construct, Operate, and Maintain a Natural Gas Pipeline Over Tracts of Land in Giles County, Craig County, Montgomery County, Roanoke County, Franklin County, and Pittsylvania County, Virginia et al.*, Civ. No. 7:17cv492-EKD (W.D. Va.).

those actions are threatened with premature entry of their property, premature timbering of their forests, and premature trenching on their property before FERC acts on Interveners' request for rehearing and before judicial review of the Certificate Order is available. Such premature destruction of private property under the color of a legally deficient Certificate of Public Convenience and Necessity threatens those landowners with irreparable injury.[393]

Sierra Club members Tammy Capaldo, Maury Johnson, Robert Jarrell, and James Gore, and West Virginia Rivers Coalition members Charles Chong and Rebecca Eneix-Chong are defendants in the condemnation action in the United States District Court for the Southern District of West Virginia.[394] If their forests are timbered and their riverfront beaches excavated under the color of FERC's legally deficient Certificate Order, those forests will not mature and those streambanks will not be restored in their lifetimes. Those irreparable harms can only be avoided through a stay of the Certificate Order.

II. Any Harm to the Applicant Would Not Be Irreparable and is Outweighed by the Imminent Irreparable Harm to the Environment, Intervenors, and Their Members

The injury to Intervenors, the public, and the environment outweighs any harm that a stay may cause the applicant or FERC. Any delay in construction that would result from a stay would be, at most, merely economic harm, no matter how the applicant may

[393] *See Carpenter Technology Corp. v. City of Bridgeport*, 180 F.3d 93, 97 (2d Cir. 1999) (finding threat of irreparable injury presented by potentially wrongful exercise of eminent domain); *Tioronda, LLC v. New York*, 386 F. Supp. 2d 342, 350 (S.D.N.Y. 2005) (holding that deprivation of an interest in real property, and damage to sensitive vegetation and wetlands that would result from wrongful condemnation, constitutes irreparable harm); *Monarch Chemical Works, Inc. v. Exon*, 452 F. Supp. 493, 502 (D. Neb. 1978) (holding condemnation of land can result in irreparable injury).

[394] Capaldo Declaration at ¶ 36; Johnson Declaration at ¶ 24; Jarrell Declaration at ¶ 11; Gore Declaration at ¶ 14; Chong Declaration at ¶12; Eneix-Chong Declaration at ¶ 12.

try to spin it. Any harm that will befall the applicant stems directly from the fact that it entered into contracts and shipping agreements *in anticipation of a Certificate Order to which it had no guarantee*. Accordingly, the applicant, from the beginning of this venture, assumed the risk to its outlays in time and capital.[395]

Moreover, it is well established that economic harm is not irreparable. The D.C. Circuit has explained that "monetary loss may constitute irreparable harm only where the loss threatens the very existence of the movant's business."[396] No matter how costly, the applicant cannot seriously contend that a stay would jeopardize its very existence without undermining its argument that it is sufficiently capitalized to undertake this endeavor, purportedly in the public convenience and necessity. Accordingly, economic harm to the applicant is not irreparable and does not provide an adequate basis for denying a stay, particularly when balanced against the irreparable harm to the environment, Intervenors, and their members.[397] Even FERC acknowledges that principle.[398]

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[395] *Sierra Club v. U.S. Army Corps of Eng'rs*, 645 F.3d 978, 997 (8th Cir. 2011) (finding where permittees "jump the gun or anticipate a pro forma result in permitting application they become largely responsible for their own harm," even where company spent $800 million on plant construction before a permit was issued).

[396] *Wisconsin Gas Co.*, 758 at 674.

[397] *See Sampson v. Murray*, 415 U.S. 61, 90 (1974) (potential monetary injury is not irreparable); *San Louis Valley Ecosystem Council v. U.S. Fish & Wildlife Serv.*, 657 F. Supp. 2d 1233, 1242 (D. Colo. 2009) ("delay in drilling the exploratory wells is not irreparable"); *Ohio Valley Envtl. Coalition v. U.S. Army Corps of Eng's*, 528 F. Supp. 2d 625, 632 (S.D. W. Va. 2007) ("Money can be earned, lost, and earned again; a valley once filled is gone."); *Alaska Ctr. for the Env't v. West*, 31 F. Supp. 2d 714, 723 (D. Alaska 1998) (longer permit processing time was "not of consequence sufficient to outweigh irreversible harm to the environment"); *Citizen's Alert Regarding the Env't v. U.S. Dep't of Justice*, Civ. No. 95-1702 (GK), 1995 WL 748246 at *11 (D.D.C. Dec. 8, 1995) (potential loss of revenue, jobs, and monetary investment that would be cased by project delay did not outweigh "permanent destruction of environmental values that, once lost, may never again be replicated").

III. A Stay of the Certificate Order is in The Public Interest

Because Intervenors seek to compel compliance with federal laws designed by Congress to protect the environment, and because a stay would prevent permanent environmental damage, the public interest weighs heavily in favor of granting a stay. The public interest is protected by preventing irreparable harm to the environment that will result from the construction activities.[399] Moreover, the public interest is served by ensuring that federal agencies scrupulously comply with their statutory duties.[400] The public "has a strong interest in maintaining the balance Congress sought to establish between economic gain and environmental protection."[401] Congress instructed federal agencies to comply with NEPA "to the fullest extent possible."[402] Congressional intent and statutory purpose are statements of the public interest.[403] Accordingly, there "is no

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[398] *See, e.g.*, 154 FERC ¶ 61,263, at P 6.

[399] *See Nat'l Wildlife Fed'n v. Burford*, 676 F. Supp. 271, 279 (D.D.C. 1985) ("a preliminary injunction would serve the public by protecting the environment from any threat of permanent damage").

[400] *See N.D. v. Haw. Dep't of Educ.*, 600 F.3d 1104, 1113 (9th Cir. 2010); *Apotex, Inc. v. U.S. F.D.A.*, 508 F. Supp. 2d 78, 88 (D.D.C. 2007) ("When administrative agencies fail to follow statutory procedures, the public suffers."); *Citizen's Alert*, 1995 WL 748246 at *11 (compliance with the law "is especially appropriate in light of the strong public policy expressed in the nation's environmental laws" (citation omitted)); *Fund for Animals v. Espy*, 814 F. Supp. 142, 152 (D.D.C. 1993) (finding "meticulous compliance with the law by public officials" as relevant to the public interest).

[401] *Ohio Valley Envtl. Coalition*, 528 F. Supp. 2d at 633.

[402] 42 U.S.C. § 4332.

[403] *Johnson v. U.S.D.A.*, 734 F.2d 774, 788 (11th Cir. 1984).

question that the public has an interest in having Congress' mandates in NEPA carried out accurately and completely."[404]

Indeed, the alternatives analysis is "the heart of the environmental impact statement."[405] Allowing construction to continue while the Certificate Order is under rehearing dilutes the availability of a "no-action" and other potential alternatives to the MVP if FERC ultimately reconsiders its NEPA analysis. In that event, the applicant would be able to ram its preferred alternative through via construction without NEPA compliance, by maintaining that neither the "no action" alternative nor other alternatives are viable once the pipeline is finished. Such an outcome is most certainly not in the public interest.[406] If construction is allowed to continue it would defeat the purpose and intent of NEPA, in contravention of the public's congressionally recognized interest in fully informed environmental decision-making.

Moreover, the MVP will cause or contribute to increased upstream gas production through hydraulic-fracking and infrastructure development, including all adverse environmental impacts associated therewith, and result in major adverse downstream environmental impacts from combustion of the natural gas. NEPA requires FERC to consider those adverse impacts, including the effects of burning gas that will produce tons of greenhouse gas emissions ("GHGs"), NO_x, VOCs, and HAPs. The pollutants that

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[404] *Brady Campaign to Prevent Gun Violence*, 612 F. Supp. 2d 1, 26 (D.D.C. 2009).

[405] 40 C.F.R. § 1502.14.

[406] *See Davis v. Mineta*, 302 F.3d 1104, 1115 n.7 (10th Cir. 2002) (once a part of a project proceeds "before environmental analysis is complete a serious risk arises that the analyses of alternatives required by NEPA will be skewed toward completion of the entire [p]roject").

result from the combustion of natural gas are known to cause serious adverse health effects. Thus, there is a strong interest in protecting the public from those effects.

Additionally, a stay is in the public interest in light of FERC's use of so-called "tolling orders" on requests for rehearing, which FERC maintains preclude judicial review. The public has an interest in judicial review of an agency action at a time that matters. If FERC follows its normal practice of tolling the time to act on the merits of Intervenors' request for rehearing, yet allows the applicant to construct the MVP, it will deprive the public of meaningful administrative and judicial process. For FERC to treat the Certificate Order as "final" for one purpose (allowing the applicant to construct the pipeline), yet insist that it is not final others (including for purposes of judicial review) violates the public's trust in this nation's administrative bodies to execute the laws of this Nation in a fair and equitable manner. Without a stay, FERC will essentially be stacking the deck for the applicant, and leaving the public, the environment, and affected landowners with no opportunity for meaningful relief.

The public interest also lies in affording parties due process of law under the Fifth Amendment to the United States Constitution. Intervenors and their members will be deprived of constitutionally-protected procedural due process rights. Construction of the pipeline will begin, private property will be condemned, and irreparable environmental harm will occur before FERC acts on the merits of Intervenors' request for rehearing. FERC will oppose judicial review of its NEPA and NGA analysis prior to action on the merits of Intervenors' request for rehearing, and condemnees (who number in the hundreds and, as described above, are currently defendants in two pending condemnation

actions in federal district court) may not be able to collaterally challenge the validity of the Certificate Order in the condemnation proceedings.[407]

Procedural due process guarantees an "opportunity to be heard . . . at a meaningful time and in a meaningful manner."[408] As the Supreme Court of the United States has observed, "[t]he basic guarantees of our Constitution are warrants for the here and now . . . ."[409] Without a stay, the environment, Intervenors, their members, and the public will be cast into administrative limbo. Without a stay, pipeline construction will proceed and FERC will insist that it maintains jurisdiction indefinitely over Intervenors' rehearing request.

For procedural due process, that will not suffice. Without a stay, FERC will insist that Intervenors sit on the sidelines and wait for the Commission to act on the merits of their request for rehearing; meanwhile, it will allow the applicant to proceed with construction of the MVP under the challenged Certificate Order. The only solution to protect the public's interest in the Constitutional exercise of FERC's administrative authority is a stay of the Certificate Order. "[I]t is always in the public interest to prevent violation of a party's constitutional rights."[410]

Finally, given the high stakes, a stay of the Certificate Order and construction pending a final decision on the merits is clearly in the public interest. A stay will help

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[407] *See, e.g.*, *Williams Natural Gas Co. v. City of Oklahoma City*, 890 F.2d 255, 262 (10th Cir. 1989).

[408] *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

[409] *Watson v. City of Memphis*, 373 U.S. 526, 533 (1963).

[410] *Déjà Vu of Nashville, Inc. v. Metro, Gov't of Nashville & Davidson Cty.*, 274 F.3d 377, 400 (6th Cir. 2001) (quoting *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994)).

ensure that a full and complete analysis of the impacts, and potential mitigation, occurs before alternatives are foreclosed by construction. Furthermore, given the level of interest demonstrated by the public in this controversial pipeline project, the public interest lies in maintaining the status quo until the pending request is considered fully on the merits.[411] Accordingly, the public interest favors a stay.

IV. Based on the Three Factors, Justice Requires a Stay of the Certificate Order

For the foregoing reasons, justice requires a stay of the Certificate Order pending resolution of Intervenors' request for rehearing. Construction of the MVP threatens irreparable harm to the environment, Intervenors, and their members that far outweighs the exclusively economic harm that the applicant might incur from a stay. Moreover, the public interest lies with the protection of the environment, compliance with federal laws, proper administrative procedure, and the protection of Constitutional rights. Accordingly, Intervenors respectfully request that FERC grant their motion for a stay pending resolution of their request for rehearing.

CONCLUSION AND REQUESTED RELIEF

For the foregoing reasons, Intervenors respectfully request the following relief:

1. Grant Intervenors' Request for Rehearing;

2. Immediately stay the Applicants from taking any action authorized by the Certificate Order including, but not limited to, any construction of the projects (including tree clearing) and any attempt to use the power of eminent domain pending final action on the Request for Rehearing;

[411] *See San Luis Valley Ecosystem Council v. U.S. Fish & Wildlife Serv.*, 657 F. Supp. 2d 1233, 1242 (D. Colo. 2009) (holding that voluminous public comments indicate a public interest in maintaining status quo pending proper review).

3. Conduct an evidentiary hearing into the need for the projects, permitting discovery and cross-examination of witness;

4. Upon completion of the rehearing process, rescind the Certificate Order;

5. Before making any new certificate ruling, conduct a NEPA analysis that fully assesses the direct, indirect, and cumulative impacts of the Projects, as set out in this request and Intervenors' previous comments in these dockets;

6. Grant any and all other relief to which Intervenors are entitled.

Dated: November 13, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2017, I caused the foregoing document to be served by electronic mail upon each person designated on the official service list compiled by the Secretary in this proceeding.

/s/ Benjamin A. Luckett

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