

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

APPALACHIAN VOICES, et al.,)	
Petitioners)	
)	
v.)	
)	No. 18-1175 (Consolidated
FEDERAL ENERGY REGULATORY)	with Nos. 17-1271, 18-1002,
COMMISSION,)	18-1177, and 18-1186)
Respondent)	
_____)	

On Petition for Review of Orders of the Federal Energy Regulatory
Commission, 161 FERC ¶ 61,043 (October 13, 2017) and
163 FERC ¶ 61,197 (June 15, 2018)

[ORAL ARGUMENT NOT SCHEDULED]

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

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INTRODUCTION

Pursuant to Federal Rule of Appellate Procedure 18(a), Petitioners Appalachian Voices, Chesapeake Climate Action Network, Sierra Club, West Virginia Rivers Coalition, and Wild Virginia seek a stay of the Federal Energy Regulatory Commission (FERC) Order Issuing Certificates and Granting Abandonment Authority in *Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043 (October 13, 2017) (“Certificate Order”)¹ and the Order on Rehearing, 163 FERC ¶ 61,197 (June 15, 2018) (“Rehearing Order”)² upholding the Certificate Order.³ Those Orders authorize Mountain Valley Pipeline, LLC (“Mountain Valley”) to construct a 303.5-mile large-diameter gas pipeline—the Mountain Valley Pipeline (“the Project”)—from Wetzel County, West Virginia to Pittsylvania County, Virginia. Pipeline construction is underway and is causing irreparable harm to the environment and private property along the route, including Petitioners’ members’ property and other areas they use and enjoy.

This Court has jurisdiction under the Natural Gas Act, 15 U.S.C. § 717r(b), because Petitioners have timely appealed FERC’s ruling. On January 8, 2018,

¹ Attached as Ex. A.

² Attached as Ex. B.

³ As required by Federal Rule of Appellate Procedure 18(a)(1), Petitioners moved for a stay of the Certificate Order before FERC on November 13, 2017. FERC denied the stay as part of the June 15, 2018 Rehearing Order. Petitioners informed the other parties of their intent to file this motion. FERC and Respondent-Intervenors oppose the motion. The other Petitioners and Petitioner-Intervenors support the motion.

Petitioners requested a stay in this Court in Case No. 17-1271. That case was filed on December 22, 2017, based on FERC's issuance of a "tolling order" on Petitioners' request for rehearing of the Certificate Order, before FERC's denial of Petitioners' rehearing request. As set forth in that motion for stay, the "tolling order" was invalid and thus Petitioners' rehearing request before FERC was denied by operation of law under 15 U.S.C. § 717r(a).

Nevertheless, FERC and Mountain Valley moved to dismiss Case No. 17-1271 and opposed the motion for stay, arguing the case was premature and that this Court lacked jurisdiction. On February 2, 2018, the Court denied the motion for stay and deferred the motions to dismiss to the merits briefing. Order, Doc. No. 1716262 (February 2, 2018). After FERC issued the Rehearing Order, Petitioners filed a second petition for review challenging both the Certificate Order and Rehearing Order (Case No. 18-1175).

The jurisdictional questions raised in the motions to dismiss, which were present when the Court denied the previous motion to stay, are no longer at issue. The Court now indisputably has jurisdiction. Further, new facts arising since the Court's denial of the previous stay motion bolster both Petitioners' likelihood of success on the merits and their irreparable harm in the absence of a stay. The Court's denial of that motion is thus not determinative of the instant motion. As set forth below, this motion meets this Circuit's standards for a stay pending review since

FERC authorized the Project in violation of the National Environmental Policy Act (NEPA).⁴

Without a stay, continued construction and operation of the Project would render moot full and complete relief that this Court could grant. Petitioners' members would suffer irreparable injuries to their property and to their aesthetic, recreational, and environmental interests. A stay must be granted to protect these interests, to preserve the *status quo*, and to enable meaningful judicial review of FERC's orders.

STANDARD OF REVIEW

A party seeking a stay pending review must show that it is likely to prevail on the merits; the prospect of irreparable injury to the moving party if relief is withheld; the possibility of harm to other parties if relief is granted; and the public interest. D.C. Cir. Rule 18(a)(1). A moving party need not show a "mathematical probability" of success on the merits, and relief may be granted if the movant has made a "substantial case" on the merits. *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977).

Agency action should be overturned as arbitrary and capricious if the agency "relied on factors which Congress has not intended it to consider, entirely failed to

⁴ The claims in this motion are not exhaustive. Petitioners intend to raise additional claims in their merits brief.

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).

ARGUMENT

I. PETITIONERS ARE LIKELY TO SUCCEED ON THE MERITS

A. FERC’s EIS Failed to Adequately Assess the Project’s Impacts to Aquatic Resources

FERC’s Environmental Impact Statement (“EIS”)⁵ failed to take a “hard look” at the direct and indirect effects of the Project on waterbodies and wetlands. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

Construction authorized by the Certificate Order would cross 1,146 waterbodies and disturb over 5,000 acres of soils with potential for severe water erosion. EIS at 4-118, 5-2. Moreover, much of the pipeline route follows very steep slopes, which are particularly susceptible to erosion. *Id.* at 2-49. About 77 percent of the Project route in West Virginia and 48 percent of the route in Virginia “is considered to have a high incidence of and high susceptibility to landslides.” *Id.* at 4-28.

⁵ Excerpts attached as Ex. C.

Mountain Valley has begun and will continue to clear a 150-foot wide corridor along the pipeline route, “remov[ing] the protective cover and expos[ing] the soil to the effects of wind and rain, which increases the potential for soil erosion and sedimentation.” *Id.* at 4-81. In addition to erosion from right-of-way clearing, soil compaction from construction could “increase[] 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 waterbod[ies].” *Id.* at 4-137. Finally, “[i]mpacts on waterbodies could occur as a result of construction activities in stream channels and on adjacent banks,” including “local modifications of aquatic habitat involving sedimentation, increased turbidity, and decreased dissolved oxygen concentrations.” *Id.* at 4-136.

Despite generally acknowledging these impacts, FERC in the EIS concluded that “[n]o long-term or significant impacts on surface waters are anticipated” and that “[t]emporary impacts would be avoided or minimized” by adherence to certain mitigation measures. *Id.* 4-143, 4-149. FERC must support with substantial evidence its conclusion that proposed measures would protect water resources. *See New York v. U.S. Nuclear Reg. Comm’n*, 589 F.3d 551, 555 (2d Cir. 2009). FERC’s conclusion was not supported by the record and is belied by the significant sedimentation impacts that have already occurred during Project construction.

1. FERC Failed to Support Its Conclusion that Mountain Valley's Erosion and Sedimentation Mitigation Measures Will Protect Aquatic Resources

FERC's reliance on Mountain Valley's mitigation measures to conclude that pipeline construction would not significantly contribute to sedimentation and related impacts was not supported by substantial evidence. Despite the steep slopes and highly erodible soils traversed by the Project, FERC concluded that construction would not result in significant impacts because Mountain Valley would adhere to its Erosion and Sedimentation Plans and other related mitigation plans. *See, e.g.*, EIS at 5-2; Certificate Order ¶185; Rehearing Order ¶¶173, 176, 187-88. Those plans, however, are not included in the EIS, and the EIS neither evaluates the effectiveness of nor discusses in detail the measures in those plans. In its Rehearing Order, FERC merely states that its conclusion regarding the effectiveness of the measures is based on "Commission staff's field experience gained from pipeline construction and compliance inspections conducted over the last 25 years." Rehearing Order ¶187. But Petitioners in their comments to FERC presented contrary expert analysis to which FERC failed to respond, and identified numerous examples of the inadequacy of such measures on past pipeline projects that resulted in significant impacts to water quality. Petitioners' Draft EIS

Comments at 45, n.148, 49 n.159;⁶ Petitioners' Rehearing Request at 65-71.⁷

Insufficient mitigation measures, even if longstanding in their use, are still insufficient. *See Summit Petroleum Corp. v. EPA*, 690 F.3d 733, 746 (6th Cir. 2012) (rejecting agency argument that its interpretation is entitled to deference merely because it is longstanding).

FERC's failure to support its conclusion that those measures would successfully minimize sedimentation renders its NEPA analysis arbitrary and capricious. *Nat'l Parks Conservation Ass'n v. Babbitt*, 241 F.3d 722, 734 (9th Cir. 2001), *abrogated on other grounds by Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 157 (2010) ("A perfunctory description, or mere listing of mitigation measures, without supporting analytical data, is insufficient to support a finding of no significant impact.") (citations and internal quotation marks omitted); *Ohio Valley Envtl. Coal. v. Hurst*, 604 F. Supp. 2d 860, 901 (S.D.W. Va. 2009) (rejecting agency's conclusion that aquatic impacts would not be significant because the conclusion was "based on the success of a mitigation process whose success is not supported by the [agency's] analysis.>").

2. The Inadequacy of Mountain Valley's Mitigation Measures Has Been Confirmed by Numerous Significant Impacts to Aquatic Resources During Ongoing Project Construction

⁶ Excerpts attached as Exhibit D.

⁷ Excerpts attached as Exhibit E.

Petitioners' predictions of severe sedimentation impacts have, unfortunately, been validated. Project construction has resulted in numerous significant sedimentation events along the pipeline route. Although not part of the record before the agency at the time of its decision, such "events indicating the truth or falsity of agency predictions should not be ignored." *Am. Petroleum Inst. v. EPA*, 540 F.2d 1023, 1034 (10th Cir. 1976) (citing *Amoco Oil Co. v. EPA*, 501 F.2d 722, 729 n.10 (D.C. Cir. 1974) ("[B]y the time judicial review is secured events may have progressed sufficiently to indicate the truth or falsity of agency predictions. We do not think a court need blind itself to such events.... A contrary rule would convert the reviewing process into an artificial game.")). These events confirm that FERC's reliance on Mountain Valley's proposed mitigation measures to prevent significant sedimentation impacts was arbitrary and capricious.⁸

For example, the U.S. Forest Service's compliance monitoring firm, Transcon Environmental, cited Mountain Valley for causing sediment pollution in

⁸ Evidence of those events is contained in official government documents and newspapers of wide circulation. These constitute "adjudicative facts" that can be "accurately and readily determined from sources whose accuracy cannot reasonably be questioned" and are thus properly the subject of judicial notice in accordance with Federal Rule of Evidence 201. *See Detroit Int'l Bridge Co. v. Gov't of Canada*, 133 F. Supp. 3d 70, 85 (D.D.C. 2015); *Agee v. Muskie*, 629 F.2d 80, 81 n.1, 90 (D.C. Cir. 1980). Judicial notice of such facts is appropriate "at any stage of the proceeding." Fed. R. Evid. 201(d). Courts have specifically taken judicial notice of "developments since the taking of [an] appeal," *Bryant v. Carlson*, 444 F.2d 353, 357-58 (9th Cir. 1971).

Jefferson National Forest and noted that the company's sediment control measures were "failing" and "not functioning properly," resulting in sedimentation impacts as far as 300 feet downstream from a Project stream crossing. Transcon Environmental, Non-Compliance Report (April 17, 2018), Ex. F.

Likewise, the West Virginia Department of Environmental Protection (WVDEP) on April 3, 2018, cited Mountain Valley for violations at the construction sites of two compressor stations, noting that the erosion control measures had failed to contain sediment and sediment-laden water from leaving the work site. WVDEP, Notice of Violation No. W18-52-021-RDD, Ex. G. WVDEP issued another Notice of Violation on May 9, 2018, for an incident where sediment controls at a stream crossing "failed and were breached allowing sediment laden water to enter stream. ... Sediment deposits were observed in stream causing conditions not allowable" under West Virginia's water quality standards. WVDEP, Notice of Violation No. W18-52-001-CP at 1-2, Ex. H. Additionally, separate WVDEP inspections on June 6, 2018, resulted in two Notices for failure of control measures leading to sediment and sediment-laden water leaving the pipeline right-of-way, noting that Mountain Valley's plans were inadequate and that additional mitigation measures were required. WVDEP, Notice of Violation No. W18-17-065-TJC at 2, Ex. I; WVDEP, Notice of Violation No. W18-52-002, Ex. J. Most recently, a July 6, 2018, WVDEP inspection led to yet another notice for failing to

prevent sediment and sediment laden water from leaving the right-of-way.

WVDEP, Notice of Violation No. W18-09-076-TJC, Ex. Y.

The Virginia Department of Environmental Quality (VADEQ) issued a Notice of Violation on July 9, 2018 for widespread sedimentation impacts identified in citizen-complaint driven investigations conducted on May 21, May 23, May 24, May 30, June 6, June 13, June 26, and June 27, 2018. VADEQ, Notice of Violation No. 2018-CO-0001 at 2, Ex. K. Those impacts occurred along the Project route in Craig, Franklin, Giles, Montgomery, Pittsylvania and Roanoke Counties. *Id.* at 1. VADEQ noted that many of Mountain Valley's erosion and sedimentation controls were ineffective and that the company did not repair failing controls within the required timeframe. *Id.* at 3-4, 6-7. In one instance, “[c]ombined impacts to the two stream channels covered a distance of approximately 2,800 linear feet. This unauthorized fill ranged in depth up to eleven inches of sediment, which was released from MVP's construction right of way due to overwhelmed and damaged erosion and sediment controls.” *Id.* at 4. Failing controls at another site led to 6,009 linear feet of impacts with sediment depositions up to seven inches deep. *Id.* at 7. Though Mountain Valley temporarily halted work in Virginia in late June due to these and other persistent erosion and sedimentation problems, it has resumed activity at most locations. *See* Jeff

Sturgeon, *Virginia Regulators Accuse Mountain Valley Pipeline of Erosion Violations*, The Roanoke Times, July 10, 2018.⁹

Mountain Valley itself has identified numerous sedimentation events, including events not cited in the above notices, in its weekly status reports to FERC. *See, e.g.*, Weekly Status Report No. 34 (July 10, 2018), Appendix B (noting at least twenty erosion and sediment control-related failures such as: “Silt fence failure from sediment and water overwhelming the device.”; “Water and sediment overtopped super silt and sock around water resource 12A.”; “Slip into stream SJ60 on AR 14A, Sam’s run. Slip tore out super silt and part of the bridge and plugged up stream forcing water into the road.”; “Debris is restricting flow from stream channel.”; “Erosion controls overtopped by muddy water, and sediment went around [erosion control devices] and off [limit of disturbance].”; “Rock and sediment migrated into the stream for an approximate distance of 2,300 linear feet, beyond the right of way limits.”; “Right of way clean water crossing was impacted with sediment and rock. Material washed outside of the [limit of disturbance] for over 1,500 linear feet.”; “Slope breaker failure led to [erosion control device] failure. Stream S-MM15 was impacted with sediment, approximately 3,175 linear feet beyond the [limit of disturbance].”), Ex. L.

⁹ Available at https://www.roanoke.com/news/local/franklin_county/virginia-regulators-accuse-mountain-valley-pipeline-of-erosion-violations/article_d314b3a2-166b-5a86-8c40-29696127865c.html.

Contrary to FERC's argument in its Rehearing Order, such failures are not simply a result of faulty implementation, but in many cases inadequacy of the chosen measures to handle sedimentation loads in the steep, highly erodible terrain crossed by the Project. Indeed, following a severe event that resulted in the deposition of eight inches of sediment outside the pipeline right-of-way, Mountain Valley asserted that its "controls were installed properly." Laurence Hammack, *Construction Halted at Mountain Valley Pipeline Work Site Following Severe Erosion in Franklin County*, The Roanoke Times, May 20, 2018.¹⁰ The fact that FERC has not taken a single enforcement action or issued a stop work order for violations of its own Plans and Procedures on which it relied further demonstrates that the mitigation measures themselves, not just Mountain Valley's implementation, are inadequate. *See* Rehearing Order ¶¶189-90; *see also* Ex. I at 2 (noting that Mountain Valley's Stormwater Pollution Prevention Plan was inadequate). In the face of such widespread impacts and Commission inaction, FERC cannot seriously maintain that Mountain Valley's mitigation measures are both "sufficient" and "adequately policed." Rehearing Order ¶188. FERC's

¹⁰ Available at https://www.roanoke.com/business/construction-halted-at-mountain-valley-pipeline-work-site-following-severe/article_2eeebd3a-5007-56b0-9469-3e381b09b668.html.

reliance on those measures was thus arbitrary and capricious. *State Farm*, 463 U.S. at 43.

B. FERC Failed to Adequately Assess the Project's Downstream Greenhouse-Gas Impacts

FERC estimates “total GHG emissions from end use” of the gas transported by the Project at 40,000,000 tons of CO_{2-eq} (carbon-dioxide equivalent) per year. EIS at App. AA, CO105-54, 4-620. This is equivalent to the annual emissions of 9.9 coal-fired power plants¹¹—a staggering amount for a single project. Yet the EIS devotes only one paragraph to downstream emissions, and makes no attempt to assess their significance or impact. *Id.* at 4-620. “Quantifying the GHG emissions that result from the Project is not sufficient.” Rehearing Order (Glick, Comm’r, *dissenting*) (“Glick Dissent”) at 7. *See also WildEarth Guardians v. U.S. BLM*, 870 F.3d 1222, 1228, 1237 (10th Cir. 2017); *Ctr. For Biological Diversity v. Nat’l Hwy. Traffic Safety Admin.*, 538 F.3d 1172, 1216 (9th Cir. 2008). FERC’s “refus[al] to consider” these emissions “is inconsistent with [its] statutory obligations” under NEPA and the Natural Gas Act. Glick Dissent at 4.

FERC insists these emissions are “not reasonably foreseeable” and do not “fall within the definition of indirect impacts or cumulative impacts” under NEPA. Rehearing Order ¶¶270, 271. But downstream emissions are an indirect effect of

¹¹ *See* EPA, Greenhouse Gas Equivalencies Calculator, *available at* <https://www.epa.gov/energy/greenhouse-gas-equivalencies-calculator>

FERC's action. *Sierra Club v FERC*, 867 F.3d 1357, 1373-74 (D.C. Cir. 2017). *See also San Juan Citizens Alliance v. U.S. BLM*, No. 16-cv-376-MCA-JHR, 2018 WL 2994406, at *10 (D. N.M. June 14, 2018). Here, FERC approved a gas pipeline “designed to transport about ... 2.0 billion cubic feet per day” for downstream combustion. EIS at ES-2. Uncertainty regarding the “precise use to which every molecule of gas will be devoted” does not allow FERC to “turn[] a blind eye to these emissions.” Glick Dissent at 5. *See also id.* (record indicates combustion of gas transported through the Project is “entirely foreseeable”); *id.* at 7 n.20; Rehearing Order (LaFleur, Comm’r, *dissenting*) (“LaFleur Dissent”) at 3-4 n.10.

FERC is thus incorrect that the downstream emissions estimate “was provided outside the scope of [its] NEPA analysis.” Rehearing Order ¶271, n.740. FERC’s disavowal of this causal connection fatally undermines its decision because the agency does not “consider environmental effects that are outside of [its] NEPA analysis ... in [its] determination of whether a project is in the public convenience and necessity...” *Dominion Transmission, Inc.*, 163 FERC ¶ 61,128, at P 43 (May 18, 2018). *See also* Rehearing Order ¶309, n.831 (disavowing authority to deny a pipeline due to downstream effects).

The truncated analysis FERC did provide is “woefully light on reliable data and reasoned analysis.” *American Rivers v. FERC*, No. 16-1195, 2018 WL 3320870, at* 13 (D.C. Cir., July 6, 2018). The EIS provides a full-burn estimate,

asserts (without support) that coal displacement could “potentially” offset “some” emissions, and concludes:

[downstream] 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. Because we cannot determine the projects’ incremental physical impacts on the environment caused by climate change, we cannot determine whether the projects’ contribution to cumulative impacts on climate change would be significant.

EIS at 4-620. This cursory statement hardly constitutes the required “discussion of the ‘significance’ of this indirect effect, as well as [cumulative impact].” *Sierra Club*, 867 F.3d at 1374 (citation omitted). “An EIS is deficient, and the agency action it undergirds is arbitrary and capricious, if the EIS does not contain ‘sufficient discussion of the relevant issues...’” *Id.* at 1368 (citation omitted).¹² *See also* 40 C.F.R. §§ 1502.16(b), 1508.7, 1508.27; *Ctr. for Biological Diversity*, 538 F.3d at 1217.

In the Certificate Order, FERC claims the Project also might “displace gas that otherwise would be transported via different means, resulting in no change in

¹² FERC contends its Certificate Order put downstream emissions “in context” by comparing them to the national emissions inventory and an inflated regional inventory (comprised of unspecified states equal to approximately half the national inventory). Certificate Order ¶294. FERC does not discuss how the calculated percentages bear on significance or environmental impact—including why a single project with emissions equivalent to 1% of emissions for the *entire country* is not significant.

GHG emissions.” Certificate Order ¶293.¹³ This “lacks support in the record[, which] is enough for [the Court] to conclude that the analysis which rests on this assumption is arbitrary and capricious,”—and, moreover, “the assumption itself is irrational (i.e., contrary to basic supply and demand principles).” *WildEarth Guardians*, 870 F.3d at 1235-36. *See also* *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 549 (8th Cir. 2004); *Mont. Env'tl. Info. Ctr. v. U.S. Office of Surface Mining*, 274 F. Supp. 3d 1074, 1098 (D. Mont. 2017) (rejecting notion that coal mine expansion would merely displace other coal in the marketplace as “illogical”).

Similarly, in the Rehearing Order, FERC asserts (again without support) that the no-action alternative “would not decrease the ultimate consumption of fossil fuel to satisfy demand for electricity or reduce GHG emissions.” Rehearing Order ¶300. *But see* *WildEarth Guardians*, 870 F.3d at 1235-36, 1238 (rejecting “irrational and unsupported” assumption that if agency rejected proposed coal lease, the same amount of coal would be mined elsewhere, such that greenhouse-gas emissions would be the same under the no-action alternative). FERC’s

¹³ FERC makes no effort to obtain information that could help it estimate potential displacement. *See* *Sierra Club*, 867 F.3d at 1375 (where decisionmaker and public are left in the dark as to degree of net change in emissions, the EIS “fails to fulfill its primary purpose”).

“fail[ure] to adequately distinguish between [the preferred and no-action] alternatives defeated NEPA’s purpose.” *Id.* at 1237.

Finally, although FERC “has the tools needed to evaluate the Project[’s] impacts on climate change,” it “simply refuses to use them.” Glick Dissent at 1. FERC acknowledges the Social Cost of Carbon “can be used to estimate incremental physical climate change impacts.” Rehearing Order ¶290. FERC admits it is an “appropriate[.]” tool for federal agencies to use “to inform their decisions” – and that agencies have been rightly “faulted for failing to use it” – but then concocts a false distinction between itself and these other agencies. *Id.* ¶281; *id.* at n.772, 773. *See* Glick Dissent at 7 n.23 (“To transport natural gas in interstate commerce is not less tied to its consumption than to produce it, and the case law reflects this accord.”); LaFleur Dissent at 4-5.

FERC’s refusal is thus not due to any alleged deficiency in the tool, but rather to FERC’s rejection of this Court’s determination that it “is a ‘legally relevant cause’ of the ... indirect environmental effects of pipelines it approves,” including downstream effects. *Sierra Club*, 867 F.3d at 1373 (citation omitted). FERC explicitly rejects this Court’s conclusion that the agency can deny a pipeline because of downstream impacts: “[W]ere we to deny a pipeline certificate on the basis of impacts stemming from the end use of the gas transported, that decision would rest on a finding not ‘that the *pipeline* would be too harmful to the

environment,’ but rather that the *end use* of the gas would be too harmful to the environment.” Rehearing Order ¶309 (quoting *Sierra Club*, 867 F.3d at 1357)). This is “a collateral attack on the Court’s decision” in *Sierra Club v. FERC. Fla. Southeast Connection, LLC*, 162 FERC ¶ 61,233 at *20 (Mar. 14, 2018), *reh’g pending* (Glick, Comm’r, dissenting).

In sum, FERC failed to “engage in ‘informed decision making’ with respect to the greenhouse-gas effects of this project.” *Sierra Club*, 867 F.3d at 1374 (citation omitted). Denying that downstream emissions are an effect of the Project, FERC “turned a blind eye to these emissions” and “failed to sufficiently consider the[ir] impacts.” Glick Dissent at 5; LaFleur Dissent at 4. Because the Project’s downstream effects “are critical to determining whether [it is] in the public interest..., the Commission’s failure to adequately address them is a sufficient basis for vacating this certificate.” Glick Dissent at 2.

II. PETITIONERS WILL SUFFER IRREPARABLE HARM WITHOUT A STAY

“When a procedural violation of NEPA is combined with a showing of environmental or aesthetic injury, courts have not hesitated to find a likelihood of irreparable injury.” *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 24 (D.D.C. 2009) (citing *Fund for Animals v. Norton*, 281 F. Supp. 2d 209, 221 (D.D.C. 2003)). “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.” *Amoco Prod. v. Village of Gambell*, 480 U.S. 531, 545 (1987).

Petitioners’ members are suffering, and will continue to suffer, irreparable environmental harm from the construction and operation of the pipeline.

Petitioners’ members own land, recreate, and live near the path of the pipeline and have interests in aquatic resources that would be harmed by construction.¹⁴ For example, member James Gore owns two parcels of land crossed by the Project, including stream and wetland crossings. *See Gore Decl.* ¶¶6, Ex. M. Pipeline construction threatens those water resources, which support Mr. Gore’s livestock and wildlife that he enjoys viewing. *Id.* at ¶¶6-7, 10. The property of member Stephen Bernard likewise includes a creek crossing, and he is concerned about how sedimentation in the creek will affect the animals that depend on it. *See Bernard Decl.* ¶10, Ex. N. Member Tammy Capaldo owns the property on one side of the Project’s crossing of the Greenbrier River, one of five stream segments designated for protection under West Virginia’s Natural Streams Preservation Act as possessing “outstanding scenic, recreational, geological, fish and wildlife, botanical, historical, archeological or other scientific or cultural values.” Capaldo Decl. ¶¶5-10, Ex. O; W.V. Code §§ 22-13-2, 22-13-5. The pipeline crossing,

¹⁴ Petitioners have attached Declarations from 13 of their members who are threatened with imminent irreparable harm from further construction. *See Exhibits M-X, Z.* These declarations also establish Petitioners’ standing.

including sedimentation impacts, will greatly reduce Ms. Capaldo's enjoyment of her property and may cause her to abandon her lifelong dream of living along the river. Capaldo Decl., ¶19-27, 34. The pipeline route crosses three streams on member Maury Johnson's property that have a hydrologic connection to his drinking water well and support abundant wildlife, just 600 feet from Mr. Johnson's house. Johnson Decl. ¶7-16, Ex. P. In addition to the crossings on his property, the Project would also cross Indian Creek at or near the location where Mr. Johnson was baptized. *Id.* ¶¶22-24. *See also* Eneix-Chong Decl. ¶¶3-8, Ex. Q; Apgar Decl. ¶14-15, Ex. R; Jones Decl. ¶¶11-12, Ex. S; Tobey Decl. ¶¶7-11, Ex. T; Jenkins Decl. ¶4-9, Ex. Z.

In addition to impacts to water resources, pipeline construction has caused and will continue to cause substantial impacts to forest resources. FERC concluded that the MVP will have significant and long-term impacts on forests, affecting 4,435.1 acres of upland forest, including acres 2,500 of valuable contiguous interior forest the clearing of which would result in "conversion of about 17,194 acres of interior forest in West Virginia and 4,579 acres of interior forest in Virginia into edge habitat." EIS at 4-178, 4-191, 5-5. Those impacts would "increase the potential for the introduction and spread of noxious and invasive plant species," and otherwise adversely affect suitability for wildlife. *Id.* at 4-177, 4-181-82.

Many of those impacted forest resources are on property owned or regularly used by Petitioners' members. *See* Gore Decl. ¶¶ 5, 8-11, 13-15; Eneix-Chong Decl. ¶¶ 2-3, 7-11; Jarrell Decl. ¶¶ 6-10, Ex. U; Apgar Decl. ¶¶ 17-18; Bohon Decl. ¶¶ 7-8, 11, Ex. V; Cohen Decl. ¶¶ 6-14, Ex. W; Johnson Decl. ¶¶ 18-21; Jones Decl. ¶¶ 6-10; Tobey Decl. ¶¶ 14-17; Wilson Decl. ¶¶ 6-7, Ex. X. Mountain Valley has already “clear[ed] a swath through the mountains ... destroying th[e] character” of one such area near the Appalachian Trail where member David Jenkins hikes and fishes. Jenkins Decl. ¶5.

III. OTHER PARTIES WILL NOT BE SUBSTANTIALLY HARMED BY A STAY

In contrast to the real and permanent environmental harms discussed above, a stay pending judicial review would pose only minimal or temporary injury to FERC and Mountain Valley. Although FERC has interests in defending its Orders, “the effect of an injunction on these interests seems rather inconsequential.” *Ohio Valley Env'tl. Coal. v. U.S. Army Corps of Eng'rs*, 528 F.Supp.2d 625, 632 (S.D.W.Va. 2007).

For its part, Mountain Valley is likely to argue that delaying its construction schedule will result in economic harm. But such monetary loss is relevant to the balance of harms only when it “threatens the very existence of the movant’s business.” *Wisc. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (citation

omitted). To the extent that such harm to Mountain Valley's economic interests is relevant, it is outweighed by the irreparable harm to the environment caused by pipeline construction. *See, e.g., Ohio Valley Env'tl. Coal.*, 528 F. Supp. 2d at 632.

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. "There is no question that the public has an interest in having Congress' mandates in NEPA carried out accurately and completely." *Brady*, 612 F. Supp. 2d at 26. 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. 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.

Further, the fact that the purported demand for the gas to be carried on the Project was established solely through the existence of contracts with Mountain Valley's own corporate affiliates undermines any claim that the pipeline's capacity is needed to serve the public interest. *See* Certificate Order ¶¶ 41, 45. Commissioner Glick explained in his dissent to FERC's Rehearing Order that "[t]he mere existence of affiliate precedent agreements—which, by their very nature, are not necessarily the product of arms-length negotiations—is insufficient to demonstrate that the

Projects are needed.” Glick Dissent at 1.¹⁵ Indeed, as Commissioner LaFleur noted in her dissent to the Certificate Order, end users have been identified for only thirteen percent of the MVP’s capacity. Certificate Order (LaFleur, Comm’r, *dissenting* at 3-4).

The public interest thus favors a stay to prevent irreparable environmental damage in violation of federal law.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request the Court stay all construction activities authorized by FERC’s Certificate Order and Rehearing Order pending judicial review.

Dated: July 20, 2018

Respectfully submitted,

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¹⁵ *See also id.* at 3-4 (“The developer of a potential pipeline, especially of a pipeline that is not clearly needed, still has a powerful incentive to secure precedent agreements with one of its affiliates. The Commission consistently relies on those agreements, by themselves, to conclude that a proposed pipeline is needed. This incentive to secure precedent agreements in order to make this showing is, at least potentially, sufficient for a pipeline developer’s corporate parent to cause one of its affiliates to enter into a precedent agreement with the developer.”)

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g) and Circuit Rule 32(e), I certify that this motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) and Circuit Rule 27(d)(2)(A) because this motion contains 5,195 words.

I further certify that 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: July 20, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on July 20, 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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