IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-2159

APPALACHIAN VOICES, ET AL.,
Petitioners,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.,
Respondents,

and

MOUNTAIN VALLEY PIPELINE, LLC,
Intervenor-Respondent.

On Petition for Review from the
United States Department of the Interior
(FERC Docket No. CP16-10-000)

MOUNTAIN VALLEY PIPELINE, LLC'S FINAL RESPONSE BRIEF

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ACP	Atlantic Coast Pipeline
APA	Administrative Procedure Act
BiOp	Biological Opinion
BLM	Bureau of Land Management
CD	Candy darter
ESA	Endangered Species Act
FEIS	Final Environmental Impact Statement
FERC	Federal Energy Regulatory Commission
FWS	Fish and Wildlife Service
NEPA	National Environmental Policy Act
NRCS	National Resources Conservation Service
RLP	Roanoke logperch
SSA	Species Status Assessment
TOYR	Time-of-year restriction
USFS	U.S. Forest Service
USGS	U.S. Geological Survey

INTRODUCTION

In 2018 and 2019, this Court sent a clear message in its decisions addressing evaluation of potential effects to listed species under the Endangered Species Act (ESA). Heeding that message, the U.S. Fish and Wildlife Service (the "Service") and the Federal Energy Regulatory Commission (FERC) conducted a comprehensive re-consultation for the Mountain Valley Pipeline project (the "Project"). After 360 days of careful work and study, the Service produced a 360-page revised Biological Opinion (BiOp) for the Project that thoroughly analyzed the Project's potential effects on listed species and whether those effects would jeopardize them.

Particularly robust was the Service's independent evaluation of the Project's potential effects on Roanoke logperch (RLP) and candy darter (CD). Building on substantial work the Service already had done to evaluate the condition of these species, the Service evaluated baseline conditions and how increased sedimentation from the Project and other non-federal projects could affect those conditions. The Service then directed Mountain Valley to revise its analysis of the Project's potential to increase sedimentation. Mountain Valley did so, and the Service assembled independent experts from five federal agencies to review the updated analysis. Mountain Valley responded to peer-review comments to the satisfaction of both the reviewers and the Service, all

of whom agreed that the end product—the Hydrologic Analysis of Sedimentation (the "Sedimentation Analysis")—constituted the best available analytical tool for evaluating potential sedimentation from the Project. The Service then used the Sedimentation Analysis to evaluate the Project's potential to increase sediment in species streams under extreme conditions, developed conservative thresholds to ensure its analysis captured all effects of the Project, and imposed a comprehensive monitoring system to enforce clear limits on species impacts.

Petitioners almost exclusively challenge aspects of the Service's analysis of Project effects on RLP and CD. But Petitioners do not challenge the core components of that analysis. They do not contend the Service's reliance on modeled assessment of Project-related sedimentation was arbitrary or capricious. Nor do they challenge the Service's overall approach for assessing the effect of Project-related sediment on those species.

Petitioners instead pick at the margins. They attempt to impose extra procedural requirements on the Service's analysis. They cherry-pick lines from the Service's voluminous administrative record, divorce them of context, and urge the Court to reach sweeping conclusions that are contradicted by record evidence. And Petitioners quibble with the way the Service organized its analysis.

Ultimately, Petitioners simply disagree with the conclusions the Service drew based on its comprehensive review of scientific evidence and available data, but that does not make the agency's analysis arbitrary or capricious. *See Am. Whitewater v. Tidwell*, 770 F.3d 1108, 1116 (4th Cir. 2014) ("At bottom, American Whitewater disagrees with the Forest Service's factual conclusions and the balance it chose to strike. But the APA does not give us license to second-guess an agency's well-reasoned decision simply because a party disagrees with the outcome."). An agency is entitled to select the appropriate methodology and draw reasonable conclusions from available scientific evidence. In reviewing such "scientific determination[s]," this Court's review "must . . . be at its most deferential." *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983).

The Court should deny the Petition for Review.

STATEMENT OF THE CASE

I. The current status of the Project

The Court is now well familiar with the Project, a 303-mile natural gas pipeline that will deliver gas to existing pipelines and other customers along the pipeline's route. *See generally Sierra Club v. State Water Control Bd.*, 898 F.3d 383, 386–87 (4th Cir. 2018).

By the end of 2017, Mountain Valley had secured necessary federal and State authorizations for the Project, including a biological opinion and incidental take statement from the Service (the "2017 BiOp"). FERC authorized Mountain Valley to start construction in early 2018, but orders from this Court later that year required Mountain Valley to stop work in many areas. With FERC's approval, Mountain Valley continued construction in areas unaffected by those orders until August 15, 2019, when it voluntarily suspended certain construction work as FERC and the Service prepared to reinitiate consultation under Section 7 of the ESA.

Several categories of new information came to light during 2018 and 2019 that led the Service and FERC to reinitiate consultation. First, the candy darter was listed as an endangered species in late 2018, and the 2017 BiOp had not evaluated the Project's potential effects on that species. Second, several decisions from this Court caused the Service to reevaluate the analytical underpinnings of its previous work. The Court criticized the U.S. Forest Service's (USFS) reliance on Mountain Valley's analysis of the Project's potential sedimentation impacts, on which the Service also relied. *See Sierra Club v. U.S. Forest Serv.*, 897 F.3d 582, 594–96 (4th Cir. 2018). And the Court identified flaws in aspects of the Service's biological opinions for the Atlantic Coast Pipeline (ACP) of relevance to the Project's 2017 BiOp. *See Defs. of*

Wildlife v. U.S. Dep't of Interior, 931 F.3d 339, 361–63 (4th Cir. 2019); *Sierra Club v. U.S. Dep't of Interior*, 899 F.3d 260 (4th Cir. 2018). So the agencies reinitiated consultation on September 11, 2019.

II. Reinitiation of comprehensive ESA Section 7 consultation

For almost a full year FERC and the Service undertook a comprehensive analysis of the Project's potential to affect any listed species within the Project's action area. All told, the Service analyzed the Project's potential to affect 19 species. JA-363. It concluded the Project was likely to adversely affect only five,[1] and Petitioners here only challenge the Service's conclusions with respect to three: Indiana bat, RLP, and CD.

A. Indiana bat

In the 2017 BiOp, the Service concluded that clearing suitable but unoccupied summer habitat would not adversely affect Indiana bats. During the reinitiated consultation, the Service collected and analyzed additional information regarding the Project's potential effects on Indiana bats, and it revisited its original conclusion on the clearing of suitable unoccupied habitat. Negative mist-net surveys, along with the absence of reports of captures, detections, or roost trees, confirmed that Indiana bats were not using these areas "for any purpose." JA-81–82. Because the species is absent from the

[1] Indiana bat, RLP, CD, Virginia spiraea, and northern long-eared bat.

unoccupied habitat areas that Mountain Valley would clear, the Service rationally concluded that no adverse effects to Indiana bats in this area were anticipated, let alone "reasonably certain to occur." JA-12, 82. The Service then considered the potential impact of clearing 1,252.11 acres of unoccupied summer habitat on Indiana bat recovery, even assuming the species might have inhabited these areas at some point in the future. Because these areas comprise only 0.0066% of the potential habitat in Virginia and West Virginia, clearing them would not affect species recovery. JA-159–60.

B. Roanoke logperch and candy darter

The 2017 BiOp evaluated the Project's potential to produce sedimentation in streams in the Project's action area. But that analysis focused mostly on increased sedimentation associated with Project stream crossings. So the Service pushed Mountain Valley to develop analytical tools to more thoroughly understand the Project's potential to increase sedimentation due to runoff from disturbed upland areas. *See* 50 C.F.R. § 402.14(f) ("The responsibility for conducting and funding any studies belongs to the Federal agency and the applicant, not the Service."). Armed with that analysis, the Service independently reviewed the body of relevant scientific literature for numerous freshwater fish species to understand the effect any sedimentation increases would have on RLP and CD.

1. The Service independently evaluated the Sedimentation Analysis and used it to identify the scope of Project-produced sedimentation.

The Project can increase sedimentation in species streams through (1) actual instream work associated with stream crossings and (2) run-off from disturbed upland construction areas.

For the effects of dry open-cut crossings of streams, the Service relied on a well-developed body of scientific literature. Based on that science, the Service concluded that the Project's few open cuts of RLP streams would have only temporary and localized impacts. During construction, increased suspended sediment concentrations from such crossings would dissipate to imperceptible levels within several hundred meters and would return to background levels thereafter. JA-102–03, 113.

Erosion and sedimentation from rain events are also well understood. When it rains, exposed soil can erode. The rivers and streams RLP and CD occupy routinely experience elevated sediment levels during rain events.[2] But the Project's potential to increase that sediment delivery required Project-specific analysis. So at the Service's direction, Mountain Valley developed the Sedimentation Analysis, which used well-accepted next-generation modeling tools and incorporated more refined information about Project siting and

[2] *See* JA-798 (noting delivered sediment loads for streams during baseline (i.e., without the Project) conditions).

erosion and sedimentation control plans to more thoroughly understand the Project's potential sedimentation effects. JA-728–817.

Mountain Valley submitted the first draft of this analysis to the Service in July 2019. The Service then sent it to multiple peer-reviewers, including a Service hydrologist and experts at the U.S. Geological Survey (USGS), the Natural Resources Conservation Service (NRCS), the Bureau of Land Management (BLM), and the USFS. Over the next six months, these experts provided detailed comments on the model. Mountain Valley's consultants coordinated extensively with the reviewers to ensure all comments were fully addressed to the reviewers' satisfaction, making changes to the model where necessary. JA-572–649; JA-717; JA-894; JA-892.

The final Sedimentation Analysis is the product of that independent, multi-agency review. It conservatively calculated potential delivered sediment loads during various stages of construction to 14 streams within the Project area with habitat suitable for one or more threatened or endangered species. The analysis showed that only 1 of the 14 streams would experience a localized increase in sediment delivery of greater than 10% above baseline conditions on an annual basis. And none of the streams where RLP (4.1% max increase) or CD (0.9% max increase) are assumed present would experience a localized increase even half that large. *See* JA-739.

The Service then relied on the Sedimentation Analysis model to evaluate the areal extent of Project-related sedimentation increases under environmental conditions that would be most likely to produce the largest increases in sedimentation. This extremely conservative scenario took the delivered sediment loads calculated in the Sedimentation Analysis, which were increased by using rainfall data from 2018 (the wettest year on record in Virginia (JA-98)), and then scaled those data to estimate the sediment delivery during a 10-year, 24-hour storm event. JA-903. To avoid any underestimation of the potential distribution of sediment, the model assumed that *all* Project areas would be disturbed *simultaneously* and generate construction-related sediment during the modeled storm event, even though the Project is constructed and stabilized in stages and work in each stage is largely sequential. JA-657. The analysis further assumed that all sediment mobilized within the watershed would be delivered *instantaneously*, even though under real-world conditions that sediment would be delivered over the course of the entire 24-hour rain event. *Id.* Using these assumptions, this modeled scenario established a reasonable (if extreme) outer bound for the Project's potential to increase sediment concentration in streams. The Service then relied on that analysis to delineate the aquatic portion of the Project's action area and, as discussed below, the areas where the Project could affect RLP and CD.

Based on its comprehensive review of the literature and the Project-specific sedimentation potential, the Service concluded that any "measurable increases in turbidity will be short-term and episodic from waterway crossings and from storm events that deliver sediment from construction activities in upland areas into waterways." JA-102, 113.

2. The Service carefully assessed the potential for Project-related sedimentation to affect RLP and CD.

Having established the Project's potential to increase sedimentation in streams where RLP and CD are present, the Service carefully reviewed available scientific literature to assess the extent to which increased sedimentation would affect those species. The Service comprehensively cataloged the adverse effects on RLP and CD associated with "[e]xcessive sedimentation," including adverse effects on habitat, increased mortality, and lower reproductive success. JA-97–98, 110–11. The Service explained that the "duration and severity of the effects of increased suspended sediment on individuals and populations depends on factors such as the duration of disturbance, the amount of sediment loading, the length of stream segment directly affected by construction, and whether there were repeated disturbances." JA-97–98, 111.

The Service relied on a 1996 study authored by Newcombe and Jensen to provide a "basis for analyzing" those effects. JA-101–02, 112. That study

develops a "dose-response matrix [that] encompasses all combinations of sediment concentration (1-500,000 mg SS/L) and exposure duration (1-35,000 h)" and identifies "severity-of-effect" values under different models for analyzing impacts to various species. JA-1799–1814. Based on this work, the Service identified four circumstances under which adverse effects[3] to RLP and CD are likely to occur:

> (1) any increase that exceeds 148 mg/L over background;
>
> (2) when sediment concentrations exceed 99 mg/L over background for more than one hour continuously;
>
> (3) when sediment concentrations exceed 40 mg/L over background for more than 3 hours continuously; and
>
> (4) when sediment concentrations exceed 20 mg/L over background for more than 7 hours continuously.

JA-102, 113.

The Service then identified areas where the Project might produce sediment that would exceed these thresholds. For the three dry open-cut crossings of RLP streams,[4] the Service relied on published literature showing that increased sedimentation from crossings like Mountain Valley's dissipates

[3] Sediment concentrations exceeding these thresholds, while sufficient to adversely affect fish, are well below lethal levels. JA-1193 ("Lethal effects can occur if suspended sediment concentrations reach 22,026 mg/l at any one time, or remain at concentrations of 3,000 mg/l for 3 hours (Newcombe and Jensen 1996).").

[4] Mountain Valley does not plan to use open-cut crossings for any CD streams.

within 500 meters of the crossing area and conservatively assumed that RLP would experience adverse effects within 200 meters upstream and 800 meters downstream of the crossing. JA-103.

For sediment produced from upland areas during rain events, the Service used the modeled prediction of sedimentation under extreme conditions. The Service specifically identified any species stream where sedimentation from the Project during those conditions would cause an increase of 20 mg/L *for any period of time*, even though the dose-response thresholds identified by Newcombe and Jensen required at least seven hours of exposure at that level. The Service then included "mixing zones," where modeling projected no increase greater than 20 mg/L in species streams themselves but showed the Project would cause a 20 mg/L or greater increase in an unoccupied tributary to the species stream where the tributary joins the stream. Within these "impact areas"—24.3 km of known or presumed-occupied RLP habitat and 3 km of known or presumed-occupied CD habitat—the Service concluded that RLP and CD would be adversely affected.

To set enforceable take limits, the Service used a habitat surrogate based on the defined impact areas. If "project-related [suspended sediment concentration]/turbidity levels cause an exceedance of any of the [enumerated] thresholds at the downstream limit of any of the impact areas," the take limit

will be exceeded. JA-169, 173. The Service then adopted a comprehensive Monitoring Plan to allow the Service to monitor those limits.

STANDARD OF REVIEW

The Court reviews the Service's action under the familiar arbitrary-and-capricious standard. *Sierra Club*, 899 F.3d at 270. "Review under this standard is highly deferential, with a presumption in favor of finding the agency action valid." *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 192 (4th Cir. 2009). And this Court's review is "*at its most deferential*" when, as here, the agency has made "complex predictions based on special expertise." *N. Carolina Utilities Comm'n v. FERC*, 741 F.3d 439, 448 (4th Cir. 2014) (emphasis added); *see also Am. Whitewater*, 770 F.3d at 1115 ("Our review is particularly deferential when … 'resolution of th[e] dispute involves primarily issues of fact' that implicate 'substantial agency expertise.'" (citation omitted)).

The Court does not "scrutinize the agency's decision-making process to determine for [itself] the proper regulatory course," and instead "review[s] the record to 'understand enough about the problem confronting the agency' to assess its decision fairly." *Sanitary Bd. of City of Charleston v. Wheeler*, 918 F.3d 324, 333 (4th Cir. 2019) (citation omitted). Thus, the Court should uphold an agency's explanation of a decision so long as its "path may reasonably be discerned.'" *Id.* (citing *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S.

644, 658 (2007)). The Administrative Procedure Act "does not give [the Court] license to second-guess an agency's well-reasoned decision simply because a party disagrees with the outcome." *Am. Whitewater*, 770 F.3d at 1116. The "demanding burden" of showing that the agency acted in an arbitrary or capricious fashion falls on the Petitioners. *Almy v. Sebelius*, 679 F.3d 297, 307 (4th Cir. 2012).

SUMMARY OF ARGUMENT

1. The Service must evaluate the Project's effects on species in the context of the effects of past and ongoing activities and account for the effects of future non-federal Projects. Building on substantial work already completed, the Service comprehensively described the aggregate effects of past and on-going activities on RLP and CD. Petitioners complain that this analysis was arbitrary and capricious because the Service did not separately list each individual activity and quantify the effects of each. But the regulations do not require that type of project-specific analysis.

To identify any future non-federal activities that could affect RLP and CD within the Project's action area, the Service reviewed stormwater permit information from State databases. Petitioners complain that this review was flawed, because Mountain Valley compiled that information and allegedly missed activities. But the regulations do not forbid the Service from relying on

information an applicant has compiled, and Petitioners identify no specific future non-federal activity the Service missed.

2. The Service cataloged the ways the Project might affect RLP and CD, used advanced modeling tools to develop a conservative estimate of the Project's potential impacts, and then explained why those impacts were not expected to affect the recovery of the species. Petitioners disagree with the Service's conclusions, but that disagreement does not make the Service's action arbitrary or capricious.

3. To set clear and enforceable limits on take of RLP and CD, the Service used a habitat surrogate, under which the Service identified stream reaches where RLP and CD could be adversely affected by Project-related sedimentation. It then used the best available science to set a series of limits based on combinations of sediment concentrations and exposure durations.

a. The manner by which the Service measures exposure duration differs slightly from the method used by some other field offices for different types of projects affecting different species. Petitioners call this reasoned adaptation arbitrary and say it relaxes limits used previously. But the Service acknowledged the difference and explained its reasons. And the approach actually strengthens protections for *this* Project.

b. The Service makes clear repeatedly that the take limits apply to the sediment increases caused by the Project. Petitioners say this is ambiguous, but it is not. Petitioners also complain that the Service gives Mountain Valley too much latitude to determine whether observed increases are caused by the Project. But the Service only directs Mountain Valley to provide information so that the Service can make that determination. Mountain Valley has no discretion to make that determination itself.

c. In its Monitoring Plan, the Service relied on the peer-reviewed Sedimentation Analysis to identify the locations where the Project may cause take of RLP and CD. The Service fully explained the scientific and analytical bases for the methods it used to identify the scope of areas where Project-related sedimentation could affect RLP and CD. None of these actions was arbitrary or capricious.

4. The Service concluded that RLP do not occupy the Blackwater River drainage based on historic and recent surveys, which were corroborated using innovative "environmental DNA" survey methods. Petitioners disagree with this conclusion, but the Service fully explained it. It was not arbitrary or capricious.

5. The Service has consistently concluded that the Project's clearing of suitable, but unoccupied, summer habitat for Indiana bat will not adversely

affect that species. Based on thorough review of the effects of *this* action, the Service concluded that Indiana bats would not use suitable unoccupied habitat for any purpose. The Service's conclusion was not arbitrary or capricious.

ARGUMENT

I. The Service evaluated the effects of the Project together with the effects of past and ongoing actions and future non-federal actions.

The Service must put the effects of a proposed action in context. The Section 7 regulations direct the Service to consider the Project's effects in light of the effects of past and ongoing actions and account for the effects of non-federal actions likely to occur in the future in the Project's action area. 50 C.F.R. § 402.14(g)(4).

Petitioners say the Service failed to meet this obligation with respect to RLP and CD. Petitioners fault the Service for not listing each and every one of the specific past and ongoing activities that in the aggregate contribute to the environmental baseline and quantifying the effects of each individually, even though no regulation imposes that requirement. They say the Service should not have relied on Mountain Valley's identification of future non-federal activities, but they do not identify a single future activity in the Project's action area the Service overlooked. And Petitioners say the Service failed to account for the effects of climate change, though the Service did just that.

A. The Service comprehensively evaluated the environmental baseline for both RLP and CD.

The "environmental baseline" refers to the pre-action condition of a listed species in the action area. It includes "the past and present *impacts* of all Federal, State, or private actions and other human activities in the action area." 50 C.F.R. § 402.02 (emphasis added). The Service's analysis of the environmental baseline is sufficient if it describes the status of the species and the factors affecting species environment within the action area. *Nw. Envt'l Advocates v. Nat'l Marine Fisheries Serv.*, No. C04-0666RSM, 2005 WL 1427696, *11 (W.D. Wash.). *See also WildEarth Guardians v. U.S. Army Corps of Eng'rs*, 429 F. Supp. 3d 1224, 1265 (D.N.M. 2019) ("The environmental baseline thus accounts for the condition of the species and allows FWS to determine whether the action will cause jeopardy to the listed species and the critical habitat.").

In the BiOp, the Service analyzed the effects of past and ongoing stressors to RLP and CD and the causes of habitat degradation. As to RLP, the Service explained that "RLP decline in the action area is primarily the result of destruction and modification of habitat and fragmentation of the species range. Primary causes of RLP habitat degradation include chemical spills, non-point runoff, channelization, impoundments, impediments, and siltation." JA-72–73. The Service acknowledged that the primary factors

influencing the RLP status are the risks posed by large dams and reservoirs, small dams and barriers to movement, watershed urbanization, increased sediment and deposition from agricultural and silvicultural activities, channelization, roads, toxic spills, riparian/woody debris loss, and water withdrawals. JA-49. It also provided a table that summarizes, on a population basis, the threat levels these various risks pose. JA-47.

For CD, the Service explained that "[t]he primary factor influencing the current status in WV is hybridization with the introduced but closely related variegate darter." JA-53. "Other contributing threats to CD populations include increases in water temperature, excessive sedimentation, habitat fragmentation, changes in water chemistry and water flow, and competition with nonnative species." *Id.*

The Service also described the quality of habitat in the Project's action area. For RLP, the Service identified the areas with suitable habitat for the species. JA-70–72. It explained how past actions have affected habitat in the Roanoke and Pigg Rivers, where RLP are present.[5] And the Service noted the actions that have improved conditions for the species.[6] The Service documented similar effects on CD habitat, noting the aggregate effects of past

[5] *See, e.g.*, JA-72 (noting differences in the Roanoke River and Pigg River microhabitats).

[6] *See, e.g.*, JA-73 (describing instream and bank restoration projects and impediment removal projects).

and ongoing activities on the Upper Gauley[7] and Stony Creek[8] watersheds, which are in the Project's action area.

Petitioners say this analysis is insufficient. Petitioners first fault the Service (at 17) for observing that certain Project stream crossings are not reasonably certain to cause impacts to RLP and CD and thus will not be considered further. *See, e.g.*, JA-70–71. Petitioners do not suggest it is inappropriate for the Service to eliminate from its effects analysis aspects of the Project not expected to adversely affect listed species. Nor do Petitioners seriously contend these crossings are, in fact, reasonably certain to affect RLP.[9] Petitioners instead seem to suggest that the Service ignored the condition of streams at these specific crossings, which occur within the Roanoke and Pigg River watersheds, from its broader assessment of the environmental baseline. But that is just not so. As explained above, the Service thoroughly assessed the

[7] *See, e.g.*, JA-91 (describing water conditions in the Upper Gauley watershed and the presence of known predators).

[8] *See, e.g.*, *id.* (describing water conditions in Stony Creek).

[9] Petitioners observe in a footnote (at 17 n.2) that FERC documented in the Draft EIS the potential risks associated with boring underneath streams. But under section 7 the Service is only required to consider effects that are "reasonably certain to occur." 50 C.F.R. § 402.17(b). Petitioners do not argue that any of the crossings that would be bored are reasonably certain to affect RLP or CD. That would contradict evidence in the record. JA-1896. They have not sufficiently developed this argument as Rule 28 requires. *See Wahi v. Charleston Area Med. Ctr., Inc.*, 562 F.3d 599, 607 (4th Cir. 2009).

effects of past and ongoing actions throughout the Roanoke and Pigg River watersheds.

Petitioners then say that the Service wrongfully failed to analyze "past or present *activities* or their *impacts* on these areas." Pet'rs' Br. at 17. But that, too, is simply not correct. The Service analyzed the current condition of RLP and CD in light of environmental conditions created by past and present activities. *See* supra at 18–20. Petitioners identify no relevant baseline information about the condition of these streams the Service overlooked.

Petitioners argue that the Service should have listed each past and ongoing activity occurring in the action area and separately quantified the effects of each. Pet'rs' Br. at 20 (citing *Defs. of Wildlife v. Babbitt*, 130 F. Supp. 2d 121, 127–28 (D.D.C. 2001)). Petitioners here ask the Court to move the goal posts. The definition of "environmental baseline" directs the Service to evaluate the "condition of the species" and assess "impacts" of human activities in the action area. No regulation requires the Service to separately list and analyze each past or present activity and quantify its specific effect.

The cases Petitioners cite stop well short of imposing any such requirement. In *American Rivers v. FERC*, for example, the court did not fault the agency for any alleged failure to list activities and quantify their individual effects. 895 F.3d 32, 45–46 (D.C. Cir. 2018). It instead faulted the agency for

failing to account for the aggregate effects of historic actions. *Id.* The other cases Petitioners cite are similar.[10] Here, the Service described the condition of the species in light of the impacts of various activities, and it analyzed the impacts of the proposed action in the context of that baseline. The Court should reject Petitioners' invitation to graft extra procedural requirements onto the regulations. *The Lands Council v. McNair*, 537 F.3d 981, 993 (9th Cir. 2008) ("Nor may we impose procedural requirements [not] explicitly enumerated in the pertinent statutes." (internal quotation marks omitted)), *overruled in part on other grounds by Winter v. NRDC*, 555 U.S. 7 (2008)).

B. The Service evaluated the "cumulative effects" of future activities.

"Cumulative effects" on listed species consist of "those effects of *future State* or *private* activities, not involving Federal activities, that are *reasonably certain to occur* within the action area." 50 C.F.R. § 402.02 (emphases added). As with the environmental baseline, the regulations do not require the Service to list each and every specific future non-federal activity and quantify its

[10] *See Defs. of Wildlife*, 130 F. Supp. 2d at 128 ("There must be an analysis of the status of the environmental baseline given the listed *impacts*, not simply a recitation of the activities of the agencies." (emphasis added)); *see also Defs. of Wildlife v. Jewell*, No. 14–CV-1656-MWF, 2014 WL 1364452, *13 (D.D.C.) ("[T]he central holding of *Defenders of Wildlife* has been called into question in a number of later decisions…. The BiOp's analysis of the environmental baseline is thorough and includes the *effects* of past, present, and future development in the action area…. Plaintiff has not shown that the chosen environmental baseline is irrational." (emphasis added)).

effects. They merely require consideration of cumulative effects as a whole along with the effects of the proposed action. 50 C.F.R. § 402.14(g)(3).

The Service satisfied this obligation, analyzing the potential effects of future activities—both ongoing activities that would persist into the future and activities not yet commenced—in the Project's action area.

1. The Service analyzed future effects of ongoing activities.

For ongoing activities that would continue into the future, the BiOp explains in its discussion of cumulative effects that, "[w]hile there are numerous state and private activities currently occurring within the action area, these activities are ongoing and the effects created by those activities are considered in the Status of the Species and Status of Critical Habitat and Environmental Baseline sections of this Opinion." JA-141. And in those sections, the Service not only identified the ongoing stressors on the species, it also relied on species analyses that provided projections of species status based on ongoing and likely future stressors.

For example, in its summary of RLP status the Service discussed a recent Population Viability Analysis, which identified current population sizes. The Service stated whether those populations where numerically and geographically stable or expanding, and predicted extinction risks over the next 100 years based on different scenarios of anthropogenic disturbances that could

result in fish kills, taking into account environmental stochasticity,[11] such as high stream-flow events. JA-48; JA-1612.

And for CD, the Service relied heavily on the 2018 Species Status Assessment (SSA), which similarly analyzed the persistence of ongoing conditions affecting the species.[12] The BiOp later acknowledges that the SSA also "predict[s] future condition scenarios based on negative impacts to habitat, increased hybridization with variegate darters, and a combination of both." JA-151–52. The Service considered these future projections when concluding that the Project was not likely to appreciably reduce the likelihood of CD survival or recovery. JA-151–53.

Petitioners ignore all of this. Their complaint seems to be that this analysis was not included in the "cumulative effects" section of the BiOp. But the regulations impose no such requirement. *See Selkirk Conservation Alliance v. Forsgren*, 336 F.3d 944, 964 (9th Cir. 2003) ("[The Service] may employ any

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[11] "Environmental stochasticity" refers to events such as floods, droughts, and other catastrophes, which are expected to increase with climate change, that may affect the spatial distribution of populations. *See* X. Fauvergue, et al., The biology of small, introduced populations, with special reference to biological control, Evolutionary Applications 426 (June 11, 2012), *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3407862/.

[12] JA-53–54 (citing the SSA to describe the resiliency levels for the extant populations and concluding that the ongoing threats of introgressive hybridization and stream degradation make the recovery potential low for CD in the near term); JA-75 (noting that "CD populations in Stony Creek and the Gauley River were determined to be 'generally secure' in the SSA").

method that adequately considers cumulative impacts. ESA does not impose a requirement that [the Service] list, detail, and discuss each and every forest practices application, so long as [it] employs a device that considers the cumulative impacts of future … activities."); *WildEarth Guardians v. U.S. Army Corps of Eng'rs*, 429 F. Supp. 3d 1224, 1263–65 (D.N.M. 2019) (upholding an environmental baseline in a BiOp that included projections of future sedimentation aggradation impacts in the absence of the proposed action); *Oceana v. Pritzker*, 125 F. Supp. 3d 232, 242 (D.D.C. 2015) (concluding that the resource agency had properly analyzed cumulative impacts by relying on population trends and trajectories set forth in the "Status of the Species" and "Environmental Baseline" sections).

2. The Service reasonably evaluated available information to identify future activities.

For yet-to-commence future activities, the Service analyzed information Mountain Valley collected from publicly available stormwater permit databases for Virginia and West Virginia to assess whether any such activities were reasonably certain to affect any of the species the Service evaluated. *See* JA-906.[13] Activities listed in these databases include any construction project

[13] Mountain Valley incorrectly labeled the table in the Supplement to the Biological Assessment that lists these projects "Energy and transportation projects within two miles of the Mountain Valley Pipeline Project." JA-907.

resulting in land disturbance greater than one acre—exactly the types of activities that might cause increased sedimentation in streams. The Service independently reviewed the activities Mountain Valley identified and concluded that none was reasonably certain to affect species within the action area.[14]

Petitioners fault the Service for relying on information Mountain Valley submitted. Citing the Section 7 Consultation Handbook, Petitioners say (at 27) the Service should have independently identified reasonably foreseeable future projects. The regulations do not forbid the Service from relying on information collected by an applicant, and courts have rejected attempts to use the Consultation Handbook to impose an independent research requirement. *See, e.g.*, *Oceana v. Ross*, CV 15-0555 (PLF), 2020 WL 5995125, *22 n.9 (D.D.C. Oct. 9, 2020) (rejecting argument that the Handbook obligates the agency to undertake "any particular data collection activities"); *Alliance for the Wild Rockies v. Marten*, 455 F. Supp. 3d 956, 962 (D. Mont. 2020) (rejecting

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The table actually included any project with an open stormwater permit, not just energy and transportation projects.

[14] Mountain Valley originally identified 15 activities, JA-906, but later concluded that 12 should be excluded because the permit had expired, the project was complete, or the project had a federal nexus. JA-454. Mountain Valley then identified three more projects added to State databases after its original submission. The Service independently concluded that four of the six projects were complete, one had no anticipated effects, and one lacked information to justify further analysis. JA-141.

arguments that the Handbook imposed additional procedural requirements). The regulations indicate that, when initiating consultation, the action agency (FERC) should provide a "description of the effects of the action and an analysis of any cumulative effects." 50 C.F.R. § 402.14(c)(1)(iv). Mountain Valley, acting as FERC's designated non-federal representative, provided that analysis. The Service satisfied its Section 7 obligations by independently reviewing that analysis and reaching its own conclusions.

More fundamentally, Petitioners do not identify any specific reasonably foreseeable *future* activity that the Service missed.[15] Petitioners suggest (at 24 n.10) that an inquiry like the broader cumulative impacts analysis in the Final Environmental Impact Statement (FEIS) would have revealed such activities. But this compares apples to oranges. ESA "cumulative effects" are limited temporally and geographically, exclude federal activities, and include only those reasonably certain to occur. By contrast, the "cumulative impacts" inquiry under NEPA is not so constrained. *Kleppe v. Sierra Club*, 427 U.S. 390, 413–14 (1976) ("[D]etermination of the extent and effect of [cumulative impacts under NEPA], and particularly identification of the geographic area within which they may occur, is a task assigned to the special competency of

[15] The individual activities in the vicinity of the Project that Petitioners identify (at 26–27) were on-going when the Service issued the BiOp.

the appropriate agencies.").[16] So in the FEIS, FERC evaluated cumulative impacts on wildlife over 3,680,974 acres, many of which are well outside the Project's *action area*, let alone the much narrower areas where the Project will actually affect listed species. JA-1569–81. The ESA does not require an analysis that broad. *See Conservation Cong. v. U.S. Forest Serv.*, 720 F.3d 1048, 1055 (9th Cir. 2013) ("In essence, [plaintiff] demands that Defendants conduct a more extensive, NEPA-like cumulative impacts analysis. But NEPA and ESA call for different regulatory review, and we must defer to the procedural mechanisms established by the implementing agency.").

C. The Service evaluated the effects of climate change on both RLP and CD.

Petitioners suggest that the Service only considered the effects of climate change in one sentence relating to the status of RLP and did not account for climate change as part of its jeopardy analysis for RLP or CD. Petitioners, again, are wrong.

As Petitioners note, the Service acknowledged in the BiOp that climate change constitutes an "increasing threat to RLP" that produces effects that "affect the RLP's abilities to forage, shelter, and reproduce." JA-49. But

[16] *See also, e.g., W. Watersheds Project v. U.S. Dep't of Interior*, 1:15-cv-00047-REB, 2016 U.S. Dist. LEXIS 136472 *64 (D. Idaho) ("[I]dentifying the spatial and temporal scope of the cumulative effects analysis [under NEPA] is a task assigned to the special competency of the agency and is given considerable deference by the courts.").

Petitioners ignore that climate change also figured prominently in the RLP Population Viability Analysis, on which the Service relied as part of its jeopardy analysis.[17] JA-148–49. That analysis predicted extinction risks based on different scenarios of anthropogenic disturbances that could result in fish kills, taking into account environmental stochasticity, which was modeled using some of the highest stream-flow events on record. JA-48; JA-1612. And that analysis specifically concluded that the numerically large and geographically extensive populations in Roanoke and Pigg rivers are at lower risk for environmental stochasticity. JA-1627.

Petitioners similarly ignore the discussion of climate change in the CD SSA. JA-151–53. In the BiOp itself, the Service explained that contributing threats to CD populations range-wide include increases in water temperature. JA-53. But the Service did not need to discuss this particular stressor further, because the SSA concluded that populations in more forested watersheds are at low risk of water temperature increases caused by climate change impacts. JA-1442. The areas where the Project encounters CD populations (Stony Creek (VA) and the Upper Gauley (WV)) are highly forested. JA-90–101. Thus, no further discussion of climate change impacts to CD was warranted.

[17] "[T]here is no requirement that every detail of the agency's decision be stated expressly in [a BiOp]" so long as "[t]he rationale is present in the administrative record underlying the document." *Am. Rivers v. U.S. Army Corps of Eng'rs*, 421 F.3d 618, 634 (8th Cir. 2005).

This substantial assessment of climate change effects distinguishes the Service's analysis here from the analyses addressed in the cases Petitioners cite. In *Oceana v. Ross*, for example, the National Marine Fisheries Service contradicted record evidence when it stated that it was unaware of any anticipated climate-change effects on sea turtles. *See* 2020 WL 5995125, at *22. Likewise, in *Natural Resources Defense Council v. Kempthorne*, the BiOp did not include *any* discussion of climate change despite considerable record evidence that it could adversely affect water supply required for the delta smelt. *See* 506 F. Supp. 2d 322, 370 (N.D. Cal. 2007). Here, the Service considered potential climate change impacts consistent with record evidence.

II. The Service thoroughly assessed the Project's potential to affect recovery of RLP and CD.

The Service comprehensively assessed the potential effects of the Project on RLP and CD, using the best available scientific tools and a series of conservative, species-protective assumptions. *See* supra at 7–13. Based on this analysis, the Service concluded that the action would not jeopardize the continued existence of either species.

Petitioners say this approach was arbitrary, but in fact, Petitioners simply dispute the Service's conclusions. They do not challenge the model on which the Service relied or the Service's use of it to identify the Project's potential to affect RLP and CD. They do not argue that the Service failed to consider

important evidence about the effects of the Project on these species. They instead attack the Service's bottom-line conclusions, which are based on the Service's substantial expertise and are owed maximum deference. *See Baltimore Gas & Elec.*, 462 U.S. at 103.

A. Roanoke logperch

In assessing Project impacts, the Service developed total RLP population estimates, concluded that up to 3,141 RLP may be taken by the Project, and explained that the majority of such take is expected to be nonlethal. JA-49, 147. It also concluded that 24.3 km of known or presumed-occupied habitat would be temporarily impacted, including 14.9% of the known range extent in the Roanoke River and 6.7% of the known range extent in the Pigg River. Significantly, the Service concluded that Project-related sedimentation will not render any of these areas permanently unsuitable.[18] JA-101, 105–06. Acknowledging the resiliency of the Roanoke River and Pigg River

[18] Petitioners discuss (at 30 n.14) sediment releases identified in two past field inspections. The Service specifically requested information about every instance of sediment loss to streams so it could consider their potential effects. JA-681. The Service also extensively evaluated the erosion and sediment control failures and enforcement actions in the BiOp. JA-98–100. Very few violations involved Project sediment reaching streams, and those that did were identified, self-reported, and remediated. Any non-compliance is unacceptable, and Mountain Valley has taken steps to enhance practices to ensure they do not reoccur in the future. JA-690.

populations as projected in the population viability analysis[19] and the temporary and mostly sublethal nature of the impacts, the Service concluded that these individual RLP effects of the Project would not result in a meaningful reduction in the fitness of these populations. JA-148–49.

The Service reached these conclusions even after using a series of assumptions that tend to overestimate the number of RLP likely to be affected. First, the vast majority of the RLP impact area includes areas where "worst case" modeling shows no Project-related increase >20 mg/L of *any* duration, let alone the seven continuous hours of exposure necessary to harm individuals. Second, the Service assumed that RLP would be present across all impact areas in the same proportion, even though it concluded that RLP are unlikely to use some of those areas (Harpen Creek and Bradshaw Creek) on a regular basis. JA-106. And third, most adult RLP are mobile and would likely be able to avoid elevated suspended sediment and turbidity in impact areas and move to other areas. *Id.*

Based on its full analysis of RLP, the Service identified six reasons why the Project would not appreciably reduce the likelihood of RLP recovery:

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[19] This robust population viability analysis concludes that the Roanoke River and Pigg River populations would remain viable even under a severe catastrophic scenario. JA-148. This detailed analysis contradicts Petitioners' assertion that these populations could go extinct with minor habitat degradation. Pet'rs' Br. at 32 (citing a 2010 Service RLP fact sheet).

(1) the small number of affected individuals compared to overall population numbers;

(2) the expected sublethal nature of most effects;

(3) the primarily temporary impacts and the fact that none of the affected habitat is expected to be rendered permanently unsuitable;

(4) the small amount of habitat affected in known or presumed-occupied ranges compared to the amount of available habitat range-wide;[20]

(5) the expectation that RLP will continue to occupy waterways within the impact area during and after the Project; and

(6) the fact that the overall status of the species is improving.[21]

JA-149–50.

Petitioners assail this analysis as "arbitrary," but their complaints boil down to a disagreement about the import of the substantial data and evidence

[20] Petitioners object (at 31 n.16) to the Service's statement that the Project would only impact 0.9% of the suitable habitat available because the Service did not take into account impacts to the unoccupied Blackwater River drainage. But transitory sedimentation increases do not affect RLP in streams where the species is not present. And Project-related sedimentation is not anticipated to render any currently suitable RLP habitat permanently unsuitable. So the Service's focus on impacts to currently occupied habitat compared to overall suitable habitat was appropriate.

[21] Petitioners complain (at 35) that the Service's statement that the Project "will not increase threats listed in the [logperch] recovery plan" is wrong, because the Service identifies increased sedimentation as a threat. The rest of the sentence, which Petitioners omit, shows that the Service was referring to other types of threats: "The MVP will not increase threats listed in the RLP recovery plan (Service 1992b) *such as building dams or other impediments to movement; increase channelization; remove woody debris; or create a long-term water withdrawal project*." JA-149 (emphasis added). The Service is merely noting—accurately—that the Project will not result in these specific threats.

the Service considered. That does not make the Service's conclusions about RLP recovery arbitrary or capricious. *See Am. Whitewater*, 770 F.3d at 1116 ("[T]he APA does not give us license to second-guess an agency's well-reasoned decision simply because a party disagrees with the outcome."); *Nat'l Parks Conservation Ass'n v. U.S. DOI*, 835 F.3d 1377, 1388 (11th Cir. 2016) ("In the final analysis, Appellants' arguments can be reduced to a disagreement regarding the NPS's and FWS's ultimate conclusions."); *Colorado v. U.S. Fish & Wildlife Serv.*, 362 F. Supp. 3d 951, 970 (D. Colo. 2018) ("Plaintiffs' contentions amount to little more than a disagreement with the Service's ultimate conclusion—which constitutes insufficient grounds to reverse."); *Cascadia Wildlands v. Thraikill*, 806 F.3d 1234, 1241 (9th Cir. 2015) ("However, Cascadia's mere disagreement with the result of the biological opinion does not mean that the Service failed to use this scientific data.").

Petitioners strain to identify reasons why the Service's conclusion that impacts to RLP would be temporary is not supported by the record. They seize (at 33) on the Service's appropriate observation that Project effects will be "primarily" temporary and that "in general" habitat will recover after those impacts. The use of these qualifiers merely acknowledges that minor permanent impacts will occur as a result of vegetation removal along the permanent right-of-way. JA-107–08 (describing the permanent habitat loss

from permanent streambank vegetation removal along a 10-foot-wide corridor over the pipeline). And even there, the Service concluded that "[o]nce the ROW is restored and is maintained as a 10-ft opening we expect the RLP will move back to the general area." JA-108; *see also* JA-109 ("However, we do not expect that project-related sedimentation will render any currently suitable RLP habitat permanently unsuitable.").

Petitioners also deploy a litany of cherry-picked statements stripped of context regarding general effects of sedimentation. For example, they note (at 33) the Service's conclusion that some effects of sedimentation "will last up to 4 years." (citing JA-109). But Petitioners ignore that the Service limited this conservative assumption to "aquatic areas that received significant increased sedimentation." JA-111. And they ignore the Service's observation that the single study supporting that assumption "did not provide details on suspended sediment concentrations," and that the overwhelming weight of scientific study that actually provides concentration information "indicated recovery of the benthic invertebrate communities occurred within 6 months to 1 year after pipeline construction." JA-97. None of the record documents quoted by Petitioners contradict this conclusion.[22]

[22] Petitioners say (at 34) the permanent right-of-way is expected to increase sedimentation loading. But in support they rely solely on comments directed at the 2017 BiOp that speculate that long-term sediment loading from

B. Candy darter

The Service concluded that the Project's temporary and minor sedimentation effects are not anticipated to reduce appreciably the suitable habitat available for recovery or recovery potential for CD. As with RLP, the Project's effects on CD are temporary and mostly sublethal. They are only expected to affect small numbers relative to the total CD population and will not render any habitat permanently unsuitable. And CD are expected to continue to occupy waterways within the impact area during and after the Project. JA-154.

As with RLP, the Service's conclusions that effects will be temporary and relatively small are supported by substantial record evidence. Modeling results show that no stream segments within assumed or known CD-occupied streams are predicted to have elevated suspended sediment concentrations >20 mg/L—the lowest concentration for any harm threshold (*see* supra at 11).[23] JA-114. The only impact areas are three 1000-meter "mixing zones," which constitute 0.68% of the occupied habitat in the Upper Gauley River

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the Project "seems certain." (quoting JA-1363). The 2017 BiOp did not include an analysis of upland sedimentation impacts, predated the peer-reviewed sedimentation model, and did not provide the detailed discussion of the temporary nature of sedimentation impacts included in the 2020 BiOp.

[23] Modeling of sediment deposition also showed that any deposition in these CD streams would be trivial—only 0.035 in/yr in the Gauley River and 0.014 in/yr in Stony Creek. JA-904.

metapopulation and 2.30% of the occupied habitat in the Middle New River metapopulation. JA-153.

Petitioners argue that the CD's short life cycle means even temporary effects can impair CD recovery. But the Service considered the CD's life-cycle. JA-50. And unlike the cases on which Petitioners rely, nothing in the record suggests that the Project has even the remote potential to eradicate the species. *See Miccosukee Tribe of Indians of Fla. v. United States*, 566 F.3d 1257, 1270–71 (11th Cir. 2009) ("It is not enough that the habitat will recover in the future if there is a serious risk that when that future arrives the species will be history."); *Pacific Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1094 (9th Cir. 2005) ("[A]ll the water in the world in 2010 and 2011 will not protect the coho, for there will be none to protect."). Indeed, based on the very limited area of CD impacts and the fact that most of the take will be sublethal, that concern is absent here.

Petitioners also claim that the Project will hinder future CD repatriation (i.e., human-assisted reintroduction of the species to previously occupied areas). But the Service concluded otherwise. It noted that Project-related sediment is not expected to render any currently suitable CD habitat permanently unsuitable. JA-116. So any currently unoccupied CD habitat that is temporarily affected by the Project will be available for any future

repatriation efforts that the Service may decide to undertake.[24] Petitioners point (at 39) to statements from a West Virginia state employee regarding the importance of the currently unoccupied Indian Creek. But Mountain Valley specifically acknowledged and responded to those comments by installing enhanced erosion controls in the vicinity of Indian Creek.[25] JA-1898.

III. The incidental take limits for RLP and CD are based on substantial evidence and are not arbitrary or capricious.

A. The Service carefully evaluated scientific literature to select take thresholds appropriate for the Project.

The Service relied on the best available science to conclude that suspended sediment from the Project could adversely affect RLP and CD. As explained above (at 11), the Service specifically determined that the 1996 Newcombe and Jensen study "provided the basis for analyzing sediment effects to [RLP/CD] and their habitat," and the Service used one of that study's models to identify severity-of-effect thresholds based on combinations of sediment concentrations and exposure durations. JA-101–02, 112.

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[24] Potential locations for repatriation efforts are still under consideration. JA-1374.

[25] Petitioners also rely on the statement in the 2018 CD SSA that the Project may "*possibly* degrad[e] the habitat in streams potentially suitable for future CD reintroductions (if this is determined to be a feasible conservation tool)." JA-1441 (emphasis added). But the CD SSA predated the thorough sedimentation modeling effort and Project-specific analyses, which refined the Service's understanding of the Project's effects and support its conclusions that the Project will not affect recovery.

The Service's Washington State field office relied on the same Newcombe and Jensen model to develop guidance for evaluating sedimentation impacts to the bull trout, a western salmonid species. JA-249. But the "bull trout guidance" deviates from Newcombe and Jensen by using "cumulative" exposure for certain concentrations, not the thresholds from continuous exposures Newcombe and Jensen identified. The guidance does not explain the change, and it provides no time period over which those cumulative exposures should be tallied, making it impossible to determine when the threshold has been surpassed. Absent that explanation and information, the Service independently evaluated Newcombe and Jensen and concluded the authors only contemplated continuous exposures. JA-102. The Service thus used continuous exposure durations in setting limits for the Project.

Petitioners say this constitutes an unexplained and thus arbitrary change in position that "weakens" protections for RLP and CD. Pet'rs' Br. at 43 (citing *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016)). Petitioners are wrong. The Service fully explained its reasons for its approach, which provides more protection, not less, than previous applications of the bull trout guidance.

To start, to the extent the Service "changed" its position at all, the Service explained its reasons. It specifically looked to Newcombe and Jensen to provide "the basis for analyzing sediment effects to [RLP/CD] and their habitat" and "the most appropriate available model to use for establishing effects thresholds" for the Project. JA-101–02, 112. It interpreted that study to address continuous exposures, and it acknowledged that this differed from the Washington field office's approach. JA-102.[26] It thus displayed awareness for the difference in approach and provided "good reasons" for it. *Encino Motorcars*, 136 S. Ct. at 2126. Plaintiffs may disagree with the Service's conclusions,[27] but that does not make the Service's action arbitrary or capricious. *See Am. Whitewater*, 770 F.3d at 1116.

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[26] This was hardly a "last-minute change," as Petitioners wrongly contend. In May 2020, the Service requested that Mountain Valley provide information about areas that were expected to have suspended sediment concentrations at 20 mg/L above baseline for "an extended duration (e.g., >7 hours and >5 days)." JA-820. And a July 15, 2020 draft of the BiOp included continuous exposure requirements for 3- and 7-hour standards. JA-540. The fact that the Service included a footnote later in the drafting process to explain that approach does not make the approach itself a "last-minute" decision. The Service displayed both "awareness" that it was departing from the bull trout guidance and provided "good reasons" for that change.

[27] Petitioners argue (at 44) that the Service's interpretation of the term "duration" failed to capture a specialized usage of the term "exposure duration" that would include intermittent exposures. But the extra-record source Petitioners cite does not support their position. *See* EPA, Guidelines for Exposure Assessment (1992), https://www.epa.gov/sites/production/files/2014-11/documents/guidelines_exp_assessment.pdf. EPA developed those

And the Service's adaptation of the Newcombe-and-Jensen-derived framework in the bull trout guidance to the circumstances here is no different from similar adaptations the Service has made when using that framework for other Projects. Indeed, the West Coast biological opinions Petitioners cite show that the field offices have used a variety of approaches for applying the bull trout guidance. For example, the State Route 20 biological opinion identifies a 10-hour workday to track cumulative exceedances and resets its count each day. ECF No. 23-13 at 36. The Index-Galena Road BiOp uses a 10-hour workday in one section and a 12-hour workday in others, resetting after each. ECF No. 30-10 at 75–76. Only the Telegraph Vegetation BiOp does not to set a time limit over which exceedances can cumulate, and that flaw makes measuring an exceedance impracticable. ECF No. 23-11 at 2–42.

Significantly, for each of those projects, instream work during the workday was the predominant cause of increased sedimentation.[28] Here, by contrast, increased sediment occurs when it rains, and weather does not

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guidelines to assess *human* exposures to chemical substances. *See Id.* at 2. Critically, it specifically cautions against using its glossary of terms—citing the definition of exposure as an example—to "replace such basic definitions used in another field of science." *Id.* Petitioners cite no authority suggesting that "exposure duration" is used in this same way in the context of sedimentology and ichthyology. Nor do they suggest that Newcombe and Jensen meant to adopt this specific usage.

[28] *See, e.g.*, Biological Opinion, Index-Galena Road Relocation Project 50 (Feb. 14, 2017), https://ecos.fws.gov/tails/pub/document/11725431.

observe a 10- or 12-hour workday. As explained in the "research underlying the bull trout framework" that Petitioners cite (at 44), sedimentation data should be analyzed "based on site-specific circumstances." JA-979. Where, as here, the construction period is protracted and sediment-producing events are separated by "long periods when sediment loads return to near background levels," it would not be appropriate to add together periods of increased sedimentation and evaluate them as a single event. *Id.*

Finally, Petitioners are wrong to say this approach weakens the Newcombe and Jensen thresholds. In fact, resetting the measurement clock at the end of each work day could miss extended periods of increased sedimentation. For example, if a 7+ hour increase of 20 mg/L begins just before a 12-hour workday ends, the limit would not be exceeded under Petitioners' preferred approach. The Service here did not "relax" or "weaken" the Newcombe-and-Jensen thresholds. They applied them appropriately for the circumstances of this specific project.

B. The Incidental Take Statement sets clear standards for reinitiating consultation.

Petitioners say the BiOp's Incidental Take Statement (ITS) is unlawful, because it sets "vague" take limits and is ambiguous about whether any detected increase in sedimentation must be attributed to the Project. Not so.

The ITS and Monitoring Plan repeatedly make plain that the thresholds for both the RLP and CD are tied to "*project-related* SSC/turbidity levels"—not some combination of sediment from the Project and non-Project sources. JA-169, 173. As explained above (at 12–13), the ITS states that the surrogate-based take limits "will be exceeded if implementation of the procedures set forth in the Monitoring Plan (Appendix F) indicates that project-related SSC/turbidity levels cause an exceedance of any of the [enumerated] thresholds at the downstream limit of any of the impact areas depicted in Appendix D" of the BiOp. JA-169, 173. The ITS also specifies that each threshold is a measure of "project-related SSC/turbidity levels" of "sediment concentration *above background*" for a defined duration. *Id.* (emphasis added). The Monitoring Plan is similarly clear: "To ensure compliance with the amount or extent of sediment-related take identified by [the Service] for those species, the [ITS] requires Mountain Valley to monitor areas of RLP and CD streams to ensure that Project-related sediment concentrations do not cause more take of RLP or CD than USFWS anticipates." JA-329 (also describing procedures to avoid "skew[ing] the monitoring results" by "measuring sediment from non-Project sources").

The Service thus plainly established that the Project, not other sources, must not cause sediment concentration increases sufficient to exceed the limits.

And it provided express, quantitative thresholds for when the take limit has been exceeded. *See Cabinet Res. Grp. v. Forest Serv.*, No. 00-cv-225, 2004 WL 966086, at *7–8 (D. Mont.) (noting "increased density of open roads" above certain square mileage and other surrogate parameters "provided concrete standards by which to measure incidental take" of grizzly bears).

Petitioners also are wrong to say (at 46–47) that the ITS and the Monitoring Plan insufficiently describe "how any increase in sediment will be attributed to MVP or to another source" and give Mountain Valley "too much latitude" to evaluate whether a threshold exceeds the take limits.

Under the Section 7 regulations, the triggers for reinitiating consultation are tied to a determination that the activity caused an exceedance of the take limit. 50 C.F.R. § 402.16(a); 50 C.F.R. § 402.02; JA-168–74. So in every case involving an apparent exceedance, the agencies must determine whether the activity, as opposed to some other actor, caused the exceedance. *See, e.g.*, *City of Santa Clarita v. U.S. Dep't of Interior*, No. 02-cv-00697, 2006 WL 4743970, at *14 (C.D. Cal.), *aff'd*, 249 F. App'x 502 (9th Cir. 2007) (upholding incidental take statement requiring [BLM] to contact the Service, but not suspend operations, when three dead toads are found so that the cause may be determined, as the protections in the BiOp would still be implemented and "there could be other causes for animal mortalities").

Petitioners do not dispute this fundamental feature of the regulatory scheme, but instead complain (at 47–48) that the Service gives Mountain Valley too much discretion to determine whether the Project has caused an exceedance. This is wrong. The Service requires Mountain Valley to compile and present information so that the Service and FERC can make that determination.

Under the Monitoring Plan, which USGS peer-reviewed (JA-437–46) and the Service approved, Mountain Valley must install an array of monitoring stations in areas where Project-related sediment is expected to affect species. Stations are located upstream and downstream of each RLP and CD impact area to measure sediment concentrations to establish the background (*i.e.*, non-Project) sediment concentration of the species stream entering the impact area and the concentration leaving the area. JA-331–34. But because non-Project sources (*e.g.*, active farm fields) between the upstream and downstream stations also can contribute sediment, JA-329, the Service mandated additional monitoring stations in the tributaries to the impact areas at locations where all Project-related sediment in the watershed catchment would be captured. JA-331. The monitoring stations are synchronized to calculate an overly-conservative measurement of the Project's sediment concentration at the

downstream boundary of the impact area, where the sediment concentration take limits apply.[29]

When the stations measure a potential exceedance, Mountain Valley must execute a "Rapid Response Protocol" to collect data and locate and abate any Project-related sediment source. JA-343–45. But as with take limits involving the discovery of dead individuals, *see, e.g.*, *City of Santa Clarita*, 2006 WL 4743970, at *14, other activities could have caused the exceedance. So more investigation is required to ascertain whether the Project actually exceeded the take limit. JA-343.

To that end, the Rapid Response Protocol mandates that "Mountain Valley … respond … by providing immediate notice, identifying the Project- and non-Project cause(s) of the elevated concentration, quickly implementing any measures to reduce Project-related contributions, [and] analyzing all available information to make a preliminary determination of whether Project-related sediment in fact caused" an exceedance. *Id.* Mountain Valley must then compile and submit this information, including documentation and photographic support, to the agencies for their consideration. JA-345.

[29] This is overly conservative because it does not account for non-Project sediment entering the impact area from sources adjacent to the species stream or entering the tributary downstream of the tributary monitoring station. *See* JA-329.

Significantly, Mountain Valley's report is not the final word. The "preliminary determination" Petitioners criticize is merely "a preliminary causation assessment" that the Service and FERC will consider when they "independently determine whether any such exceedance is attributable to the project, and, if so, to request that FERC immediately reinitiate Section 7 consultation." JA-371–72. This approach is completely appropriate. *See City of Santa*, 2006 WL 4743970, at *14.[30]

C. The Monitoring Plan establishes a comprehensive approach to ensure the RLP and CD take limits are not exceeded.

Petitioners say the Monitoring Plan is arbitrary because it does not include monitoring stations where the Project is not expected to cause sediment increases. Petitioners' complaints, based on isolated statements from the record and disregard for the Service's reasoned explanations, do not withstand scrutiny.

Petitioners first ask the Court to find fault with the Service's reliance on a sedimentation model that was peer-reviewed by five federal agencies to determine where incidental take may occur and thus monitoring is required.

[30] Petitioners also claim (at 34. n.17) that the take limit does not account for long-term impacts. This one-sentence throwaway is based on language in a draft of the BiOp that the Service rejected. Petitioners do not explain how this rejected language in a draft disturbs the Service's reasoned conclusion that the ITS accounts for the full extent of anticipated impacts from the Project, and thus have failed to develop the argument as Rule 28 requires. *See Wahi*, 562 F.3d at 607.

Pet'rs' Br. at 48–50 (speculating that there could be impacts to darter "[i]f MVP's modeling is wrong"). But deference to an agency is "at its highest" where a "high level of technical expertise" is required, such as in the use of "scientific models." *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 994 (9th Cir. 2014). Petitioners identify no flaw in the model or information about its use that the Service failed to consider.

Petitioners point to a series of statements acknowledging limits and uncertainties associated with the model, but then ignore the multiple steps the Service took to account for those factors. Indeed, the very documents Petitioners cite show that the model *overpredicts* impacts—making the Service's reliance on it all the more reasonable. JA-657–58 ("If it were possible to dynamically model sediment delivery under real-world conditions, we would expect such a model to show that the number and extent of streams showing any increase in sediment concentration greater than 20 mg/L would be substantially lower."). The Section 7 regulations only require monitoring where take is expected to occur. *See* 50 C.F.R. § 402.14(i)(3) (describing reporting requirements "to monitor the impacts of incidental take"); *id.* § 402.14(i)(1) (referring to monitoring of "take-related impacts"). By asking the Court to require monitoring where take is not expected to occur, Petitioners (again) ask the Court to add procedural requirements the

regulations do not impose. That is not allowed. *See The Lands Council*, 537 F.3d at 993.

Petitioners also wrongly assert (at 34 n.18) that the Service proposed a more stringent aquatic species monitoring plan in an earlier draft of the BiOp. The Service initially would have asked Mountain Valley to propose an aquatic species monitoring plan, as well as an assessment plan for fish and benthic invertebrate communities, for the Service's approval at least three months before resuming construction. JA-535–37. Mountain Valley correctly cautioned that such a requirement would violate the Service's regulations. JA-511–12; *see also* 50 C.F.R. § 402.14(i)(2) (terms and conditions, including monitoring requirements, cannot alter the "duration, or timing of the action and may involve only minor changes"). So Mountain Valley agreed to a third extension of the consultation period so that it could develop a monitoring proposal, present it to FERC and the Service (and USGS) for peer review, and revise it in response to the agencies' comments. *See* JA-369–72; JA-420–22; JA-375.

The differences between the Service's preliminary monitoring concept and the comprehensive Monitoring Plan it ultimately approved are entirely appropriate and fully explained. JA-369–72; *see Butte Envtl. Council v. U.S. Army Corps of Eng'rs*, 620 F.3d 936, 946 (9th Cir. 2010) ("Certainly, the Corps'

initial comments were preliminary and subject to change as understanding of permit issues expanded, the factual record developed, and the mitigation plan [was] created."). This includes the assessment plan for fish and benthic invertebrate communities on which Petitioners focus, which the Service determined was inappropriate because (1) reliable pre-construction baseline data cannot be developed for the fish and benthic invertebrate communities because Project construction began two years ago; (2) the assessment plan could not determine when incidental take limits are exceeded because the Service already concluded the Project will take all RLP and CD in the impact areas; and (3) the scientific understanding of specific benthic invertebrate and fish community metrics is insufficient to directly correlate to fine-scale changes of darter abundances. JA-373. Nothing more is required.

Finally, Petitioners argue (at 50–51) that the Service "arbitrarily assumes that impacts in areas downstream of crossings and mixing zones will not exceed 800 meters." But the Service based this well-reasoned conclusion on the best available science.

For stream crossings, the Service relied on leading studies showing that sedimentation increases from dry open-cut crossings dissipate within a few hundred meters:

> Reid et al. (2008) reviewed 27 past monitoring studies of open-cut pipeline crossings (both wet and dry

> crossing techniques) …. and found that sediment released from the construction sites was generally limited to a short distance downstream. … [B]iological effects to fish and benthic invertebrates were limited to several hundred meters downstream of the crossings and were temporary (<1 year)…. Reid et al. (2002a) studied the effects of a pipeline water crossing… [and] reported habitat conditions >500 m downstream of the crossing were unaffected.

JA-103. The Service appropriately relied on these studies instead of the single "anecdotal experience" Petitioners tout.[31] *See Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 538 n.3, 547–48 (11th Cir. 1996) (finding "anecdotal evidence" of sightings of listed species "not persuasive," as "such information is generally unsupported by verifiable documentation").

The Service's decision to use these same parameters to delineate mixing zones was hardly arbitrary. Remember, these zones are areas where the model predicts the Project will cause no increase of *any* duration of even 20 mg/L. They are included only to account for the possibility that some portion of Project-affected tributary water will cause momentary increases before being diluted. JA-39–40.[32] Contrary to Petitioners' assertion, the Service fully

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[31] Petitioners misconstrue even that anecdote. They suggest it refers to sediment dispersal distances at pipeline crossings, but the scientist actually was referring to the "overall potential contribution" from the Project "to catchment-wide sediment-loading." JA-1347, 1351–52.

[32] Petitioners' assertion (at 51) that several tributaries to CD streams were omitted from further consideration because the crossing of the tributary is more than 800 meters away from an extant CD stream section is based on

explained its rationale for including these areas to ensure it accounted for all Project-related sedimentation effects on RLP and CD.

IV. Substantial record evidence supports the Service's conclusion that RLP do not occupy the Blackwater River drainage.

The Service determined that RLP do not occupy the Blackwater River drainage. Contrary to Petitioners' claims, substantial evidence supports that conclusion.

In the BiOp, the Service noted its conclusion that RLP do not occupy the Blackwater River drainage and explained its reasons. "To date, survey efforts have not documented RLP in the Blackwater River drainage … ." JA-69. The Supplement to the Biological Assessment explained:

> Although the Blackwater River and select tributaries contain suitable [RLP] habitat, a known population does not exist in the Blackwater River drainage (M. Pinder personal communication [March 11, 2016], P. Angermeier personal communication [May 29, 2019], (USFWS 2017a). Survey efforts from 1983 to 2018 throughout the drainage have failed to detect any [RLP] individuals.

JA-1878. The results of eDNA sampling, both specific to and independent of the Project, supplemented these historic surveys and further supported the

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outdated analysis from 2018 that focused only on stream crossings. JA-1326, 1343. The BiOp's robust "worst case" model replaced that approach, was not limited to impacts from instream work, and did not eliminate any tributaries based on an 800-meter distance. Indeed, the Service actually included a mixing zone for one of the tributaries (Little Laurel Creek) Petitioners say was eliminated. *Compare* JA-1611 *with* JA-114, 312.

conclusion that RLP are not currently present in the Blackwater River drainage. JA-1880. According to Dr. Angermeier, the Blackwater River is "presumed-unoccupied" for RLP with an estimated density of 0 fish/km. JA-1382–83 (the 2019 eDNA report).

This substantial evidence amply supports the Service's conclusion that RLP are not present in the Blackwater River drainage. *See League of Wilderness Defenders/Blue Mountain Biodiversity Project v. Connaughton*, 752 F.3d 755, 764 (9th Cir. 2014) (upholding the Service's determination, based on 15-year-old snorkel surveys, that bull trout were not present in Eagle Creek). Petitioners' disagreement with that conclusion does not make it arbitrary or capricious. *See Am. Whitewater*, 770 F.3d at 1116.

Petitioners' complaint about the Service's reference to Mountain Valley's compliance with time-of-year restrictions (TOYRs) in the Blackwater River drainage is thus beside the point. Because the species is not present, TOYRs are not necessary to avoid impacts. JA-504 ("TOYRs are being implemented as a backstop conservation measure to ensure against the potential for unexpected impacts to [RLP] … .").

V. The Service rationally concluded that clearing suitable unoccupied summer habitat would not adversely affect Indiana bats.

Petitioners say the Service improperly reversed course in its evaluation of the effect of clearing suitable unoccupied summer habitat. Specifically,

Petitioners note that, in its original biological opinion for the ACP project, the Service concluded that clearing unoccupied habitat could have indirect effects on Indiana bats. Pet'rs' Br. at 55 (citing *Defs. of Wildlife*, 931 F.3d at 361–63). But unlike the ACP project, the Service always has concluded that clearing suitable unoccupied habitat for this Project will not adversely affect Indiana bats.

Beginning with the Project's 2017 BiOp, the Service concluded that clearing suitable—but unoccupied—habitat for Indiana bats will not adversely affect the species. JA-1501–05; JA-133. It never has wavered from that sound conclusion. Mountain Valley performed extensive mist-net surveys over two years and across more than 220 miles of suitable Indiana bat summer habitat. JA-82. Not one Indiana bat was captured, indicating that the species is not using these sites "for any purpose."[33] JA-81–82. This conclusion—which Petitioners do not question—remains valid, as no new captures, detections, or roost trees have been reported in the Project action area, and the philopatric nature of Indiana bats means "there is no basis for assuming that Ibats moved into the previously-surveyed areas since the surveys were conducted or are likely to [do so] in the foreseeable future." JA-82.

[33] Petitioners say (at 56 n.24) that these surveys expired, but that is incorrect. JA-82 (explaining why results remained valid).

Because Indiana bats are not expected to roost, forage, or travel within unoccupied summer habitat in the Project area, the Service properly determined that potential stressors like habitat loss and fragmentation of unoccupied habitat would no more affect Indiana bats than they would affect countless other species not using the area. JA-81–82. The Service cannot find incidental take when it has "no evidence" that a species "exists anywhere in the area." *Ariz. Cattle Growers' Ass'n v. U.S. Fish and Wildlife Service*, 273 F.3d 1229, 1244–45 (9th Cir. 2001) (invalidating ITS where the species did not occupy the project area, as the Service may not "regulate any parcel of land that is merely capable of supporting a protected species").

Petitioners skirt this consistent and cogent analysis by pointing to the Service's evaluation of potential effects to Indiana bats from the unrelated ACP project. At the threshold, the Service's conclusion about the effect of ACP clearing suitable habitat was simply wrong. That biological opinion found indirect impacts based on energy expenditure by pregnant females that would be required to seek out alternative travel corridors as a result of the habitat clearing. JA-1511. But the fact that the habitat is unoccupied means it is not being used by any Indiana bats, including as a travel corridor by pregnant females. *Cascadia Wildlands v. Thrailkill*, 49 F. Supp. 3d 774, 786 (D. Or. 2014) (upholding the Service's explanation that, "to determine if habitat removal

likely to be caused by a proposed Federal action is also likely to significantly disrupt the breeding, feeding, or sheltering behavior of the spotted owl to the extent that it actually injures or kills affected spotted owls (i.e., 'take' spotted owls), there must be a reasonable certainty that the spotted owl occupies the affected habitat area"), *aff'd* 806 F.3d 1234 (9th Cir. 2015). The Service is not obligated to repeat the errors it made on separate projects.

Furthermore, as some Petitioners themselves have acknowledged, the proposed ACP project differs from this Project in key respects. JA-1044.

First, "the amount of acreage cleared makes a difference." JA-1045. "ACP was 'the first project that propose[d] to remove such a large amount of trees.'" *Id.* (quoting 2017 Service email). Even disregarding the Service's conclusion that Indiana bats will not use the unoccupied habitat in the Project area "for any purpose," the Project's footprint in unoccupied suitable habitat is 62% smaller than ACP's. *See Defs. of Wildlife*, 931 F.3d at 360.

Second, acoustic surveys for ACP demonstrated Indiana bats occupied that habitat, and agency guidance precluded the use of subsequent mist-net surveys to negate those positive identifications. JA-1045–46; *Defs. of Wildlife*, 931 F.3d at 360, 362. In contrast, the Project's surveys in suitable summer habitat have never detected Indiana bats, there is no evidence of bat presence,

and the Service's conclusion for the Project directly aligns with its agency guidance regarding negative surveys and unoccupied habitat. JA-82.

Third, unlike ACP, the Service never found that the Project's relatively minor clearing in unoccupied summer habitat may affect the Indiana bat. JA-82.

Petitioners next speculate (at 57) that bats from other regions might have relocated to now-vacant habitat in the Project area in the future due to climate change. But they overlook the complete absence of support for asserting that any Indiana bats that might relocate at some unknown future time would choose the specific Project area over the millions of other available unoccupied habitat within the Appalachian Mountain Recovery Unit. And they ignore altogether that the Service considers the entire question of the potential negative effects of climate change "largely unanswered" and concludes that "[f]urther monitoring and research is needed to better understand the impacts of climate change on Indiana bats and their habitat." JA-1056. This falls well short of the "reasonably certain to occur" standard that governs section 7 impacts analysis. 50 C.F.R. 402.17(b); *Ariz. Cattle Growers*, 273 F.3d at 1246–47 (potential for species translocation to project area is insufficient to find incidental take). Regardless, the Service already considered potential future implications from clearing this habitat if Indiana bat populations unexpectedly

flourish, found that the Project affects just 0.0066% of the total potential habitat available in Virginia and West Virginia, and concluded that any new populations are not expected to "fill in previously unoccupied suitable habitat." JA-75, 159–60.

CONCLUSION

For the reasons above, the Court should deny the Petition for Review.

This 19th day of March 2021.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this filing complies with the type-face requirements of Fed. R. App. P. 32(a)(5) and the type-volume limitations of Fed. R. App. P. 28(b). This Response Brief contains 12,958 words, excluding the parts of the filing excluded by Fed. R. App. P. 27(d)(2) and 32(f).

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CERTIFICATE OF SERVICE

I hereby certify that on March 19, 2021, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System which will automatically send e-mail notification of such filing to all counsel of record.

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