

ORAL ARGUMENT NOT SCHEDULED

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

No. 20-1427

SIERRA CLUB, APPALACHIAN VOICES,
BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE,
CHESAPEAKE CLIMATE ACTION NETWORK, CENTER FOR
BIOLOGICAL DIVERSITY, and HAW RIVER ASSEMBLY,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

On Petition for Review of Order of the Federal Energy Regulatory
Commission, 171 FERC ¶ 61,232 (June 18, 2020)

**PETITIONERS' CORRECTED PAGE-PROOF
RULE 30(c) OPENING BRIEF**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

In accordance with D.C. Cir. Rule 28(a)(1), Petitioners submit this certificate of parties, rulings, and related cases.

A. Parties and Amici

Petitioners: Appalachian Voices; Blue Ridge Environmental Defense League; Center for Biological Diversity; Chesapeake Climate Action Network; Haw River Assembly; Sierra Club

Respondent: Federal Energy Regulatory Commission

Petitioner-Intervenors: Monacan Indian Nation; Sappony Tribe

Respondent-Intervenors: Mountain Valley Pipeline, LLC; Public Service Company of North Carolina;

Amici Curiae: No parties have moved for leave to participate as amici curiae.

Rule 26.1 Disclosure Statement

Appalachian Voices, Blue Ridge Environmental Defense League, Center for Biological Diversity, Chesapeake Climate Action Network, Haw River Assembly, and Sierra Club are non-profit organizations who have no parent companies, and there are no companies that have a 10 percent or greater ownership interest in them.

Appalachian Voices works in partnership with local people and communities

to defend the natural heritage and economic future of the Appalachian region.

Blue Ridge Environmental Defense League is a regional, community-based environmental organization founded to serve the principles of earth stewardship, environmental democracy, social justice, and community empowerment.

Center for Biological Diversity is a national conservation organization with over 1.6 million members and online activists dedicated to the protection of endangered species, a safe climate, wild places, and a healthy environment.

Chesapeake Climate Action Network 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.

Haw River Assembly is a citizens' group founded in 1982 to restore and protect the Haw River and Jordan Lake, and to build a watershed community that shares this vision.

Sierra Club is a nonprofit organization with over 840,000 members that is dedicated to exploring, enjoying, and protecting the wild places of the earth; to practicing and promoting the responsible use of the earth's ecosystems and resources; to educating and encouraging humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives.

B. Rulings Under Review

The following orders issued by Respondent Federal Energy Regulatory Commission pertaining to Mountain Valley Pipeline, LLC's Southgate Project are under review:

1. Order Issuing Certificate, *Mountain Valley Pipeline, LLC*, 171 FERC ¶ 61,232 (June 18, 2020) ("Certificate Order") [JA-_____];
2. Notice of Denial of Rehearings by Operation of Law and Providing for Further Consideration, *Mountain Valley Pipeline*, 172 FERC ¶ 62,100 (August 20, 2020) ("Notice of Denial") [JA-_____];
3. Order Addressing Arguments Raised on Rehearing and Stay, *Mountain Valley Pipeline*, 172 FERC ¶ 61,261 (September 17, 2020) ("Rehearing Order") [JA-_____].

C. Related Cases

This case has not previously been before this Court or any other court. At this time, undersigned counsel are not aware of any cases related to this case within the meaning of D.C. Circuit Rule 28(a)(1)(C).

Mountain Valley Pipeline, LLC petitioned for review of the North Carolina Department of Environmental Quality's denial of a Clean Water Act Section 401, 33 U.S.C. § 1341, Water Quality Certification for the Mountain Valley Pipeline Southgate Project in the U.S. Court of Appeals for the Fourth Circuit. Petitioners

Appalachian Voices, Center for Biological Diversity, Haw River Assembly, and Sierra Club intervened on behalf of the Respondent in that case. On March 11, 2021, the Fourth Circuit issued an opinion finding that the North Carolina Department of Environmental Quality acted within its authority under Clean Water Act Section 401 and North Carolina water quality standards when it denied certification of the Southgate Project, but remanded to the agency for further explanation of certain aspects of its decision. ECF No. 57, *Mountain Valley Pipeline, LLC v. North Carolina Department of Environmental Quality*, No. 20-1971 (4th Cir. March 11, 2021). However, that Petition involved different claims against a different respondent such that Petitioners do not believe it to be a related case within the meaning of D.C. Circuit Rule 28(a)(1)(C).

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GLOSSARY

Add.	Addendum to this brief
Certificate Order	<i>Mountain Valley Pipeline, LLC</i> , 171 FERC ¶ 61,232 (June 18, 2020)
Dodds Report	Pamela C. Dodds, Ph.D, Licensed Professional Geologist, Hydrogeological Assessment of the Mountain Valley Pipeline Southgate Project Construction Impacts in Virginia and North Carolina (Sept. 9, 2019)
EIS	Environmental Impact Statement
EPA	U.S. Environmental Protection Agency
FERC	Federal Energy Regulatory Commission
JA	Joint Appendix
Mainline	Mountain Valley Pipeline Mainline, authorized by <i>Mountain Valley Pipeline, LLC</i> , 161 FERC ¶ 61,043 (October 13, 2017)
Mountain Valley	Mountain Valley Pipeline, LLC
NEPA	National Environmental Policy Act
the Project	Mountain Valley Pipeline Southgate Project
Rehearing Order	<i>Mountain Valley Pipeline</i> , 172 FERC ¶ 61,261 (September 17, 2020)
Rehearing Request	Petitioners' Request for Rehearing of Order Issuing Certificate for Mountain Valley Pipeline, LLC's Southgate Project (July 20, 2020)

JURISDICTIONAL STATEMENT

Petitioners seek review of three Federal Energy Regulatory Commission (“FERC”) orders issued under Sections 7(c) and 19(a) of the Natural Gas Act, 15 U.S.C. §§ 717f(c), 717r(a), authorizing Mountain Valley Pipeline, LLC (“Mountain Valley”) to construct and operate the Mountain Valley Pipeline Southgate Project (“the Project”). The Natural Gas Act, 15 U.S.C. § 717r(b), vests original jurisdiction over review of such orders in this Court.

On June 18, 2020, FERC issued a certificate of public convenience and necessity for the Project, which is an extension of the previously authorized Mountain Valley Pipeline Mainline (“Mainline”). *Mountain Valley Pipeline, LLC*, 171 FERC ¶ 61,232 (June 18, 2020) (“Certificate Order”) [JA-____]. Within 30 days, Petitioners timely filed a request for rehearing with FERC. [JA____-____]. On August 20, 2020, FERC issued a Notice of Denial of Rehearings by Operation of Law and Providing for Further Consideration, in response to this Court’s direction in *Allegheny Defense Project v. FERC*, 964 F.3d 1 (D.C. Cir. 2020) (en banc) (holding that, under 15 U.S.C. § 717r(a), rehearing requests may be deemed denied if FERC does not act on the merits within 30 days). *Mountain Valley Pipeline*, 172 FERC ¶ 62,100 (Aug. 20, 2020) [JA-____].

On September 17, 2020, FERC issued an order addressing the merits of arguments raised on rehearing. *Mountain Valley Pipeline*, 172 FERC ¶ 61,261

(September 17, 2020) [JA-____]. Within 60 days of both the Notice of Denial of Rehearings by Operation of Law and the Rehearing Order, Petitioners timely filed a petition for review with the Court, in compliance with 15 U.S.C. § 717r(b).

STATUTES AND REGULATIONS

Pertinent statutes and regulations appear in the Addendum to this brief.

STATEMENT OF ISSUES

1. Whether FERC's authorization of the Project was arbitrary and capricious and violated the Natural Gas Act because, in granting Mountain Valley's requested rate of return on equity of 14 percent, FERC failed to independently assess the specific market conditions and risks faced by Mountain Valley and treated Mountain Valley as a new market entrant, despite its ownership of the Mainline.
2. Whether FERC's authorization of the Project was arbitrary and capricious and violated the National Environmental Policy Act because FERC relied on mitigation measures that have proven inadequate in practice to dismiss as insignificant the Project's impacts to aquatic resources.
3. Whether FERC's authorization of the Project was arbitrary and capricious and violated the National Environmental Policy Act because FERC failed to rationally consider the Project's cumulative impacts to aquatic resources in combination with the Mainline.

STATEMENT OF THE CASE

FERC's Certificate Order authorizes Mountain Valley Pipeline, LLC ("Mountain Valley") to construct the Southgate Project, which includes over 75 miles of 16- and 24-inch diameter pipeline with the capacity to carry 375,000 dekatherms per day of gas from the terminus of Mountain Valley's Mainline at Transcontinental Gas Pipe Line, LLC's ("Transco") Compressor Station 165 in Pittsylvania County, Virginia, to connections with Dominion Energy North Carolina's local distribution system in Rockingham and Alamance counties, North Carolina. Certificate Order, ¶11 [JA-_____].

The Southgate Project is an extension of Mountain Valley's Mainline system, designed to carry a portion of the Mainline's gas into North Carolina markets. *Id.*, ¶57 [JA-_____]. On October 13, 2017, FERC issued a certificate of public convenience and necessity for the Mainline, authorizing Mountain Valley to construct more than 300 miles of 42-inch diameter pipeline, carrying two million dekatherms per day of gas from Wetzel County, West Virginia to the same interconnect at Transco's Compressor Station 165 that is the starting point of the Southgate Project. *Id.*, ¶3 [JA-_____].

Since the beginning, the Mainline has been beset with permitting problems. After receiving initial authorization from FERC to begin construction in early 2018, Mountain Valley had several of its mandatory federal authorizations vacated

by the U.S. Court of Appeals for the Fourth Circuit. *See Sierra Club v. U.S. Forest Serv.*, 897 F.3d 582 (4th Cir. 2018) (vacating the permit for the pipeline to cross 3.6 miles of the Jefferson National Forest in West Virginia and Virginia); *Sierra Club v. U.S. Army Corps of Eng'rs*, 905 F.3d 285 (4th Cir. 2018) (vacating Clean Water Act Section 404 stream and wetland crossing authorizations under the U.S. Army Corps of Engineers' Nationwide Permit 12); ECF No. 41, *Wild Virginia v. U.S. Dep't of the Interior*, Case No. 19-1866 (4th Cir. Oct. 11, 2019) (staying Endangered Species Act Biological Opinion and Incidental Take Statement while FERC reinitiated Section 7 Consultation with the U.S. Fish and Wildlife Service); *see also* Certificate Order, ¶¶4-7 [JA-____-____]. At the time FERC issued the Certificate Order for the Southgate Project, construction on the Mainline was halted due to Mountain Valley's lack of those mandatory authorizations. Certificate Order, ¶8 [JA-____]. FERC's Certificate Order for the Southgate Project made commencement of construction on the Project contingent on Mountain Valley regaining those authorizations and resuming construction on the Mainline. *Id.*, ¶9 [JA-____].

The Mainline has also been plagued by widespread failure of environmental protections, particularly its erosion and sediment control measures designed to prevent sediment from the pipeline right-of-way from reaching aquatic resources. Mountain Valley has been subject to repeated enforcement actions in both West

Virginia and Virginia as a result of its erosion and sediment control failures. For example, the West Virginia Department of Environmental Protection has issued numerous notices of violations for Mountain Valley's failures that have led to sediment deposits in streams that violated West Virginia's water quality standards. *See* Pet'rs' Request for Rehearing of Order Issuing Certificate for Mountain Valley Pipeline, LLC's Southgate Project ("Rehearing Request") at 39 [JA-_____].

Failures in Virginia have been even more pronounced. The Virginia Department of Environmental Quality issued a comprehensive Notice of Violation on July 9, 2018 for widespread sedimentation impacts identified in citizen complaint-driven investigations conducted on May 21, May 23, May 24, May 30, June 6, June 13, June 26, and June 27, 2018. *See* Rehearing Request at 40 [JA-_____] (citing Virginia Department of Environmental Quality, Notice of Violation No. 2018-CO-0001). Those impacts occurred along the project route in Craig, Franklin, Giles, Montgomery, Pittsylvania and Roanoke counties. *Id.* The Department noted that many of Mountain Valley's erosion and sedimentation controls were ineffective and that the company did not repair failing controls within the required timeframe. *Id.* In one instance, "[c]ombined impacts to the two stream channels covered a distance of approximately 2,800 linear feet. This unauthorized fill ranged in depth up to eleven inches of sediment, which was released from [Mountain Valley]'s construction right-of-way due to overwhelmed

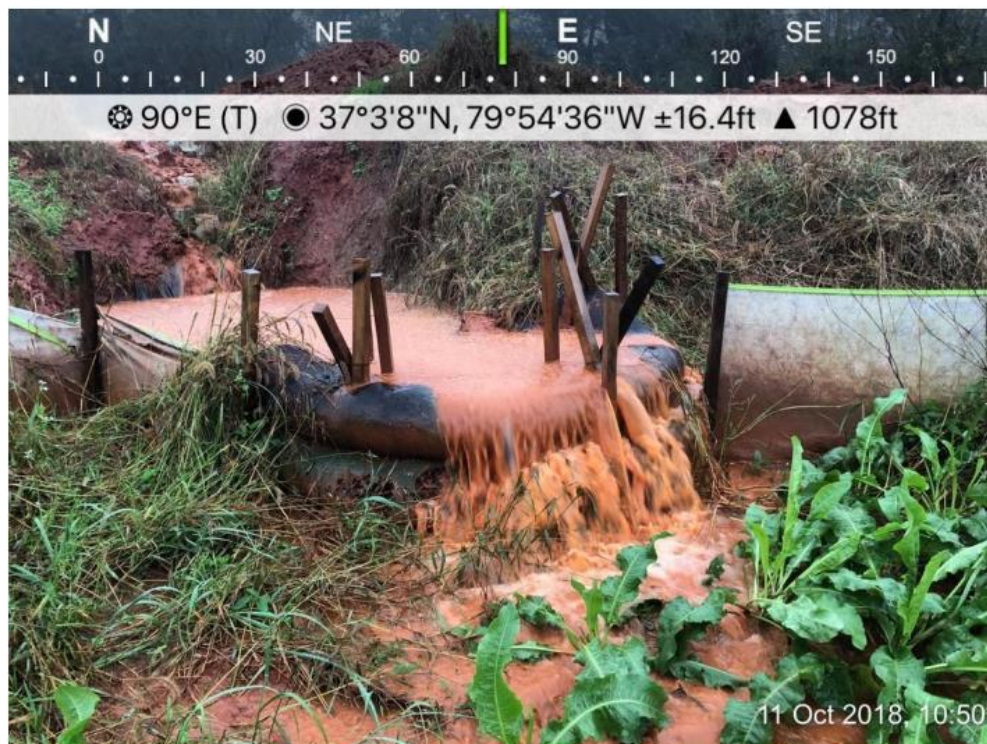
and damaged erosion and sediment controls.” *Id.* Failing controls at another site led to 6,009 linear feet of impacts with sediment depositions up to seven inches deep. *Id.*¹

Community members along the Mainline route have documented numerous additional erosion and sediment control failures leading to significant impacts to receiving waters. *See* Protect Our Water, Heritage, Rights (POWHR) Comments on Draft Environmental Impact Statement (“EIS”) for the Southgate Project [JA-____]. Photographs from those citizen reports show extreme levels of sediment-laden water overwhelming Mountain Valley’s erosion control devices and entering adjacent waterbodies:

¹ The states’ enforcement actions have not stopped Mountain Valley from continuing to harm aquatic resources by failing to control sedimentation from the Mainline right-of-way. *See* Rehearing Request at 40 [JA-____] (citing Mountain Valley’s September 16, 2020 weekly status report for the Mainline, which identified numerous slips and erosion and sediment control failures, many of which led to sedimentation of waterbodies); Mike Tony, *Mountain Valley Pipeline faces \$303,000 state fine for continued erosion, but pipeline opponents call for bigger penalty*, *The Charleston Gazette*, Feb. 5, 2021, *available at* https://www.wvgazettemail.com/news/energy_and_environment/mountain-valley-pipeline-faces-303-000-state-fine-for-continued-erosion-but-pipeline-opponents-call/article_d7e1d317-834d-5a22-9747-41ece2de8e36.html.



Id. at 94 [JA-____].



Outlet structure failure. Angle property, October 11, 2018

Id. at 45 [JA-____].



Figure 5. Sediment laden runoff flowing across Bradshaw Road into Bradshaw Creek.

Id. at 5 [JA-____].



Figure 6. Confluence of Bradshaw Creek and North Fork Roanoke River. Sediment laden water from Bradshaw Creek shown at left of photo.

Id.

The failures described above were not simply a result of faulty implementation, but in many cases inadequacy of the chosen mitigation measures. Indeed, following a severe event that resulted in the deposition of eight inches of sediment outside the pipeline right-of-way, Mountain Valley asserted that its “controls were installed properly.” Rehearing Request at 40 [JA-____] (citing Laurence Hammack, “Construction Halted at Mountain Valley Pipeline Work Site Following Severe Erosion in Franklin County,” *The Roanoke Times*, May 20, 2018). The fact that FERC has not taken a single enforcement action or issued a stop work order for violations of its own Plans and Procedures on which it relied further demonstrates that the mitigation measures themselves, not just Mountain Valley’s implementation, are inadequate. *Id.*

Numerous parties, including Petitioners, highlighted the extreme adverse aquatic impacts along the Mainline in their comments on FERC’s draft Environmental Impact Statement (“EIS”) for the Southgate Project. *See, e.g.*, [JA-____, ____, ____, ____, ____]. Those parties expressed skepticism of FERC’s conclusion in the draft EIS that the Southgate Project’s aquatic impacts would be temporary and localized, and that Mountain Valley’s compliance with FERC’s Plan and Procedures and the Project-specific Erosion and Sediment Control Plan would minimize impacts to the level of insignificance. *See* Draft EIS at 4-45 [JA-____].

On February 14, 2020, FERC issued its final EIS. [JA-____]. In the EIS, FERC continued to maintain that the Project's aquatic impacts would not be significant in light of Mountain Valley's implementation of erosion and sediment control measures. EIS at 4-51 [JA-____]. FERC also concluded that the cumulative aquatic impacts of the Southgate Project together with other reasonably foreseeable impacts, including those of the Mainline, would not be significant. EIS at 4-243 [JA-____]. FERC found that, in regard to the Mainline, cumulative impacts would not be significant because of "the geographic and temporal separation" of the projects' impacts. *Id.*

On June 18, 2020, FERC issued the Certificate Order for the Southgate Project. [JA-____]. FERC adopted the findings in the final EIS that the environmental impacts of the Project, including impacts to aquatic resources, will be insignificant. Certificate Order, ¶¶76, 144 [JA-____, ____].

As part of its Natural Gas Act rate determination in the Certificate Order, FERC approved Mountain Valley's request for a return on equity of 14 percent. Certificate Order, ¶57 [JA-____]. In approving the requested rate, FERC did not conduct an analysis of market conditions or any other factors specific to the Southgate Project. Rather, FERC claimed, without support, that Mountain Valley "faces a capital funding outlook similar to other companies constructing new pipeline systems" and thus granted the same rate that it has recently granted to new

market entrants. *Id.* Even though the Southgate Project is an extension of the Mainline, FERC departed from its general ratemaking policy for incremental expansion projects, which requires pipeline companies to use the return on equity “approved in its last [Natural Gas Act] section 4 rate proceeding, or, if the pipeline has not filed a rate case, the [return on equity] from the last litigated [Natural Gas Act] section 4 rate case.” *Id.*, Comm’r Glick, dissenting, ¶22 [JA-_____].

On July 20, 2020, Petitioners sought rehearing of FERC’s Certificate Order. [JA-_____]. On August 20, 2020, FERC issued a Notice of Denial of Rehearings by Operation of Law and Providing for Further Consideration, in response to this Court’s direction in *Allegheny Defense Project*, 964 F.3d at 1 (holding that, under 15 U.S.C. § 717r(a), rehearing requests may be deemed denied if FERC does not act on the merits within 30 days). [JA-_____]. On September 17, 2020, FERC issued an order addressing the merits of arguments raised on rehearing. [JA-_____]. And on October 19, 2020, Petitioners sought timely review of FERC’s Orders in this Court.

SUMMARY OF ARGUMENT

In carrying out its duties under the Natural Gas Act and National Environmental Policy Act with respect to its grant of a certificate of public convenience and necessity for the Southgate Project, FERC refused to grapple with the specific facts and circumstances surrounding this particular pipeline project.

Instead of undertaking the requisite meaningful analysis, FERC adopted conclusory findings based on unsupported citations to past practices. This failure renders its EIS and Certificate Order arbitrary, capricious, and contrary to law for lack of substantial evidence.

Under the Natural Gas Act, FERC was required to find that the Project serves the public interest. Part of that determination is a finding that the rates charged by Mountain Valley are just and reasonable, such that consumers will be protected, pipeline investors do not receive an excessive return on their investment, and excessive capital will not be attracted to construct unnecessary pipelines, leading to overbuilding of the nation's pipeline network. In determining the return on equity component of the rates that Mountain Valley is permitted to charge, FERC did not look to any specific evidence regarding the market conditions and risks faced by the Southgate Project. Instead, FERC concluded, without support, that Mountain Valley was similarly situated to other pipeline companies to which FERC has granted the high return on equity of 14 percent. FERC failed to adequately support its choice to treat Mountain Valley as a new market entrant constructing a greenfield pipeline, despite the Southgate Project being an extension of the Mainline, for which Mountain Valley has secured binding, long-term service contracts for the pipeline's entire capacity.

Under the National Environmental Policy Act (“NEPA”), FERC erred by relying on unsupported assumptions and incomplete information that precluded it from taking the required “hard look” at the Project’s substantial impacts to aquatic resources. FERC relied on Mountain Valley’s implementation of certain erosion and sediment control measures to find that the Project’s direct impacts to streams and wetlands would not be significant, despite overwhelming evidence that those measures have repeatedly proven ineffective to prevent severe adverse aquatic impacts, most notably on the Mainline. FERC also wrongly dismissed evidence that the aquatic impacts of the Southgate Project and the Mainline are likely to overlap in both space and time when concluding that the projects’ cumulative impacts would not be significant.

STANDING

Petitioners are non-profit organizations with members who live, work, and recreate in areas that will be affected by the construction and operation of the Project. *See* Standing Decls., ADD55-ADD79. The pipeline would bisect one member’s homeplace that has been in her family since the 1920s, felling trees and threatening her small lake. Whitehead Decl., ¶¶7-10. Other members use and enjoy waterways that would be adversely impacted by the Project and enjoy viewing wildlife that would be threatened by pipeline construction. Sutton Decl., ¶¶13, 20; Cavalier Decl., ¶7; Whitehead Decl., ¶6. Members also hike in areas that would be

adversely affected by the visual impacts of tree clearing in the pipeline right-of-way and enjoy viewing wildlife that would be harmed by that clearing. Harer Decl., ¶¶7, 8.

This Court can address the harm caused to Petitioners' members by vacating the Certificate Order and remanding to FERC. *See Horsehead Res. Dev. Co. v. Browner*, 16 F.3d 1246, 1259 (D.C. Cir. 1994). Petitioners have standing to sue on their members' behalf, *Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002), and have standing under the Natural Gas Act. *See* 15 U.S.C. § 717r(b).

ARGUMENT

I. Standard of Review

FERC's orders are reviewed under the Administrative Procedure Act's ("APA") arbitrary and capricious standard. *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1308 (D.C. Cir. 2015). Findings of fact, such as FERC's determination of the proper return on equity, must be "supported by substantial evidence," 15 U.S.C. § 717r(b), that "a reasonable mind might accept as adequate to support a conclusion." *Colo. Interstate Gas Co. v. FERC*, 599 F.3d 698, 704 (D.C. Cir. 2010). Moreover, "[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). "Subsumed in the substantial evidence requirement is the expectation that agencies will treat fully 'each of the

pertinent factors’ and issues before them.” *Tenneco Gas v. FERC*, 969 F.2d 1187, 1214 (D.C. Cir. 1992) (quoting *Public Serv. Comm’n of New York v. FPC*, 511 F.2d 338, 345 (D.C. Cir. 1975)). Where FERC has neglected to consider pertinent facts in the record or “refus[ed] to come to grips” with evidence in the record, its order “must crumble for want of substantial evidence.” *Id.*

FERC’s compliance with NEPA is also subject to review under the APA’s arbitrary and capricious standard. *Sierra Club v. FERC*, 867 F.3d 1357, 1367-68 (D.C. Cir. 2017). Judicial review of agency actions under NEPA is available “to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious.” *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1312-13 (D.C. Cir. 2014) (citing *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 97-98 (1983)). Although the standard of review is deferential, “[s]imple, conclusory statements of ‘no impact’ are not enough to fulfill an agency’s duty under NEPA.” *Found. on Econ. Trends v. Heckler*, 756 F.2d 143, 154 (D.C. Cir. 1985). The agency must comply with “principles of reasoned decisionmaking, NEPA’s policy of public scrutiny, and [the Council on Environmental Quality’s] own regulations.” *Id.* (citations omitted).

And under the applicable arbitrary and capricious standard of review,

the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made. In reviewing that explanation, [the reviewing court] must consider whether the decision was based on a

consideration of the relevant factors and whether there has been a clear error of judgment. Normally, an agency rule would be arbitrary and capricious if the agency has 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. The reviewing court should not attempt itself to make up for such deficiencies: [the court] may not supply a reasoned basis for the agency's action that the agency itself has not given.

Del. Riverkeeper, 753 F.3d at 1313 (citing *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983)) (internal quotation marks and citations omitted).

II. FERC Failed to Adequately Support Its Approval of Mountain Valley's Requested 14 Percent Return on Equity

As part of its duty under the Natural Gas Act to protect the public interest, FERC has a responsibility to ensure that rates charged by pipeline companies are “just and reasonable.” 15 U.S.C. § 717c(a); *Atl. Ref. Co. v. Pub. Serv. Comm'n of N.Y.*, 360 U.S. 378, 388 (1959). This Court has explained that the Act “aim[s] to protect consumers from exorbitant prices and unfair business practices. This purpose can be seen in the statutory requirement that rates be just, reasonable, and nondiscriminatory.” *Pub. Sys. v. FERC*, 606 F.2d 973, 979 n.27 (D.C. Cir. 1979). *See also Great Lakes Gas Transmission Ltd. P'ship v. FERC*, 984 F.2d 426, 431-32 (D.C. Cir. 1993) (“The [Natural Gas Act]'s certification provisions form the ‘heart of the Act’ and are the means by which [FERC] effectuates the purposes of

the Act, ‘to underwrite just and reasonable rates to the consumers of natural gas and to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges.’”) (quoting *Atl. Ref. Co.*, 360 U.S. at 388).

In order to carry out that duty, FERC traditionally based rates on the cost of providing the gas transportation service, *i.e.*, cost-of-service ratemaking. *See Alternatives to Traditional Cost of Service Ratemaking for Natural Gas Pipelines, Request for Comments*, 70 FERC ¶ 61,139 at p. 61,393 (1995). Cost-of-service ratemaking establishes the “recourse rates,” which are the default rates that a pipeline may charge. More recently, FERC has authorized pipeline companies to charge “negotiated rates,” as long as the cost-of-service recourse rates remain available to its customers. *See Alternatives to Traditional Cost of Service Ratemaking for Natural Gas Pipelines*, 74 FERC ¶ 61,076 at p. 61,224-25, *reh’g denied*, 75 FERC ¶ 61,024 (1996), *petitions for review denied sub nom. Burlington Resources Oil & Gas Co. v. FERC*, 172 F.3d 918 (D.C. Cir. 1998) (“Alternative Rates Policy Statement”). FERC relies on the availability of recourse rates to prevent pipeline companies from exercising market power in rate negotiations by assuring that customers can revert to the recourse rates if the pipeline company unilaterally demands excessive prices or withholds service. *Alternative Rates Policy Statement* at ¶ 61,241.

One important component to cost-of-service recourse rates is the return on equity necessary to attract sufficient capital to construct a proposed project. *See* Rehearing Order, ¶17 (“[T]he Commission can establish a recourse rate commensurate with the risk associated with the project and one mechanism for accomplishing this is setting an appropriate [return on equity].”).

As the United States Supreme Court has recognized, setting just and reasonable rates requires consideration of current market conditions for a particular project. *See Bluefield Waterworks & Improvement Co. v. Pub. Serv. Comm’n of W. Va.*, 262 U.S. 679, 692-93 (1923) (holding that a return “may be reasonable at one time and become too high or too low by changes affecting opportunities for investment, the money market and business conditions generally”); *Fed. Power Comm’n v. Hope Nat. Gas Co.*, 320 U.S. 591, 603 (1944) (“[T]he return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks.”).

Here, FERC made no specific inquiry into the market conditions and risks that would determine the return on equity component of its recourse rates. Mountain Valley employed a 14 percent return on equity when calculating its recourse rates. The company did not provide any empirical support for its proposed 14 percent return on equity, nor did it demonstrate that the proposed return reflects current market conditions and investor expectations. Rather, Mountain Valley

claimed only that FERC approved a 14 percent return on equity for the Mainline and that the return is “consistent with [FERC’s] policy for new greenfield pipelines.” Application at 17 [JA-____]. FERC granted the requested return on equity without any analysis of the specific market conditions relevant to determining the return on equity necessary to attract sufficient capital for the Southgate Project, other than to simply assert, without any evidentiary support, that Mountain Valley “faces a capital funding outlook similar to other companies constructing new pipeline systems.” Certificate Order, ¶57 [JA-____]. *See also* Rehearing Order, ¶17 [JA-____] (“Here the Commission approved the Southgate Project to include a 14% [return on equity] because we find 14% to be a reasonable [return on equity] for a company undertaking construction of a greenfield pipeline and . . . we find that with respect to the Southgate Project, Mountain Valley faces the same level of risks.”).

FERC’s decision to grant Mountain Valley the same inflated 14 percent return on equity for its Southgate Project that it granted for the Mainline was not justified. FERC’s reliance on its previous return on equity decisions without any substantive analysis of market risk for *this* Project was arbitrary and capricious, and fails to satisfy the substantial evidenced standard. Further, FERC’s treatment of Mountain Valley as a new market entrant in the context of the Southgate Project, despite it being an extension of the previously approved Mainline,

Certificate Order, ¶91 [JA-____], was arbitrary and capricious. In sum, FERC’s grant of the inflated 14 percent return on equity was “unwarranted and gratuitous and will ultimately come at the expense of end-users, such as the residential, commercial, and industrial customers this project is meant to serve.” Certificate Order, Comm’r Glick, dissenting, ¶22 [JA-____].

a. FERC’s grant of Mountain Valley’s requested 14 percent return on equity, without considering market conditions or risks specific to the Southgate Project, is arbitrary and capricious and violates the Natural Gas Act

Return on equity has a substantial impact on the recourse rates that FERC allows a pipeline company to charge its customers and, consequently, the incentive to build a new pipeline instead of utilizing existing infrastructure. In reviewing proposed rates, FERC has an obligation to ensure that pipeline investors do not receive an excessive return. *See Sierra Club*, 867 F.3d at 1377 (“The returns must be proportionate to the business and financial risk the investors take on: more risk, more reward.”). Given the potential for high rates of return to skew incentives towards building new, unnecessary pipelines, and the need for just and reasonable rates to protect consumers, it was incumbent on FERC to closely scrutinize Mountain Valley’s requested return on equity. Instead, FERC relied entirely on conclusory statements and references to previously approved projects, without meaningfully assessing the appropriate return on equity according to the specific

circumstances of this project. Certificate Order, ¶57 [JA-____]. *See also* Rehearing Order, ¶17 [JA-____].

FERC's high return on equity for greenfield pipelines incentivizes overbuilding by offering returns in excess of what can be gained through other market investments. The return that FERC provides for new pipeline construction is much higher than the returns available in comparable industries or elsewhere in the marketplace. *See, e.g.*, Rehearing Request at 14 [JA-____]. In addition to harming ratepayers, the abnormally high returns on equity authorized by FERC, in the absence of any coordinated planning process for pipeline infrastructure, attract more capital to pipeline building than is needed to serve market demand and results in overbuilding. *See* Institute for Energy Economics and Financial Analysis, Risks Associated with Natural Gas Pipeline Expansion in Appalachia at 9 (April 2016), Pet'rs' Motion to Intervene and Protest, Exhibit E at 9 [JA-____]; Rehearing Order, Comm'r Glick, dissenting, ¶4 ("Granting Mountain Valley a 14% [return on equity] . . . will only encourage the overbuilding of the pipeline system at customers' expense.").

Here, neither the Certificate Order nor the Rehearing Order demonstrates that FERC accounted for those market-skewing incentives, or the business and financial risk associated with this specific project, when it approved Mountain Valley's requested return on equity. FERC's sole reliance on the fact that it has

granted a 14 percent return on equity to previously approved greenfield pipelines, without any analysis of the specific risks faced by Mountain Valley in constructing the Southgate Project, does not provide the substantial evidence necessary to conclude that such a high rate is appropriate for this particular project. *See N. Carolina Utilities Comm'n v. FERC.*, 42 F.3d 659, 664 (D.C. Cir. 1994) (citing *Maine Pub. Serv. Co. v. FERC*, 964 F.2d 5, 9 (D.C. Cir. 1992), for the proposition that “FERC’s use of a particular percentage in a ratemaking calculation was not adequately justified by citation of a prior use of the same percentage without further reasoning or explanation”); *Emera Maine v. FERC*, 854 F.3d 9, 27-29 (D.C. Cir. 2017) (under the Federal Power Act’s “just and reasonable” rate standard, rejecting FERC’s rationale for selecting a return on equity when that rationale was simply that the agency had done so “in the past,” and explaining that “[a]lthough we defer to FERC’s expertise in ratemaking cases, the Commission’s decision must actually be the result of reasoned decision-making to receive that deference”).

b. FERC failed to supply substantial evidence necessary to support its decision to treat Mountain Valley as a new market entrant, despite the Southgate Project being an extension of the Mainline

Even assuming *arguendo* that such a high rate of return may be appropriate for a greenfield pipeline constructed by a new market entrant, FERC failed to provide the substantial evidence necessary to justify its approval of that rate here.

As Commissioner (now Chairman) Glick noted in his dissent, FERC departed from its “general policy in developing rates for incremental expansion projects,” which is “to require a pipeline to use the [return on equity] approved in its last [Natural Gas Act] section 4 rate proceeding, or, if the pipeline has not filed a rate case, the [return on equity] from the last litigated [Natural Gas Act] section 4 rate case.” Certificate Order, Comm’r Glick, dissenting, ¶22 (citing *Cheyenne Connector, LLC*, 168 FERC ¶ 61,180 at PP 51-52) [JA-_____]. Because of Mountain Valley’s ownership of the Mainline, for which it has executed binding service contracts with shippers for the system’s full design capacity, FERC should have treated it like an existing pipeline company proposing an expansion, not a new market entrant proposing a greenfield pipeline. *Id.*, ¶¶22–23. Had FERC followed its previously stated policy regarding expansion projects, Mountain Valley would have received a return of 10.55 percent. *Id.*, ¶23.

FERC counters that although the Project is an extension of the Mainline, because the Mainline is not yet in service, Mountain Valley “is not an established pipeline company and has no existing revenue base,” such that it “there are no established operations or revenue streams that would reduce the risk to the level experienced by natural gas companies whose existing systems are in service.” Certificate Order, ¶57 [JA-_____]; *see also* Rehearing Order, ¶14 [JA-_____]. But as Commissioner Glick explained, Mountain Valley’s risk as a new market entrant

has already been accounted for in the 14 percent return on equity granted to it in the Mainline Certificate Order. Rehearing Order, Comm'r Glick, dissenting, ¶22 [JA-____]. Moreover, Mountain Valley “has since executed binding service contracts with shippers for the mainline system’s full design capacity, providing a level of revenue certainty that applicants for greenfield projects do not typically have.” *Id.* Mountain Valley thus does not face the same level of financial risk that FERC claims uniformly justifies that higher 14 percent rate for all new market entrants. Neither FERC nor Mountain Valley provided the substantial evidence necessary to justify departing from FERC’s standard policy for expansion projects. FERC’s failure to rationally consider all of the factors affecting the investment risk posed by the Southgate Project, which factors distinguish the Southgate Project from other projects for which FERC has granted a 14 percent return on equity, renders FERC’s Certificate Order arbitrary and capricious and in violation of the Natural Gas Act’s requirement that FERC ensure that pipeline rates are just and reasonable and in the public interest.

Finally, FERC’s failure is not remedied by the fact that Mountain Valley’s rates may potentially be reassessed in the future, *see* Certificate Order ¶63 [JA-____], because once an unnecessary pipeline is approved and constructed based on the incentives provided by the unjustified initial return, the harm to Petitioners’ interests will have largely already occurred. Regardless of any potential future

adjustments, FERC's approval of the 14 percent return on equity in the absence of substantial evidence provides a perverse incentive to build additional pipeline infrastructure and undermines its finding that the Project is required by the public convenience and necessity. *See Sierra Club*, 867 F.3d at 1378 (expressing skepticism "that a bare citation to precedent, derived from another case and another pipeline, qualifies as the requisite 'substantial evidence'").

III. FERC's Consideration of Impacts to Aquatic Resources in Its Environmental Impact Statement Was Arbitrary and Capricious and Violated NEPA

NEPA was designed to "prevent or eliminate damage to the environment." *Env'tl. Def. v. U.S. Army Corps of Engineers*, 515 F. Supp. 2d 69, 77-78 (D.D.C. 2007) (quoting 42 U.S.C. § 4321). It requires that federal agencies prepare environmental impact statements "for all projects 'significantly affecting the quality of the human environment,' 42 U.S.C. § 4332(2)(C), identifying 'any adverse environmental effects which cannot be avoided should the proposal be implemented.'" *Id.* at 78 (quoting 42 U.S.C. § 4332(2)(C)(ii)). It implicitly requires a "reasonably complete discussion of possible mitigation measures." *Id.* (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989)); *Robertson*, 490 U.S. at 351 ("One important ingredient of an EIS is the discussion of steps that can be taken to mitigate adverse environmental consequences.").

The purpose of NEPA's requirement to prepare an EIS prior to any decision that could significantly affect environmental quality is "to guarantee that agencies take a 'hard look' at the environmental consequences of proposed actions utilizing public comment and the best available scientific information." *Colorado Env'tl. Coal. v. Dombeck*, 185 F.3d 1162, 1171–72 (10th Cir. 1999) (citing *Bissell v. Penrose*, 49 U.S. 317, 350, 12 L. Ed. 1095 (1850)); see also *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87, 97 (1983). "The hallmarks of a 'hard look' are thorough investigation into environmental impacts and forthright acknowledgment of potential environmental harms." *Nat'l Audubon Soc'y v. Dep't of Navy*, 422 F.3d 174, 187 (4th Cir. 2005) (citing *Robertson*, 490 U.S. at 350). A "hard look" means more than a perfunctory listing of impacts. *Nat. Res. Def. Council v. Hodel*, 865 F.2d 288, 299 (D.C. Cir. 1988).

The Project would have substantial impacts on aquatic resources, particularly from sedimentation associated with project construction in upland areas and at stream crossings. The Project would require crossing 223 waterbodies, including four major waterbodies, using primarily a dry, open-cut crossing technique. EIS at 4-35 [JA-_____]. It would also traverse substantial areas of steep slopes and other areas that are highly erodible and susceptible to landslides. *Id.*, Appx. C.3, C.4 [JA-_____, _____]. FERC recognizes that

[c]onstruction activities in stream channels and on adjacent banks may affect waterbodies. Clearing and grading of stream banks, in-stream

trenching, the installation and removal of temporary crossing structures (e.g., culverts, cofferdams), trench dewatering, and backfilling could each cause temporary, local modifications of aquatic habitat involving sedimentation, increased turbidity, and decreased dissolved oxygen concentrations.

EIS at 4-48 to -49 [JA-____-____]. FERC likewise notes that

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

Id. at 4-49 [JA-____]. Nonetheless, FERC concludes that these impacts would be temporary and localized, and that Mountain Valley's compliance with FERC's standard Plan and Procedures and Mountain Valley's project-specific Erosion and Sediment Control Plan would minimize impacts to the level of insignificance. *Id.* at 4-51 [JA-____]. Further, FERC concludes that the cumulative impacts of the Project combined with other reasonably foreseeable actions, particularly the Mainline, would not be significant. *Id.* at 4-242 to -43 [JA-____-____].² FERC's

² In the Certificate Order, FERC adopts the findings in the final EIS that the environmental impacts of the Project, including impacts to aquatic resources, will be insignificant. Certificate Order, ¶¶76, 144 [JA-____, ____].

conclusions are not supported by the record and FERC failed to adequately explain its findings in light of contrary evidence.

a. FERC’s reliance on mitigation measures that have proven ineffective in practice was arbitrary and capricious and violated NEPA

In order to ensure that agencies take a “hard look” at the environmental impact of their actions, Council on Environmental Quality regulations require a discussion of mitigation measures throughout the EIS. *See* 40 C.F.R. §§ 1502.14(f)³ (agency must discuss mitigation measures in discussing alternatives to proposed action), 1502.16(h) (agency must discuss mitigation in assessing consequences of the proposed action), 1508.25(b) (agency must discuss mitigation in defining scope of the EIS), 1505.2(c) (agency must discuss mitigation in explaining its ultimate decision); *Robertson*, 490 U.S. at 351–52 (recognizing that an agency must discuss mitigation when defining the scope of the EIS, discussing possible alternatives and impacts, and in explaining its final decision).

³ Citations in this brief are to the NEPA regulations in effect at the time that FERC issued its EIS, Certificate Order, and Notice of Denial. On September 14, 2020, new NEPA regulations went into effect, 85 Fed. Reg. 43304, but those new regulations are not applicable to this action. *See Policy & Research, LLC v. United States Dep’t of Health & Hum. Servs.*, 313 F. Supp. 3d 62, 72–73 (D.D.C. 2018) (“[W]hile an administrative agency can certainly ‘amend or repeal its own regulations,’ it is not free to ‘ignore or violate its regulations while they remain in effect.’”) (quoting *U.S. Lines, Inc. v. Fed. Mar. Comm’n*, 584 F.2d 519, 526 n.20 (D.C. Cir. 1978)).

A sufficient mitigation analysis requires a detailed discussion of mitigation measures and a full consideration of each measure's effectiveness in minimizing the specifically identified project impacts. Courts have found a discussion of general best management practices to be inadequate where those practices were not evaluated in light of the unique risks posed by the proposed project. *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1214 (9th Cir. 1998) (mitigation measures inadequate where measures designed to reduce erosion from logging on *unburned* areas but project proposed logging in severely burned areas). While courts do not require agencies to develop specific implementation and planning criteria for each measure, a mere listing of mitigation measures without supporting analytical data has consistently been found to be inadequate in meeting an agency's NEPA duties. *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1381 (9th Cir. 1998) (agency's EIS inadequate where mitigation analysis lacked details of the proposed mitigation measures and consideration of each measure's level of effectiveness); *S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 588 F.3d 718, 727 (9th Cir. 2009) (finding EIS inadequate where BLM failed to consider whether any of the listed mitigation measures would be effective in avoiding impact).

Here, despite acknowledging the adverse aquatic impacts associated with pipeline construction generally, and the erosion and sediment control failures of

the Mainline specifically, FERC concluded that such impacts would not be significant due to Mountain Valley's implementation of mitigation measures to control erosion and sedimentation:

Mountain Valley's Plan and Procedures and [Erosion and Sediment Control] Plan would be implemented to protect surface water resources, including reducing sediment loads, restoring stream habitat, and restoring riparian strips along streams. We conclude that the surface water mitigation measures proposed by Mountain Valley would adequately avoid or minimize potential impacts on surface water resources. Therefore, we do not anticipate long-term or significant impacts on surface water resources because of construction or operation of the Project.

EIS at 4-51 [JA-____]. *See also id.* at Appendix I.2-2, I.3-138 [JA____, ____]

(“Each proposal reviewed by the Commission is considered on its own merits irrespective of other projects. FERC’s professional judgement, based on decades of experiences on hundreds of projects is that the Plan and Procedures are sufficient to minimize impacts to resources.”). The Plan and Procedures are FERC’s standard construction requirements, which incorporate some erosion and sediment control measures. The “project-specific” Erosion and Sediment Control Plan upon which FERC relies is the draft plan submitted by Mountain Valley in June 2019, which consists of a narrative of general construction practices and a list of available erosion and sediment control measures that Mountain Valley may implement along the route. *See* EIS at 2-13 n.4 [JA-____]; Erosion and Sediment Control Narrative [JA-____-____].

But these are the same measures that repeatedly failed along the Mainline, resulting in miles of stream buried in up to a foot of sediment. *See, e.g.*, EIS at 1-12 [JA-____] (explaining that, as with the Southgate Project, on the Mainline “Mountain Valley specified and designed its erosion control measures in accordance with the Virginia Erosion and Sediment Control Handbook”); *supra* at 4-9. In a report submitted along with comments on the draft EIS, an expert hydrogeologist explained that “[o]nly the least effective Best Management Practices (BMPs) have been selected for use in managing sediment erosion and stormwater runoff.” Dodds Report at 2 [JA-____]. The report notes that the erosion and sediment control measures listed by Mountain Valley “are inadequate because they provide minimal protection against erosion and sedimentation.” *Id.* at 24 [JA-____]. The report explains that the minimal erosion and sediment control measures listed by Mountain Valley “will not adequately detain stormwater runoff to trap sediments prior to release of the stormwater into receiving streams” and that more robust measures, such as sediment basins, should be employed. *Id.* at 25 [JA-____]. The expert hydrogeologist also notes that the primary measures employed by Mountain Valley, such as silt fences, are not appropriate for the steep slopes that are encountered along much of the Project route. *Id. See also id.* at 17 [JA-____] (“Sediment eroded from the construction areas will be transported to the streams because the proposed BMPs consist only of water bars, silt fence, and

compost socks. Silt fence should be used only on flat areas, but the slope . . . is shown in the DEIS as 30-50%.”) And, critically, the “BMPs selected for use in the proposed Southgate Project are the same as those selected for the [Mainline] pipeline being constructed in West Virginia and Virginia,” which have resulted in such significant failures.⁴ *Id.* at 25 [JA-_____].

FERC’s attempts to distinguish the Southgate Project from the Mainline are unavailing. FERC claims that Mountain Valley “agreed to implement supplemental control measures, which exceed the minimum standards,” EIS at 1-12 [JA-_____], but cites to no specific upgrades or measures that have proven successful, much less a binding commitment by Mountain Valley to utilize such measures. Further, FERC’s claim is belied by the Erosion and Sediment Control Narrative upon which FERC relied. *See* Erosion and Sediment Control Narrative at 4 [JA-_____] (“Unless otherwise indicated, all vegetative and structural erosion and sediment control practices will be constructed and maintained according to the *minimum standards* of the erosion and sediment control regulations.”) (emphasis added). Indeed, Mountain Valley’s responses to comments from the Virginia Department of Environmental Quality indicate that it does not intend to comply with all of the

⁴ In addition to the failures along the Mainline, Petitioners highlighted numerous major incidents leading to significant aquatic impacts on other pipeline projects subject to the same measures in FERC’s Plan and Procedures. *See, e.g.,* Pet’rs’ Draft EIS Comments at 28-31 [JA-_____ - _____].

state's requirements. *See, e.g.*, Responses to February 13, 2019 Environmental Information Request at 40 [JA-____] (noting that Mountain Valley does not intend to comply with the standard spacing requirements in the Virginia Erosion and Sediment Control Handbook that govern placement of trench breakers); *id.* (refusing Virginia Department of Environmental Quality's request to "[s]eed and straw mulch all disturbed areas on the same day the finished grade is achieved"); *id.* at 41 [JA-____] (refusing Virginia Department of Environmental Quality's request to commit to using "super silt fence in lieu of regular silt fence" for the entirety of the project). *See also* Dodds Report at 24-25 [JA-____-____] (demonstrating inconsistencies between Mountain Valley's Erosion and Sediment Control Plan and the North Carolina Sediment and Erosion Control Planning and Design Manual).

Moreover, in the same breath that it says Mountain Valley's compliance with FERC's Procedures would adequately minimize impacts, FERC allows Mountain Valley to weaken those same Procedures in nearly 40 instances. *See, e.g.*, EIS at 4-37 [JA-____] (allowing Mountain Valley to violate the Procedure's prohibition on constructing extra work areas within 50 feet of waterbodies and wetlands in fifteen locations); *id.* at 4-37 to -38 [JA-____-____] (allowing Mountain Valley to violate the Procedure's requirement to maintain a fifteen-foot buffer when constructing parallel to a waterbody at 23 locations). FERC does not

analyze the impacts of allowing Mountain Valley to violate the Procedures in this way.

FERC next attempts to explain away Mountain Valley's failures on the Mainline by pointing to record-breaking precipitation in 2018. EIS at 1-12 [JA-_____] (citing rainfall events associated with Hurricanes Florence and Michael and Subtropical Storm Alberto). But the agency offers no explanation for why similar rainfall events should not be expected to be repeated, failing to address the fact that one of the primary effects of climate change is more severe storms. *See* Pet'rs' NEPA Scoping Comments at 19-20 [JA_____-_____] (explaining that impacts of climate change that have already begun and will increase in the future include "changes in precipitation patterns," "increasingly severe weather events, such as hurricanes of greater intensity," and "more heavy downpours and flooding"); Rehearing Request at 41 [JA-_____] ("FERC, however, ignores the effects that climate change is having on precipitation patterns in the region, causing a much greater percentage of precipitation to come in heavy storm events, despite annual levels increasing only slightly.") (citing Defenders of Wildlife, *Climate Change in the Southeast: Impacts on Lands and Wildlife*). Nor does FERC offer an explanation for why these failures along the Mainline continued to occur well past 2018 and in circumstances not associated with those storm events. Rehearing Request at 41 [JA-_____] (explaining that FERC failed to address "the numerous

sedimentation violations that occurred outside of those heavy rain events or the numerous violations that occurred in 2019”). *See also* Mike Tony, *Mountain Valley Pipeline faces \$303,000 state fine for continued erosion, but pipeline opponents call for bigger penalty*, *The Charleston Gazette*, Feb. 5, 2021⁵ (describing fines for erosion and sedimentation related violations occurring between February 2019 and September 2020).

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

⁵ Available at

https://www.wvgazettemail.com/news/energy_and_environment/mountain-valley-pipeline-faces-303-000-state-fine-for-continued-erosion-but-pipeline-opponents-call/article_d7e1d317-834d-5a22-9747-41ece2de8e36.html

FERC's choice to evaluate the Project's potential impacts on aquatic resources "irrespective of other projects" and to rely on its unsupported "professional judgement," EIS at Appx. I.2-3 [JA-____], instead of the facts before it in this record, disregarded relevant information that should have informed the agency's NEPA analysis. FERC's reliance on the EIS is thus arbitrary and capricious and violates NEPA. *See State Farm*, 463 U.S. at 43; *Neighbors of Cuddy Mountain*, 137 F.3d at 1381; *Okanogan Highlands All. v. Williams*, 236 F.3d 468, 473 (9th Cir. 2000).

b. FERC's irrational temporal and geographic restrictions on its consideration of cumulative impacts to aquatic resources were arbitrary and capricious and violated NEPA

In addition to failing to adequately analyze the direct aquatic impacts of the Project, FERC also failed to rationally consider the cumulative aquatic impacts of the Project together with the impacts of other reasonably foreseeable actions, particularly the Mainline.

NEPA regulations require that agencies assess the cumulative impacts of proposed activities. A cumulative impacts analysis must consider together the impacts of the project and all other past, present, and reasonably foreseeable actions planned by other federal and state agencies and activities on private land. 40 C.F.R. § 1508.7. "Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." *Id.* Agencies

“must give a realistic evaluation of the total impacts and cannot isolate a proposed project, viewing it in a vacuum.” *Am. Rivers v. FERC*, 895 F.3d 32, 55 (D.C. Cir. 2018) (quoting *Grand Canyon Trust v. FAA*, 290 F.3d 339, 342 (D.C. Cir. 2002)). Cumulative impact analyses that contain “cursory statement[s]” and “conclusory terms” are insufficient under NEPA. *Del. Riverkeeper*, 753 F.3d at 1319-20; *Hodel*, 865 F.2d at 298 (although “FEIS contains sections headed ‘Cumulative Impacts,’ in truth, nothing in the FEIS provides the requisite analysis,” which, at best, contained only “conclusory remarks”). The analysis of cumulative impacts should “equip a decisionmaker to make an informed decision about alternative courses of action” and should be “useful to a decisionmaker in deciding whether, or how, to alter the program to lessen cumulative impacts.” *Hodel*, 865 F.2d at 298-99. U.S. EPA guidance on cumulative impacts explains that “[s]patial and temporal boundaries should not be overly restrictive in cumulative impact analysis.” U.S. EPA, *Consideration of Cumulative Impacts in EPA Review of NEPA Documents*, 8 (1999).⁶

FERC claims that the “Project would contribute little to the long-term cumulative impacts on waterbodies.” EIS at 4-243 [JA-_____]. FERC is able to reach this conclusion only because it incorrectly assumes that the water quality

⁶ Available at <https://www.epa.gov/sites/production/files/2014-08/documents/cumulative.pdf>.

impacts of both the Project and the Mainline will not substantially overlap in either time or space. FERC acknowledges that, for both the Southgate Project and the Mainline, “[t]urbidity plumes may travel downstream for a few miles,” EIS at 4-242 [JA-____], and that impacts from such sedimentation events associated with the two projects’ construction “could be additive, if turbidity plumes settled within common stream segments,” *id.* at 4-243 [JA-____]. That is, the turbidity plumes themselves need not overlap for the two projects’ sedimentation events to have significant cumulative impacts, because the adverse impacts of the sediment that settles on the streambeds will remain after the plume has dissipated. FERC nonetheless concludes that “[g]iven the spatial separation of the [Mainline and Southgate] projects, this is unlikely.” *Id.*; *see also id.* at 4-49 [JA-____] (explaining that “the density and downstream extent of the turbidity plume” caused by Southgate construction would be determined by “sediment loads, stream velocity, turbidity, bank composition, and sediment particle size,” but failing to meaningfully analyze any of those factors to determine actual impacts).

FERC’s offers no support for this conclusory statement and, indeed, it is contradicted by broadly accepted science.

In contrast to FERC’s determination that sediment transport will be limited in scope, Petitioners submitted research showing that sediment, especially fine sediment, can travel up to hundreds of miles downstream depending on conditions.

See Rehearing Request at 43 [JA-____]. Of particular concern is the cumulative impacts of Project sedimentation together with sedimentation impact from the Mainline, all of which are upstream of the Kerr Reservoir, which sits at the confluence of the Roanoke and Dan Rivers.⁷ A briefing issued by the City of Roanoke on September 5, 2017, much of which was based on analyses by Mountain Valley’s contractors, estimated that the sedimentation from the Mainline’s massive construction project through mountain streams in Roanoke County would flow many miles downstream and deposit an additional 1,039 tons of sediment per year into the Roanoke River, costing the city \$36 million annually for removal from its drinking water supply. *See* Rehearing Request, Ex. B [JA-____]. FERC dismisses the concerns that these impacts will be cumulative with the Southgate Project’s impacts by stating that the two projects’ crossing locations would be “at least 3.5 miles apart.” EIS at 4-243 [JA-____]. *See also* Rehearing Order, ¶¶30-31 [JA-____]. Given that sediment can travel and have adverse

⁷ The Kerr Reservoir is downstream of hundreds of stream crossings from both the Mainline and Southgate Project. The crossings are in the watersheds of the North and South Forks of the Roanoke River and tributaries in Roanoke County, VA; North Fork of the Blackwater and Pigg Rivers and their tributaries in Franklin County, VA; the Bannister and Sandy Rivers and their tributaries in Pittsylvania County, VA; White Oak Creek and 1.5 miles of associated wetlands in Pittsylvania County; and the Dan River in Pittsylvania County, VA, which has been critically impaired by a 2014 coal ash spill in Eden, only 2.75 miles upstream from where the Project will cross. *See* EIS, Appx. B.5, B.6 [JA-____, ____].

downstream impacts at much greater distances from the source than 3.5 miles, *see, e.g.*, Rehearing Request, Ex. B [JA-____], FERC's conclusion is not rational.

Additionally, FERC's claim that impacts from the Project and Mainline construction will be distant in time is not supported. *See* EIS at 4-243 [JA-____]. FERC acknowledges that the Project and the Mainline would cross a number of the same waterbodies, but concludes that "the stream crossings would not occur within the same time frame due to the construction schedules for both projects." *Id.* at 4-243 [JA-____]. But these schedules are far from set in stone, as the numerous delays and schedule adjustments on the Mainline demonstrate. FERC does not provide any detail on when the projects' respective in-stream work or disturbance of upland areas that causes increased sedimentation would occur. It certainly does not mandate that construction on the two projects not occur within a timeframe that could have additive impacts. And FERC's conclusion in the EIS is belied by its Certificate Order, which conditions authorization to begin construction of the Southgate Project on the resumption of construction on the Mainline, following the lifting of a previously issued stop work order. *See* Certificate Order, ¶9 [JA-____]. Thus, while FERC in the EIS concludes that the projects' construction schedules will not overlap, its Certificate Order effectively ensures that they will.

Even if construction activities on the respective projects did not occur at the same time, FERC's conclusion that their impacts would not overlap in time is not

supported. Sediment can have long-term adverse impacts on aquatic life once it settles onto the beds of streams, rivers, and lakes. As FERC acknowledges, impacts from increased sedimentation and turbidity “could be additive, if turbidity plumes settled within common stream segments.” EIS at 4-243 [JA-____]. *See also* Jan. 10, 2019 Resource Report Comments of Virginia Department of Environmental Quality at 14 [JA-____] (explaining that crossings of streams fully supporting aquatic life must “be particularly sensitive to disturbances as impacts to benthic macroinvertebrates (not mentioned in Resource Report 2) can be long lasting from settled solids. Fish can migrate away but macroinvertebrates cannot.”). But FERC fails to analyze any of the factors that it states would determine the persistence of sediment plumes, as well as the distances at which and degrees to which turbidity settling in waterbodies could have adverse impacts. *See id.* at 4-49 [JA-____]; Rehearing Request at 45 [JA-____] (“Too much sediment deposition can also bury habitats and even physically alter a waterway. . . . If a body of water is continually exposed to high levels of sediment transport, it may encourage more sensitive species to leave the area, while silt-tolerant organisms move in.”) (citing Fondriest Environmental, Inc., “Sediment Transport and Deposition”). Without this sort of analysis, FERC cannot rationally conclude that the projects’ impacts will not overlap to cause significant impacts to aquatic resources. FERC’s analysis was

thus arbitrary and capricious because it “left out critical parts of the equation and, as a result, fell far short of the NEPA mark.” *Am. Rivers*, 895 F.3d at 55.

Finally, FERC’s conclusion that sedimentation and other impacts from the other projects discussed in the cumulative effects section would not be significant because “FERC projects and most other projects would be required (by permit) to install erosion and stormwater control devices to minimize runoff” is not supported. *See* EIS at 4-242 [JA-_____]. As explained above, the erosion and sediment control measures on which FERC relies have proven ineffective to prevent major sedimentation events in real world applications. *Supra* at 4-9. FERC’s reliance on such measures to conclude that cumulative impacts to aquatic resources will not be significant is thus arbitrary and capricious. *State Farm*, 463 U.S. at 43.

CONCLUSION AND RELIEF REQUESTED

For the reasons set forth above, FERC’s findings under the Natural Gas Act, analysis under NEPA, and its issuance of the certificate of public convenience and necessity, lacked substantial evidence, were arbitrary and capricious, and must be vacated and remanded to the agency pursuant to the Natural Gas Act, 15 U.S.C. § 717r(b), and the Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

Dated: April 1, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation in Fed. R. App. P. 32(a)(7)(B)(i) because this brief contains 9,214 words, excluding the parts of the brief exempted by FRAP 32(a)(7)(B) and D.C. Cir. Rule 32(e)(1). Microsoft Word 2017 computed the word count.

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

Dated: April 1, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2021, I electronically filed the foregoing Petitioners' Corrected Page-Proof Opening Brief with the Clerk of the Court by using the appellate CM/ECF System and served copies of the foregoing via the Court's CM/ECF system on all ECF-registered counsel.

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