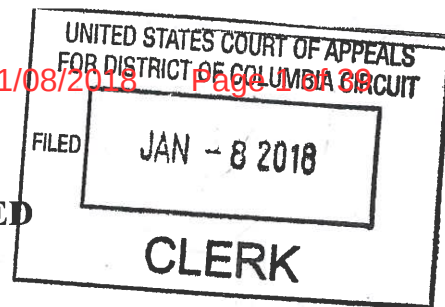


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ORAL ARGUMENT NOT YET SCHEDULED

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

CASE NO. 18-1006

FERC DOCKET NOS. CP16-10-000 & CP16-13-000

IN RE
APPALACHIAN VOICES, CHESAPEAKE
CLIMATE ACTION NETWORK, SIERRA CLUB,
WEST VIRGINIA RIVERS COALITION, AND WILD VIRGINIA,

Petitioners.

On Petition for Extraordinary Writ Pursuant to the All Writs Act to Stay Order of
the Federal Energy Regulatory Commission, 161 FERC ¶ 61,043 (Oct. 13, 2017)

PETITION FOR A WRIT STAYING THE FERC ORDER

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ORIGINAL

INTRODUCTION AND FACTS

Petitioners, Sierra Club, Appalachian Voices, West Virginia Rivers Coalition, Wild Virginia, and Chesapeake Climate Action Network (“Petitioners”), pursuant to the All Writs Act, 16 U.S.C. § 1651, Federal Rule of Appellate Procedure 21(c), and Circuit Rule 21, seek a stay of the October 13, 2017 Federal Energy Regulatory Commission (“FERC”) Order Issuing a Certificate of Convenience and Necessity in *Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043 (2017) Ex. A, (*Order*).¹ Petitioners request that the stay remain in effect until thirty days after FERC rules on the merits of Petitioners’ pending Rehearing Request such that the Order becomes final and reviewable.² Mountain Valley Pipeline, LLC (“Mountain Valley”) has stated that it intends to begin clearing trees for construction by February 2018. *See* Ex. E.

The proposed Mountain Valley Pipeline (“MVP”) is a 303.5-mile gas pipeline stretching from Wetzel County, West Virginia to Pittsylvania County, Virginia that would require a 125-foot wide cleared construction right-of-way for most of its length. The entities that have contracted for gas shipping capacity on

¹ An addendum containing relevant exhibits, including relevant portions of the FERC docket, is attached.

² These Petitioners have filed a Petition for Review of FERC’s Order, docketed as Case No. 17-1271, because they believe FERC’s Order is final. Petitioners request that the Court act on this All Writs Act petition only if it concludes that it lacks jurisdiction over the previously-filed petition.

the MVP are all corporate affiliates of the entities that share ownership of Mountain Valley. *Order* ¶¶ 4 n. 4, 10.

Petitioners, some of whose members reside near, recreate on, or own property that will be taken and degraded by the Mountain Valley Pipeline, seek this stay to preserve this Court's prospective jurisdiction over FERC's Order. Absent a stay, Petitioners' members' property will be taken and their recreational, and environmental interests will be irreparably harmed before the Court can review FERC's Order.³

Review of FERC's Order prior to clearing and construction on condemned private property is critical because FERC has failed to establish any public need for the pipeline to support its grant of eminent domain under the Natural Gas Act. Instead, FERC based its decision entirely on the existence of speculative contracts for pipeline capacity between Mountain Valley and its corporate affiliates, and ignored substantial record evidence showing a lack of market need for the pipeline. In the absence of any meaningful consideration of public demand, FERC lacked substantial evidence to support its conclusion that the project is *required* by the public convenience and *necessity* such that taking private property can be allowed.

³ In filings before the Southern District of West Virginia related to the eminent domain actions, Mountain Valley asserted that it plans to begin clearing trees by February 2018 and be completed by March 31, 2018. Mot. for Partial Summ. J. and Immediate Access to Survey the Easements Condemned 7, Oct. 27, 2017, ECF No. 4, Ex. E.

Petitioners' Rehearing Request thus calls into question the very basis for FERC's decision to approve the pipeline. This is not a case where *ex post facto* environmental review can remedy Petitioners' imminent injuries.

Action under the All Writs Act is required now because of FERC's use of "tolling orders" to prevent judicial review while allowing pipeline construction to proceed. The Natural Gas Act requires parties, before obtaining judicial review of any FERC order, to seek rehearing from the agency. 15 U.S.C. § 717r(a). Upon submission of a rehearing request, FERC "shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing." *Id.* If FERC does not take one of the specified actions on the rehearing request within thirty days, the request is denied by operation of law. *Id.* Congress thus intended that FERC act promptly on rehearing requests and that affected parties be provided meaningful judicial review of FERC orders.

FERC, however, has developed a troubling pattern of preventing parties like Petitioners from appealing FERC's orders until much (if not all) of a pipeline is complete, thereby depriving petitioners of effective means of protecting their property and environmental interests and effectively depriving courts of their jurisdiction to review FERC orders. FERC uses what have become known as "tolling orders" to delay judicial review of its decisions. These orders purport to grant rehearing, but only "for the limited purpose of further consideration." *See*

Order Granting Rehearing for Further Consideration, No. CP16-10, 20171213-3061 (Dec. 13, 2017), Ex. B (“Tolling Order”). Meanwhile, FERC authorizes the pipeline company to proceed with construction. Moreover, the grant of rehearing is an illusion, as requests that question the need for a project or raise environmental or landowner concerns are ultimately denied. *See* Ex. G.⁴ In fact, FERC has used tolling orders in 99 percent of its gas pipeline orders in the last eight years to shield itself from timely judicial scrutiny. *Id.*

FERC issued its Order finding that the MVP serves the public convenience and necessity on October 13, 2017. *Id.* On November 13, 2017, Petitioners timely filed their Request for Rehearing and simultaneously moved for a stay of FERC’s Order pending resolution of their Request. Request for Rehearing and Rescission of Certificates and Motion for Stay, No. CP16-10-000, 20171113-5366 (Nov. 13, 2017), Ex. C (“Rehearing Request”). FERC, following its usual practice, and without ruling on the Motion for Stay, issued a tolling order that indefinitely postponed a ruling on Petitioners’ Request. Tolling Order.

Petitioners respectfully ask the Court to grant a stay to preserve its prospective jurisdiction. Without a stay, Petitioners’ members’ property will be

⁴ Petitioners attach as an appendix to Exhibit G a spreadsheet detailing FERC’s tolling order practice since 2009 in all 75 proceedings where rehearing was requested. In all but one case FERC issued a tolling order, delaying indefinitely its final decision on the merits. In most cases, while the requests were pending, FERC authorized construction of the pipeline.

taken, large swaths of mature trees will be cut, trenches dug, pipeline laid, and streams polluted without the public need for the MVP—and thus the statutory and constitutional validity of FERC’s grant of eminent domain—ever being scrutinized. Because FERC has not adequately supported its finding that taking of private property for the MVP serves the public use in satisfaction of the Natural Gas Act and the Fifth Amendment to the U.S. Constitution, and has failed to adequately analyze the impacts of the project under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq.*, a stay of construction is necessary.

RELIEF REQUESTED

Petitioners ask this Court to issue, as soon as practicable, a stay of the October 13, 2017 Order to last until thirty days after FERC decides the merits of Petitioners’ Rehearing Request.

ISSUE PRESENTED

Whether a stay of FERC’s Order is necessary and appropriate to preserve the Court’s jurisdiction and maintain the *status quo* pending review of the Order where FERC has prevented an appeal by use of a tolling order.

ARGUMENT

I. The All Writs Act Confers Jurisdiction to Issue a Stay of FERC’s Order.

The All Writs Act permits “all courts established by Act of Congress [to] issue all writs necessary or appropriate in aid of their respective jurisdictions and

agreeable to the usages and principles of law.” 28 U.S.C. § 1651(a). The Supreme Court determined that the All Writs Act preserves a “court’s jurisdiction to maintain the *status quo* by injunction pending review of an agency’s action through the prescribed statutory channels.” *Id.* Such power is “merely incidental” to review of the agency’s action. *Id.* A court “may properly exercise jurisdiction to support [its] ultimate power of review, even though it is not immediately and directly involved at [the] time” where a court’s jurisdiction might be defeated by an agency action (or inaction). *United Mine Workers of Am. v. Dep’t of Labor*, 358 F.3d 40, 43 (D.C. Cir. 2004) (agency action) (quoting *Telecomm. Research & Action Ctr.*, 750 F.2d at 76 (agency inaction)).

The Natural Gas Act provides that “[a]ny person . . . aggrieved by an order issued by the Commission ... may apply for a rehearing within thirty days” 15 U.S.C. § 717r(a). The Act then grants FERC thirty days to “act” on the request for a rehearing. *Id.* Congress explicitly listed the ways in which FERC may act on a request. FERC “shall have the power to grant or deny rehearing or abrogate or modify its order” *Id.* If FERC does not act, the request is deemed denied. *Id.* A party seeking judicial review then has sixty days to file a petition in the Court of Appeals. *Id.* § 717r(b).

Instead of granting or denying rehearing requests on the merits within thirty days, FERC routinely issues tolling orders, without setting a date by which it will

make a final determination—and, critically, without staying construction. *See, e.g., Transcon. Gas Pipe Line Co., LLC*, 158 FERC ¶ 61,125 (2017) (Order Granting Rehearings for Further Consideration); *see also* Ex. G. Remarkably, since 2009, FERC has issued a tolling order in 99 percent (74/75) of gas pipeline proceedings where a party requested rehearing. *See* Ex. G. On average, those tolling orders persisted for 194 days. *Id.* During that time, courts were deprived of jurisdiction to review FERC orders—often until after construction was well under way or even complete (i.e., until the court could no longer prevent irreparable harm).

FERC's regular practice is to delay its decision on the merits of a rehearing request until significant portions of a pipeline are complete or even fully operational. By that time, FERC's tolling order has often eliminated a court's ability to review FERC's order before a pipeline is constructed.⁵ That practice

⁵ Two recent cases exemplify the effect of FERC's abuse of tolling orders. For both the Northeast Upgrade Project pipeline and the Sabal Trail pipeline, the Court ultimately found that FERC's certificate orders were granted in violation of the law. *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1320 (D.C. Cir. 2014); *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017). In both cases, however, FERC tolled the rehearing requests for nearly six months, thereby thwarting the Court's jurisdiction. Order Granting Rehearing for Further Consideration, No. CP11-161, 20120709-3002 (Jul. 9, 2012); Order Granting Rehearing for Further Consideration, No. CP14-554, 20160329-3008 (Mar. 29, 2016). While the tolling orders were in place, FERC authorized the pipeline companies to proceed with construction. *Id.* This Court in each case ultimately found that FERC violated NEPA, but by the time the Court issued its decisions, both pipelines were operational. *Compare Tenn. Gas Pipeline Co., L.L.C.*, 142 FERC ¶ 61,025 (2013) (requiring that the Northeast Upgrade pipeline be placed into service by November 1, 2013) *with Del. Riverkeeper Network*, 753 F.3d at 1304 (issuing decision on

“frustrates Congress’ purposes” and intent to subject FERC’s orders to meaningful review in the courts of appeals. *Sheehan v. Purolator Courier Corp.*, 676 F.2d 877, 885 (2d Cir. 1981); 15 U.S.C. § 717r(b); *see also* Letter from Senator Tim Kaine to FERC Chairman (January 5, 2018), *available at* <https://www.scribd.com/document/368500513/Kaine-Calls-For-FERC-Rehearing-On-Mountain-Valley-And-Atlantic-Coast-Pipelines> (questioning the meaningfulness of the rehearing process where FERC allows construction while requests are pending.).

Petitioners have no way of knowing how long FERC will toll the time for rehearing, but in some cases it has waited more than 600 days to grant or deny a request. *See* Ex. G. During that period, Petitioners are at the mercy of FERC while Mountain Valley (lawfully permitted or not) causes irreparable environmental harm, and takes and alters private property. Once the pipeline is built, no remedies ordered by the Court can fully undo the harms inflicted to private property and the environment.

Petitioners’ members and the Court thus face an intolerable predicament. *See* Decls. of Pet’rs’ Members, Ex. D. FERC has attempted to place their Rehearing Request on hold indefinitely. Once private property is taken, mature trees are cut,

June 6, 2014); *and compare* Sabal Trail Transmission, <http://www.sabaltrailtransmission.com> (Phase I facilities brought online on July 3, 2017) *with* *Sierra Club*, 867 F.3d at 1357 (issuing decision on August 22, 2017).

steep slopes denuded, wetlands filled, trenches dug, and a high pressure large-diameter pipeline laid and filled with gas, , the Court can no longer restore the *status quo*. As a result, this Court would be denied the ability to enter “an effective remedial order.” *Dean Foods Company*, 384 U.S. 597, 605 (1966). Given FERC’s pattern of indiscriminate use of tolling orders, the Court’s review of FERC orders is in danger of becoming “idle ceremony.” *Scripps-Howard Radio v. FCC*, 316 U.S. 4, 10 (1942) (“If the administrative agency has committed errors of law for the correction of which the legislature has provided appropriate resort to the courts, such judicial review would be an idle ceremony if the situation were irreparably changed before the correction could be made.”). If the Court concludes that it lacks jurisdiction over Petitioners’ Petition for Review in Case No. 17-1271, then it should exercise its authority under the All Writs Act to protect its jurisdiction (and landowners and the environment) *See Dean Foods*, 384 U.S. at 605 (explaining that the Seventh Circuit had jurisdiction “to issue a preliminary injunction preventing the consummation of [a proposed corporate merger] upon a showing that an effective remedial order, once the merger was implemented, would otherwise be virtually impossible, thus rendering the enforcement of any final decree ... futile.”).

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II. Petitioners Satisfy the Requirements for a Stay.

A stay is warranted if a movant is (1) likely to prevail on the merits; (2) 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). Although the standard provides some flexibility, a movant must “demonstrate that irreparable injury is *likely*” in the absence of injunctive relief. *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 22 (2008) (emphasis in original). “When seeking a [stay], the movant has the burden to show that all four factors, taken together, weigh in favor of the [stay].” *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1292 (D.C. Cir. 2009).

a. Petitioners Demonstrate a High Likelihood of Success on the Merits.

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

Under Section 7(c) of the Natural Gas Act, a proponent of an interstate 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). “Public use” and the more stringent “public convenience and necessity” standard must guide FERC’s consideration of applications to construct new pipelines.

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), which requires that an agency “examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotes and citations omitted). 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.” *Id.*

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 substantial record evidence showing that those contracts are not reliable indicators of public demand and independently demonstrating a lack of market need for the MVP. Because FERC lacked a rational basis for its conclusion that the MVP is required by the public convenience and necessity, the taking of private property for the project violates the Fifth Amendment’s public use requirement.

FERC’s own policies make clear that narrow reliance on capacity contracts between corporate affiliates to support a finding of public need is improper. FERC adopted a policy statement in 1999 to guide its certificate decisions. 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. *Id.* ¶ 61,743. Such contracts are often referred

to as “precedent agreements.” In its Policy Statement, FERC acknowledged that its prior sole reliance on the existence of precedent agreements 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 benefit, one of the indicators of public demand for a proposed project. *Id.* ¶ 61,747. Those include, but are 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.” *Id.* 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.” Order Clarifying Statement of Policy, 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. H.

FERC’s policy explicitly recognizes that reliance on precedent agreements to establish “necessity” is even more problematic when the agreements are between corporate affiliates, i.e., “affiliate agreements.” FERC’s Policy Statement acknowledges that “[u]sing 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.” Policy Statement ¶ 61,744. In other words, the insufficiency of precedent agreements to establish public need is exacerbated when, as in the instant action, the contracts are between affiliated entities and thus are not the result of arms-length negotiations.

In direct contradiction of its Policy Statement and common sense, FERC states in the MVP Order that “absent evidence of anticompetitive or other inappropriate behavior, [FERC] views [precedent] agreements with affiliates like those with any other shipper for purposes of assessing the demand for capacity.” *Order* ¶ 45. FERC’s Policy Statement, however, recognizes that agreements between affiliated companies are, at best, weak indicators of market demand. That

is because precedent agreements between affiliates invite self-dealing to create the appearance of market demand for capacity on a pipeline despite the lack of identified end users for the gas. As FERC's Policy Statement observed, "[a] project that has precedent agreements with multiple new customers may present a greater indication of need than a project with only a precedent agreement with an affiliate." *Id.* ¶ 61,748.

Despite the fact that the stated purpose of its 1999 policy was to reduce FERC's reliance on precedent agreements—especially affiliate agreements—the agency has stubbornly adhered to its old approach. Here, FERC relied on the existence of precedent agreements with Mountain Valley's affiliated shippers to demonstrate market need for the Project. *Order* ¶ 41 ("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."), ¶ 41 n.47 ("[W]e have relied on the existence of precedent agreements to find there is a need for the proposed projects."). Furthermore, FERC failed to consider the affiliate nature of the precedent agreements when relying on them to establish the need for the project. *Id.* ¶ 45 ("[T]he Commission does not look behind precedent agreements to question the individual shippers' business decisions to enter into contracts.").

FERC's Order thus suffers from the very inadequacies identified by the Policy Statement, is contrary to common sense economic principles, and is arbitrary and capricious. FERC impermissibly ignored other record evidence showing a lack of public need.. *Certificate Order* ¶ 41. FERC's failure to consider evidence other than precedent agreements between affiliates to establish "necessity" is the very essence of an arbitrary and capricious administrative action, in that FERC "failed to consider an important aspect of the problem" and "offered an explanation for its decision that runs counter to the evidence before the agency." *State Farm*, 463 U.S. at 43; *see also Pittsburgh Press Co. v. NLRB*, 977 F.2d 652, 655 (D.C. Cir. 1992).

Commissioner LaFleur, compelled by similar concerns as former Commissioner Bay, critiqued FERC's reliance on precedent agreements for the MVP, observing that "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." *Certificate Order* (LaFleur, Comm'r, dissenting); *id.* ("While Mountain Valley has entered into precedent agreements with two end users ... for approximately 13% of the MVP project capacity, the ultimate destination for the remaining gas" is unknown.). Noting that the end use of eighty-seven percent of the gas to be carried on the MVP is unknown, Commissioner LaFleur urged "careful consideration of a fuller record" so that

FERC could “better balance environmental issues ... with the project need and its benefits.” *Id.*

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 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. Such a failure is particularly critical in light of the MVP’s significant adverse impacts to landowners and the environment.⁶

FERC’s narrow reliance on affiliate precedent agreements to support its finding of public convenience and necessity is undermined by overwhelming evidence in the record showing that there is no true market need for the MVP’s additional capacity. The record shows that the demand for natural gas in the regions that 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

⁶ Mountain Valley was forced to sue to acquire property rights relating to more than 480 properties owned by more than 650 individuals, business associations, trusts, and groups of intestate heirs who refused to sell their property to MVP before FERC’s grant of eminent domain. . *Mountain Valley Pipeline, LLC v. An Easement to Construct, Operate and Maintain a 42-Inch Gas Transmission Line*, Civ. No. 2:17-cv-4214, ECF # 1 (S.D.W.Va. Oct. 24, 2017); *Mountain Valley Pipeline, LLC v. Easements to Construct, Operate and Maintain a Natural Gas Pipeline*, Civ. No. 7:17-cv-492-EKD, ECF # 1 (W.D.Va. Oct. 24, 2017).

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, such that there is no near-term constraint on transporting gas to the markets that MVP would serve. *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. K (Hadwin Comments). Despite only a small predicted increase in demand, pipeline takeaway capacity from the region that would supply MVP is expanding rapidly. *Id.* Industry experts project that given the current drilling activity in the Appalachian Basin, 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 “given existing pipeline capacity, existing natural gas storage, the expected reversal of the direction of flow on the existing Transco pipeline,⁷ 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

⁷ Since the release of that study, FERC approved the Transco reversal as part of the Atlantic Sunrise Project. Order Issuing a Certificate of Convenience and Necessity 158 FERC ¶ 61,125 (February 3, 2017).

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. I.

As Commissioner LeFleur recognized in her dissent, 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 need for the remaining capacity is unknown and based purely on speculation that the project shippers will find buyers for their gas.

Given the risk that the project 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.” *Order* (LaFleur, Comm’r, dissenting). She rightly faulted the other members of the Commission for considering only the existence of the precedent agreements, despite the Certificate Policy Statement’s recognition of the importance of other indicators of public need for a project. *Id.* FERC’s failure to consider the substantial evidence showing a lack of any long-term market demand for the MVP’s capacity—which FERC’s Policy Statement specifically identifies as an important factor in its analysis—renders its Order arbitrary and capricious and

violates the Natural Gas Act's mandate that all approved projects be *required* by the public convenience and *necessity*. See *Nat. Res. Def. Council, Inc. v. Rauch*, 244 F. Supp. 3d 66, 97 (D.D.C. 2017) (finding that an agency "failed to consider an important aspect of the problem" 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 on to 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 Con Edison—are utilities that have signed 20-year agreements for service on MVP. The costs of these agreements will be passed through to retail customers.

Wilson et al., *Ratepayer Impacts of ConEd's 20-Year Shipping Agreement on the Mountain Valley Pipeline* (2017), Ex. L. At the same time that these captive customers would cover the cost of the pipeline investment, the affiliated pipeline developers (RGC Midstream LLC and Con Edison Gas Midstream LLC) would enjoy high rates of return in excess of business and financial risk—approximately in the 14 percent range.⁸ “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. J; see also Hadwin Comments 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 ... for other similar utility projects such as power plants and transmission lines.”).

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

⁸ 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 the merits briefing of their challenge to the Order.

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.” Pet’rs’ Mot. for Leave to Answer and Answer 8 (Mar. 24, 2017), No. CP16-10, 20170327-5025 (quoting Testimony of N. Jonathan Peress, Director of Energy Market Policy, Environmental Defense Fund, before the Senate Energy and Natural Resources Committee (June 14, 2016)). 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 and in violation of the Natural Gas Act and the Fifth Amendment guarantee that private property be taken only for public use. *See AT&T Corp. v. F.C.C.*, 236 F.3d 729, 736–37 (D.C. Cir. 2001) (finding decision to be arbitrary and capricious where agency relied on a single factor despite previously explaining that multiple other factors were relevant to such decisions).

ii. FERC’s Environmental Impact Statement Does Not Satisfy NEPA

1. 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 1-9, CP16-10, 20170623-4000, Ex. F (“FEIS”). Instead of critically evaluating the purpose and need, FERC simply 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 point 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. M (“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 the public need for the gas to be carried on the MVP, if any such need in fact exists. EPA Comments, Enclosure-Technical Comments 2.

In particular, FERC should have given greater attention to co-locating the MVP with the ACP Project as Commissioner LeFleur urged. *Certificate 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 “these alternatives demonstrate 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, rather than improperly adopting the applicant’s narrowly stated purpose, it could have found the single corridor alternative satisfied any such need while reducing 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).

2. 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.*

b. 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, 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); *Found. on Econ. Trends v. Heckler*, 756 F.2d 143, 157 (D.C. Cir. 1985). 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, primarily from members whose land will be taken and degraded by Mountain Valley, detailing the harm each declarant would suffer without a stay. *See* Ex. D. Without a stay, it is certain that construction of MVP would result in irreparable harm. MVP would require a 125-foot wide construction right-of-way and a 50-foot permeant right of way. FEIS 2-23–24. In total, 5,119.6 acres of land would be disturbed by construction, ultimately leaving 1,846.1 disturbed acres for the permanent right-of-way. *Id.* 2-21. Construction would require clearing the 125-foot-wide right-of-way of all vegetation (including mature trees) and digging a trench up to nine-feet deep in which to bury the 42-inch pipeline. Where the pipeline crosses streams, the streams would be dewatered (i.e., diverted or dammed) and a two- to four-foot trench dug through the streambed to accommodate the pipeline. Furthermore, MVP has

already begun eminent domain proceedings in federal district courts in the Southern District of West Virginia and Western District of Virginia,⁹ 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).

For example, construction activities and Mountain Valley's use of eminent domain would leave an indelible scar on Sierra Club member James Gore 116-acre forested property. Gore Decl. ¶ 5, Ex. D. Several hundred feet of the pipeline would cut through Mr. Gore's forest, converting core interior forest to edge habitat—which FERC explains “would result in the removal of habitat from interior species,” “impact micro-climate factors ... lead[ing] to a change in species composition,” and “could also introduce ... invasive species.” FEIS 4-181–82; Gore Decl. ¶ 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.” FEIS 4-181–82.

⁹ *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.).

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. 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. D; Eneix-Chong Decl. ¶ 5, Ex. D. Their property would suffer the same fate as Mr. Gore's if 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 the property on the south side of the Greenbrier River at the location that the MVP right-of-way crosses the river. Capaldo Decl. ¶ 4. Ms. Capaldo purchased the property to fulfill her lifelong dream of living on the Greenbrier River because of her personal connection to that river. *Id.* ¶ 5. She 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] ... or along the [Greenbrier] ... 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 an increase in sediment loads of ten percent or greater. *Id.* App. O-3. Clearing the MVP right-of-way would likewise permanently despoil the view of the Greenbrier and surrounding area. Due to the irreparable impacts on the pristine Greenbrier, 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 those members’ property rights and their aesthetic, recreational, and environmental interests in a manner that cannot be reversed in a human lifetime. There is, therefore, no legal remedy for those harms.

c. 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) (finding that temporary delay of one year resulting in economic harm to ski resort developer was not so substantial as to outweigh the irreparable environmental harm faced by plaintiffs).

d. A Stay Pending a FERC Decision on Rehearing 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.

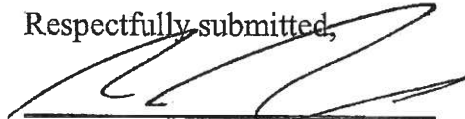
Moreover, the public interest requires that the eminent domain power granted to MVP be exercised for the public benefit. Just as the public has an interest in compliance with NEPA, the public has an interest in FERC's compliance with the execution of the Natural Gas Act by its terms—public convenience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

Accordingly, Petitioners request the Court stay FERC's Certificate Order until thirty days after FERC has ruled on Petitioners' Request for Rehearing.

Dated: January 8, 2017

Respectfully submitted,



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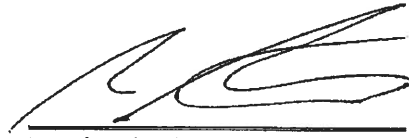
Counsel for Petitioners

CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limit of FRAP 32(c)(2) and the word limit of FRAP 21(d) because, excluding the parts of the document exempted by FRAP 32(f) this document contains 7,797 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, 2018



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

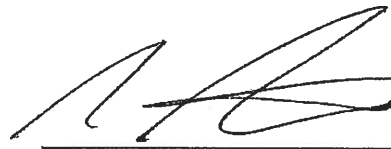
Respondent, Federal Energy Regulatory Commission

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.

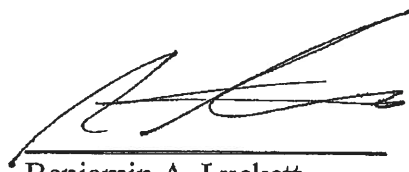
Sierra Club is a nonprofit organization dedicated to the protection and enjoyment of the environment.

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.



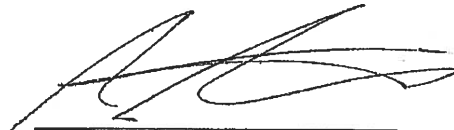
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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on January 8, 2018, a copy of the foregoing Petition for a Writ Pursuant to the All Writs Act and Corporate Disclosure Statement was served by email on the following parties:

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