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

Appalachian Voices, *et al*., Petitioners,	)	
v.	)	No. 17-1271 (consolidated with 18-1002)
Federal Energy Regulatory Commission, Respondent.	)	

On Petition for Review of Order of the Federal Energy Regulatory Commission, 161 FERC ¶ 61,043 (October 13, 2017)

[ORAL ARGUMENT NOT SCHEDULED]

APPALACHIAN VOICES, *ET AL.*'S MOTION FOR STAY

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INTRODUCTION

Pursuant to Federal Rule of Appellate Procedure 18(a), Petitioners seek a stay pending review of the October 13, 2017 Federal Energy Regulatory Commission (FERC) Order Issuing Certificates and Granting Abandonment Authority in *Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043 (2017), Ex. A (*Order*).[1] That Order authorizes Mountain Valley Pipeline, LLC ("Mountain Valley") to construct a 303.5-mile large-diameter gas pipeline—the Mountain Valley Pipeline ("MVP")—from Wetzel County, West Virginia to Pittsylvania County, Virginia and to use federal eminent domain power to take private property along the project's route. The entities that have contracted for capacity on the MVP are all corporate affiliates of the entities that share ownership of Mountain Valley. *Order* ¶¶ 4 n.4, 10. Mountain Valley intends to begin clearing trees for construction by February 2018. *See* Ex. B.

Petitioners, whose members reside near, recreate on, and own land that will be taken and degraded by the MVP, seek the stay to prevent irreparable injury to their property, environmental, aesthetic, and recreational interests pending the Court's review.

[1] As required by Federal Rule of Appellate Procedure 18(a)(1), Petitioners moved for a stay of the Order before FERC on November 13, 2017. FERC has not acted on that request. Petitioners informed FERC of their intent to file this motion by telephone and email.

ARGUMENT

Petitioners Satisfy the Requirements for a Stay. A stay of an agency order is warranted where a movant establishes that (1) it is likely to prevail on the merits, (2) it is likely to suffer irreparable harm absent a stay, (3) other parties will be unlikely to suffer substantial harm if the stay is granted; and (4) the public interest lies in granting the stay. Circuit Rule 18(a)(1). Petitioners satisfy those requirements here.

I. Petitioners Are Likely to Succeed on the Merits.

a. This Court has Jurisdiction Over the Petition for Review.

Petitioners anticipate that FERC will challenge the Court's jurisdiction on the ground that Petitioners' Request for Rehearing of the Order remains pending. Petitioners' Request, however, has been denied by operation of law under section § 717r(a) of the Natural Gas Act, which provides that "[u]nless the Commission acts upon the application for rehearing within thirty days ..., such application may be deemed to have been denied." 15 U.S.C. § 717r(a). Petitioner filed a timely rehearing request of FERC's Order. *See* Request for Rehearing and Rescission of Certificates and Motion for Stay, No. CP16-10-000, 20171113-5366 (Nov. 13, 2017), Ex. C ("Rehearing Request"). Thirty days passed and FERC took no lawful action on the request. Rather, the Deputy Secretary of FERC, relying on 18 C.F.R. § 375.302(v), issued an order purporting to grant rehearing "for the limited

purposes of further consideration," known as a "tolling order." *See* Order Granting Rehearing for Further Consideration, No. CP16-10, 20171213-3061 (Dec. 13, 2017), Ex. D ("Tolling Order"). That regulation purports to delegate to FERC's Secretary authorization to toll requests for rehearing. *Id.* FERC, however, may not delegate such authority to the Secretary. Accordingly, the Tolling Order is void and Petitioners' Rehearing Request was denied by operation of law. *Manhattan Gen. Equip. Co. v. Comm'r of Internal Revenue*, 297 U.S. 129, 134 (1936).

1. FERC has Purported to Delegate Tolling Authority to its Secretary Only on Stand-Alone Requests for Rehearing.

The Tolling Order exceeded the scope of authority of the Deputy Secretary under 18 C.F.R. § 375.302(v) because Petitioners' Request sought a stay in addition to rehearing. In the preamble to that regulation, FERC limited the Secretary's tolling authority:

> [t]his authority will apply only to stand-alone rehearing requests. In other words, if a rehearing request is combined with any other request for Commission action, such as a request ... for a stay ..., the Commission will continue to act ... according to current procedures.

Delegation of Authority to the Secretary, the Director of the Office Electric Power Regulation and the General Counsel, 60 Fed. Reg. 62,326, 62,327 (Dec. 6, 1995). Here, Petitioners' Request was combined with a motion for stay. Rehearing Request 32-33. Consequently, the Deputy Secretary was not authorized to toll the

time for action on that request, and her tolling order is, therefore, void. *Manhattan Gen. Equip. Co.*, 297 U.S. at 134.

2. FERC Cannot Delegate the Authority to "Act" on Rehearing Requests.

The Tolling Order also and does not constitute an act on Petitioners' Rehearing Request because Congress did not authorize FERC to delegate its authority to act on such requests. The statute expressly required *the Commission* to act on rehearing requests. 15 U.S.C. § 717r(a). The Commission's delegation was thus unlawful and any action pursuant to that delegation has no legal effect.

When a statute grants the authority to delegate some functions but omits the grant as to others it "shows a legislative intention to withhold the latter." *Cudahy Packing Co. of La. v. Holland*, 315 U.S. 357, 364 (1942). Congress explicitly authorized the Commission to delegate other specific functions. *See, e.g.*, 42 U.S.C. §§ 7171(g), 717m(c), 717n(e). The specificity with which Congress listed the delegable duties demonstrates that it did not intend for the Commission to delegate duties other than those specifically enumerated. In this case, *expressio unius est*, indeed, *exclusio alterius*. *See NLRB v. SW General, Inc.*, 137 S. Ct. 929, 940 (2017). Such delegation is particularly improper where, as here, the function being delegated is not ministerial but rather a discretionary action that has direct and substantial impacts on the rights of parties. *See Cudahy*, 315 U.S. at 361 (It "can hardly be accepted unless plainly required by its words" that a statute permits

delegation of discretionary functions.). The Court should thus reject FERC's attempt to insert language here that Congress conspicuously declined to supply; to do otherwise would render superfluous provisions that authorize delegation of other specific authorities.

b. FERC's Order is Unlawful.

1. FERC Lacked Sufficient Evidence of Market Demand to Support a Finding of Public Convenience and Necessity.

Anyone seeking to build an interstate natural gas pipeline must obtain a "certificate of public convenience and necessity" from FERC. 15 U.S.C. § 717f(c)(1)(A). "[A] certificate shall be issued ... upon a finding that ... the proposed service ... is or will be ***required*** by the present or future public ... ***necessity***." *Minisink Residents for Envtl. Preservation and Safety v. FERC*, 762 F.3d 97, 101 (D.C. Cir. 2014) (citing 15 U.S.C. § 717f(e)) (emphasis added). Because such certificates confer the extraordinary power of eminent domain, they may only be issued for projects that serve a "public use" in accord with the Fifth Amendment to the United States Constitution. *See Kelo v. City of New London*, 545 U.S. 469 (2005).

FERC must base its determination of public convenience and necessity on "substantial evidence." 15 U.S.C. § 717r(b). "The substantial evidence standard requires more than a scintilla, but can be satisfied by something less than a preponderance …." *FPL Energy Me. Hydro LLC v. FERC*, 287 F.3d 1151, 1160

(D.C. Cir. 2002). "The substantial evidence inquiry turns ... on whether that evidence adequately supports [FERC's] ultimate decision." *Fla. Gas Transmission Co. v. FERC*, 604 F.3d 636, 645 (D.C. Cir. 2010). The standard is functionally the same as the Administrative Procedure Act's arbitrary and capricious review. *Crooks v. Mabus*, 845 F.3d 412, 423 (D.C. Cir. 2016). Agency action is arbitrary and capricious if the agency "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

FERC lacked substantial evidence to support its finding of public convenience and necessity, which rests entirely on the existence of contracts for pipeline capacity between Mountain Valley and its own corporate affiliates. Further, FERC failed to meaningfully consider record evidence showing that those contracts are not reliable indicators of public demand and independently demonstrating a lack of market need. Because FERC lacked a rational basis for its conclusion, its Order violates the statute and the taking of private property for the project violates the Fifth Amendment.

FERC's own policies make clear that narrow reliance on contracts between corporate affiliates to support a finding of public need is improper. Certification of New Interstate Natural Gas Pipeline Facilities, 88 FERC ¶ 61,227, 61,747 (Sept. 15, 1999), *clarified*, 90 FERC ¶ 61,128 (Feb. 9, 2000), *further clarified*, 92 FERC ¶ 61,094, 61,373 (Jul. 28, 2000) ("Policy Statement"). Prior to 1999, FERC required applicants to show market support for a project through contractual commitments for pipeline capacity, often referred to as "precedent agreements." *Id.* ¶ 61,743. In its Policy Statement, FERC acknowledged that its prior practice 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." *Id.* at ¶ 61,744 (emphasis added).

The Policy Statement included a list of relevant factors for assessment of market demand, including "precedent agreements, demand projections, potential cost savings to consumers, or a comparison of projected demand with the amount of capacity currently serving the market." *Id.* ¶ 61,747. 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." 90 FERC ¶ 61,128, 61,390 (Feb. 9, 2000).

In practice, however, FERC rarely (if ever) considers any factor other than precedent agreements. *See, e.g.*, *Order* (LaFleur, Comm'r, dissenting) (FERC's "implementation of the Certificate Policy Statement has focused more narrowly on the existence of precedent agreements"). Former FERC Commissioner Norman Bay also recently criticized overreliance on precedent agreements; while the Policy Statement "lists a litany of factors for the Commission to consider in evaluating need ... in practice, the Commission has largely relied on the extent to which potential shippers have signed precedent agreements for capacity on the proposed pipeline," thus ignoring "a variety of other considerations." *See Nat'l Fuel Gas Supply Corp.*, 158 FERC ¶ 61,145 (2017) (Bay, Comm'r, Separate Statement), Ex. E.

FERC's policy recognizes that reliance on precedent agreements to establish "necessity" is even more problematic when precedent agreements are between corporate affiliates, *i.e.*, "affiliate agreements." Policy Statement ¶ 61,744 ("Using contracts as the primary indicator of market support for the proposed pipeline project also raises additional questions when the contracts are held by pipeline affiliates."); *id* ¶ 61,748. In other words, the insufficiency of precedent agreements to establish public need is exacerbated when, as here, the contracts are between affiliated entities and are not the result of arms-length negotiations.

FERC's Order suffers from the very inadequacies identified by the Policy Statement. FERC here relied on the existence of precedent agreements with Mountain Valley's affiliated shippers to establish market need for the Project. *Order* ¶ 41 n.47. Furthermore, FERC failed to consider the affiliate nature of the precedent agreements when relying on them to establish the purported need for the project. *Id.* ¶ 45.

In addition to improperly relying solely on precedent agreements between affiliated entities, FERC ignored substantial record evidence showing a lack of market need for the MVP's additional capacity. The record shows that the demand for gas in the regions Mountain Valley purports to 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.

Industry analysts have concluded that there is a substantial surplus of pipeline capacity between existing pipelines, projects under construction, and applications in the regulatory queue. *See, e.g.*, Comments of Thomas Hadwin on behalf of Friends of the Central Shenandoah 6-8 (Jun. 30, 2017), Docket CP16-10, 20170630-5306, Ex. F (Hadwin Comments). These experts project that pipeline capacity in the region will be over fifty percent greater than production capacity through 2022, at least. *Id.* 5, 11. A study by Synapse Energy Economics found that

"the supply capacity of the Virginia-Carolinas region's existing natural gas infrastructure is more than sufficient to meet expected future peak demand." 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), Ex. G.

Mountain Valley has only entered into agreements with end users for thirteen percent of the MVP's capacity. *Order* (LaFleur, Comm'r, dissenting). The specific demand for the remaining capacity is unknown and based purely on speculation that the shippers will find buyers for their gas. Particularly given the risk that the shippers will be unable to find a market for the vast majority of the MVP's subscribed capacity, FERC was obligated to assess other indicators of market demand. It failed to do so. 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." *Id.*. She rightly faulted the other members of the Commission for narrowly focusing on the precedent agreements, despite the Policy Statement and urged "careful consideration of a fuller record" so that FERC could "better balance environmental issues ... with the project need and its benefits." *Id*[2]. FERC's failure

[2] Such balancing of the public benefits of a project against its impacts to the environment and landowners is required by FERC's Policy Statement. Policy Statement ¶ 61,745–47. There, FERC explained that it will consider "all relevant

to consider the substantial evidence showing a lack of any long-term market demand for the MVP's capacity renders its Order arbitrary and capricious. *See Nat. Res. Def. Council, Inc. v. Rauch*, 244 F. Supp. 3d 66, 97 (D.D.C. 2017) (agency arbitrary and capricious when it neglected to consider a factor that its own guidance stated should be relevant to its decision).

Moreover, by refusing to scrutinize the affiliate nature of the precedent agreements FERC "failed to consider an important aspect of the problem," rendering its decision arbitrary and capricious. Agreements between corporate affiliates do not reflect true demand for new capacity, particularly where one or more of those affiliates is a utility that can pass costs on to captive ratepayers. Where pipeline developers can push the risks of an investment onto captive customers, the market becomes distorted. As FERC has acknowledged, "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." Cross-Subsidization Restrictions on Affiliate Transactions, 122 FERC ¶ 61,155 (2008).

The entities that have contracted to ship gas on the MVP are all corporate affiliates of Mountain Valley's owners. Two of those entities—Roanoke Gas and

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factors reflecting the need for the project" to evaluate the public benefit of the project. *Id.* ¶ 61,747. FERC's failure to assess the public need for the project by any means other than precedent agreements prevents it from adequately weighing the "public benefits" side of the scale.

Con Edison—are utilities that have signed 20-year agreements for service on MVP. The costs of these agreements would be passed through to retail customers. Wilson et al., *Ratepayer Impacts of ConEd's 20-Year Shipping Agreement on the Mountain Valley Pipeline* (September 2017), Attachment A to Rehearing Request. At the same time that these customers would cover the cost of the pipeline investment, the affiliated pipeline developers would enjoy high rates of return well in excess of business and financial risk—approximately 14 percent.[3] "The high returns on equity that pipelines are authorized to earn by FERC … 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." Cathy Kunkel & Tom Sanzillo, *Risks Associated with Natural Gas Pipeline Expansion in Appalachia* 9 (2016), Ex. H; *see also* Hadwin Comments 17-18. The result of these skewed market incentives is a significant overbuilding of pipeline infrastructure. FERC's decision "not to second guess the business decisions of end users," *Order* ¶ 53, means that it "failed to consider an important aspect of the problem," rendering its finding of public convenience and necessity arbitrary and capricious. *See AT&T Corp. v. F.C.C.*, 236 F.3d 729, 736–37 (D.C.

[3] Petitioners believe that the rate of return authorized by the Order is unreasonably high and that FERC lacked substantial evidence to support it. *See* Rehearing Request at 22–25. Petitioners intend to pursue this claim in their merits briefing.

Cir. 2001) (decision was arbitrary and capricious where agency relied on a single factor despite previously explaining that other factors were relevant to such decisions).

2. FERC's Environmental Impact Statement Does Not Satisfy NEPA

i. FERC Violated NEPA by Failing to Evaluate Reasonable Alternatives to the MVP

FERC's refusal to critically evaluate the purpose and need for the MVP prevented it from considering reasonable alternatives to the project that would have significantly fewer environmental impacts. 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." 42 U.S.C. § 4332(C). The EIS must include the full consideration of environmental consequences that may result from a proposed project and alternatives that may minimize those impacts. 40 C.F.R. § 1500.1. The scope of "reasonable alternatives" should not be constrained by "those alternative means by which a particular applicant can reach his goals." *Van Abbema v. Fornell*, 807 F.2d 633, 638 (7th Cir. 1986).

Here, FERC's refusal to evaluate the purpose and need for the project in the EIS undermined its alternatives analysis. Despite NEPA's clear requirement to "specify the purpose and need" for a project, the EIS explicitly states that it "does

not address in detail the need or public benefits" of the pipeline. Final Environmental Impact Statement under CP16-10 et al., 20170623-4000, 1-9, excerpts attached as Ex. I ("FEIS"). Instead of critically evaluating the purpose and need, FERC improperly adopted the goals of the applicant and refused to meaningfully consider any alternatives that would not transport Mountain Valley's requested volume of gas from its desired starting pointing to its desired end point. As the U.S. Environmental Protection Agency explained in its comments on the project, "[e]stablishing 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, Comments on Draft Environmental Impacts Statement 2 (Dec. 20, 2016), Ex. J ("EPA Comments").

FERC's failure to assess the public's need for the Project in the EIS prevented it from giving adequate consideration to less damaging alternatives, including co-locating the pipeline in the same corridor as the very similar, concurrently approved Atlantic Coast Pipeline. Without evaluating "markets, rates, gas supply, existing facilities and service, long-term feasibility information, unserved demand, bottlenecks, problems with interstate grid, [or] high consumer costs," FERC could not determine if a differently configured project could meet any actual public need for the gas to be carried on the MVP. EPA Comments, Enclosure-Technical Comments 2.

In particular, FERC should have given greater attention to co-locating the MVP with the Atlantic Coast Pipeline as Commissioner LeFleur urged. *Order* (LaFleur, Comm'r, dissenting). As Commissioner LeFleur observed, "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." *Id.* She concluded that "the regional needs that these pipelines address may be met through alternative approaches that have significantly fewer environmental impacts." *Id.*

Nonetheless, FERC only gave cursory attention to this alternative, concluding that the "co-location" options did not provide feasible means by which both applicants could transport their entire desired volumes of gas from and to their desired termini. FEIS 3-14–16. Had FERC meaningfully considered the true public need for the MVP in the EIS, it may have found the single corridor alternative satisfied any such need and avoided substantial adverse impacts to the environment and human communities. Its failure to do so renders the EIS deficient. *See Union Neighbors United, Inc. v. Jewell*, 831 F.3d 564, 574–77 (D.C. Cir. 2016).

ii. FERC Violated NEPA by Failing to Adequately Analyze the MVP's Climate Impacts

FERC likewise failed to adequately analyze the climate impacts of the downstream use of the gas to be transported on the MVP. NEPA requires agencies

to assess not only the direct effects of a proposed action, but also the indirect and cumulative effects. 40 C.F.R. §§ 1508.8(b), 1508.7.

This Court's recent decision in *Sierra Club v. FERC* ("*Sabal Trail*") sets a bar for evaluating impacts that FERC did not meet. 867 F.3d 1357 (D.C. Cir. 2017). 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 gas. *Id.* at 1371-74. Combustion of the gas transported by a pipeline "is not just 'reasonably foreseeable,' it is the project's entire purpose." *Id.* at 1372. 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." *Id.* at 1374.

Here, FERC declined to consider downstream GHG emissions as indirect effects of the project. FEIS 4-516 ("The downstream use of natural gas in the market areas ... is beyond the scope of this EIS."). Although FERC estimated downstream GHG emissions, it failed to assess their significance, and thus failed to inform the public and decisionmakers about the impact of those emissions. *See* 40 C.F.R. §§ 1508.8(b), 1502.16(a)-(b). Astonishingly, the EIS concludes that FERC "cannot determine whether the projects' contribution to cumulative impacts on climate change would be significant." FEIS 4-620; *Order* ¶¶ 287-96; *see also* 40 C.F.R. §§ 1508.8(b), 1502.16(a)-(b).Upon closer inspection, FERC made no real

effort to assess significance. Rather, it states that it cannot do so because it "cannot determine the projects' incremental physical impacts on the environment caused by climate change…." *Id.* The *Sabal Trail* Court firmly rejected this rationale and found that FERC was required to do more to assess climate impacts, stating unequivocally that an EIS "need[s] to include a discussion of the 'significance' of this indirect effect." 867 F.3d at 1374 (citing 40 C.F.R. § 1502.16(b)).

FERC's inadequate analysis also impermissibly downplayed the Project's downstream GHG emissions by concluding that gas transported by MVP would displace "some" coal use as an energy source, thereby "potentially" offsetting "some" of the MVP's emissions. FEIS 4-620. The *Sabal Trail* Court expressly rejected this approach as well, explaining that the EIS "fail[ed] to fulfill its primary purpose" because "an agency decisionmaker reviewing [the] EIS would ... 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." 867 F.3d at 1375. The MVP EIS similarly makes no attempt to assess whether total emissions would be reduced or increased, or the degree of reduction or increase, thus violating NEPA. *Id.*

II. Petitioners Will Suffer Irreparable Harm in the Absence of a Stay.

The environmental harm and consequent harms to the recreational, aesthetic, and property interests of Petitioners' members caused by the exercise of eminent

domain, mature tree clearing, grading, trenching, blasting, soil compaction, soil erosion, and water degradation at stream and wetland crossings warrant relief because the harms are certain, great, imminent, and cannot be cured by legal remedies. *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). The Supreme Court has recognized that environmental harm, "by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable." *Amoco v. Village of Gambell*, 480 U.S. 531, 545 (1987); *see also Nat'l Audubon Soc'y v. Dep't of Navy*, 422 F.3d 174, 201 (4th Cir. 2005); *New Mexico v. Watkins*, 969 F.2d 1122, 1137 (D.C. Cir. 1992). FERC acknowledges that pipeline construction causes irreparable harm. *See* FEIS 4-50 ("Pipeline construction across rivers and streams … can result in … long-term adverse environmental impacts[.]), 4-71 ("Cutting clearing, and removing existing vegetation for construction would … permanently impact vegetation.").

Petitioners submit 22 declarations detailing the harm that their members would suffer without a stay. *See* Ex. K. It is certain that construction of MVP will result in irreparable harm. MVP will require a 125-foot wide construction right-of-way and a 50-foot permeant right of way. FEIS 2-23–24. Construction requires clearing the 125-foot-wide right-of-way of all vegetation and digging a trench up to nine-feet deep. Where the pipeline crosses streams, the streams will be dewatered (i.e. diverted or dammed) and a two- to four-foot trench dug through the

streambed. Furthermore, MVP has already begun eminent domain proceedings in federal district courts in the Southern District of West Virginia and Western District of Virginia,[4] imperiling the property rights of Petitioners' members. *See Carpenter Tech. Corp. v. City of Bridgeport*, 180 F.3d 93, 97 (2d Cir. 1999) (finding threat of irreparable injury from potentially wrongful exercise of eminent domain).

Pipeline construction would, for example, leave an indelible scar on Sierra Club member James Gore's 116-acre forested property. Gore Decl. ¶ 5, Ex. K. Several hundred feet of the pipeline would cut through Mr. Gore's core interior forest, converting it to edge habitat that FERC explains "would result in the removal of habitat from interior species," "lead to a change in species composition," and "could also introduce ... invasive species." FEIS 4-181–4-182; *Id.* ¶ 8. Large-scale conversion of interior forest to edge habitat, FERC found, may "result[] in an overall change to the structure of the forest community." *Id.*

Mr. Gore and his co-tenants intended to preserve the forest on their property without timbering to use it for hunting and wildlife observation. Gore Decl. ¶ 10.

[4] *Mountain Valley Pipeline LLC v. An Easement to Construct Operate and Maintain a 42-Inch Gas Transmission Line Across Props. in the Ctys. of Nicholas, Greenbrier, Monroe, Summers, Braxton, Harrison, Lewis, Webster, and Wetzel*, No. 2:17-cv-04214 (S.D. W. Va.); *Mountain Valley Pipeline, LLC v. Easements to Construct, Operate, and Maintain a Nat. Gas Pipeline Over Tracts of Land in Giles Cty., Craig Cty., Montgomery Cty., Roanoke Cty., Franklin Cty., and Pittsylvania Cty.*, No. 7:17-cv-492-EKD (W.D. Va.).

In addition to spoiling Mr. Gore's dearly held forest with a permanent clear-cut, the fragmentation "will harm the wildlife that [he] hunt[s] and the non-game wildlife that [he] enjoy[s] seeing while in the woods." *Id.* ¶ 12.

Similarly, Charles Chong and Rebecca Eneix-Chong own a 220-acre forested property in the path of MVP. Chong Decl. ¶ 5, Ex. K; Eneix-Chong Decl. ¶ 5, Ex. K. Their property would suffer the same fate as Mr. Gore's when MVP cuts through thousands of linear feet of their land, "destroy[ing] more than 13%" of their forests. *Id.* ¶ 10.

Construction across surface waters would also irreparably harm Petitioners' members. Sierra Club member Tammy Capaldo owns property at the location that the MVP crosses the Greenbrier River. Capaldo Decl. ¶ 4. Ms. Capaldo purchased the property to fulfill her lifelong dream of living on the Greenbrier River. *Id.* ¶ 5. She currently uses her property for recreation. Construction of MVP would severely harm that use, if not eliminate it entirely. *Id.* ¶¶ 11-17.Construction of MVP threatens the Greenbrier River with sedimentation, blasting, and interference with recreation. FERC admits that "[p]eople participating in recreational activities on the [Greenbrier and its banks] may be affected during construction." FEIS 4-323. MVP's own analysis found many miles of stream segments downstream of the right-of-way would experience a significant increase in sediment loads. *Id.* App. O-3. Clearing the MVP right-of-way would likewise permanently despoil the

view of the Greenbrier and surrounding area. Due to these irreparable impacts, Ms. Capaldo would be forced to abandon her dream of living on her water-front property full-time. Capaldo Decl. ¶ 19.

Those are but a few examples of the harms to property and the environment that the MVP would inflict on Petitioners' members. Clearing mature trees, trenching across streams and rivers, and spoiling the viewshed of Petitioners' members will harm their aesthetic, recreational, environmental, and property interests in a manner that cannot be reversed in a human lifetime. There is, therefore, no legal remedy for those harms.

III. A Stay Will Not Cause FERC or Mountain Valley Substantial Injury.

A stay pending FERC's resolution of Petitioners' rehearing request is unlikely to result in any substantial injury to Mountain Valley and certainly not to FERC.

Mountain Valley is likely to argue that delaying its construction schedule will result in economic harm. While such harm is relevant, any potential temporary harm to Mountain Valley's economic interests is outweighed by the irreparable harm to the environment caused by pipeline construction. *See, e.g., Ohio Valley Envtl. Coal. v. U.S. Army Corps of Engineers*, 528 F. Supp. 2d 625, 632 (S.D.W. Va. 2007). Moreover, Mountain Valley has yet to begin construction. A temporary stay before construction has begun will reduce any economic harm Mountain

Valley may suffer and will allow the Court to address the merits of Petitioners' arguments before the company commits substantial resources to construction activities. Accordingly, a stay will not inflict substantial or irreparable harm on Mountain Valley. *See League of Wilderness Defs. v. Connaughton*, 752 F.3d 755, 766 (9th Cir. 2014).

IV. A Stay is in the Public Interest.

In cases involving preservation of the environment, the balance of harms generally favors the grant of injunctive relief. *See Amoco*, 480 U.S. at 545 ("If such injury is sufficiently likely ... the balance of harms will usually favor the issuance of an injunction to protect the environment."). There "is no question that the public has an interest in having Congress' mandates in NEPA carried out accurately and completely." *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 26 (D.D.C. 2009). Here pipeline construction impacts to forests, streams, and wetlands, and the resulting loss of ecological services they provide, constitute injury to the public interest in protecting natural resources pursuant to environmental laws.

Moreover, the public interest requires that the eminent domain power granted to MVP be exercised for the public benefit. Just as the public has an interest in compliance with NEPA, the public has an interest in FERC's compliance with the execution of the Natural Gas Act by its terms—public

convenience and necessity—when it grants the awesome power of eminent domain to a private company. Taking private property without a reasonable determination that the taking is in the public interest harms the public's Fifth Amendment rights.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request the Court stay FERC's Order.

Dated: January 8, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limit of FRAP 32(a) and the word limit of FRAP 27(d) because, excluding the parts of the document exempted by FRAP 32(f), this document contains 5,197 words.

This document complies with the typeface requirements of FRAP 32(a)(5) and the type-style requirements of FRAP 32(a)(6) because this document has been prepared with a proportionally spaced typeface using Microsoft Word 2017 in 14-point font size and Times New Roman type style.

Dated: January 8, 2017

/s/ Benjamin A. Luckett
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CERTIFICATE OF PARTIES

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

1. **Parties**

Petitioners, Appalachian Voices, Chesapeake Climate Action Network, Sierra Club, West Virginia Rivers Coalition, Wild Virginia

Respondent, Federal Energy Regulatory Commission

2. **Movant-Intervenors**

At present, no parties have moved to intervene in this action.

3. ***Amici Curiae***

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

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PETITIONERS' RULE 26.1 STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Petitioners make the following disclosures:

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

Appalachian Voices works in partnership with local people and communities to defend the natural heritage and economic future of the Appalachian region.

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

CCAN is a grassroots, nonprofit organization dedicated to fighting climate change and all of the harms fossil-fuel infrastructure causes in Maryland, Virginia, and Washington, D.C.

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

Sierra Club is a nonprofit organization dedicated to the protection and enjoyment of the environment.

West Virginia Rivers Coalition: West Virginia Rivers Coalition has no parent companies, and there are no publicly held companies that have a 10 percent or greater ownership interest in West Virginia Rivers Coalition.

West Virginia Rivers Coalition is a statewide non-profit organization dedicated to conserving and restoring West Virginia's exceptional rivers and streams.

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

Wild Virginia is a statewide organization that works to preserve and support the complexity, diversity and stability of natural ecosystems by enhancing connectivity, water quality and climate in the forests, mountains, and waters of Virginia.

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CERTIFICATE OF SERVICE

I hereby certify that on January 8, 2018, I caused to be served the foregoing Appalachian Voices, *et al*.'s Motion for Stay upon all ECF-registered counsel via the Court's CM/ECF system.

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