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' PAGE-PROOF RULE 30(c) REPLY BRIEF

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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 *Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043 (October 13, 2017)
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SUMMARY OF ARGUMENT

The Federal Energy Regulatory Commission's ("FERC") issuance of a certificate of public convenience and necessity under section 7 of the Natural Gas Act to Mountain Valley Pipeline, LLC ("Mountain Valley") for its Mountain Valley Pipeline Southgate Project ("Southgate Project"), an expansion of its existing but incomplete Mountain Valley Pipeline Mainline ("Mainline"), violated both the Natural Gas Act and the National Environmental Policy Act ("NEPA"). In its environmental impact statement ("EIS"), Certificate Order, and Rehearing Order, FERC made conclusory findings that are not supported by the evidence in the record.

FERC failed to support its conclusion that granting Mountain Valley's requested 14 percent return on equity—a component of the Southgate Project's initial recourse rates—satisfied the "public interest" standard applicable to Natural Gas Act section 7 proceedings. FERC did not rationally explain why the risks of this particular project justify such an elevated return, which harms consumers and encourages overbuilding. FERC and Mountain Valley's response briefs rely in part on risk factors that the agency did not consider in the challenged orders. As for FERC's justifications contained in its orders, the agency relied exclusively on citations to past decisions regarding "new market entrants" that do not support its conclusions and are not applicable to this project.

Under NEPA, FERC's reliance on its EIS was arbitrary and capricious because FERC's conclusions that the Southgate Project would have minimal direct aquatic impacts and no significant cumulative aquatic impacts are not supported by the record. FERC failed to rationally explain why the erosion and sediment control mitigation measures that have repeatedly failed to prevent significant aquatic impacts on the Mainline and numerous other FERC-regulated pipelines will successfully minimize such impact on the Southgate Project. FERC's bare reliance on its staff's professed expertise, without any underlying analysis, was not rational in the face of these past failures and significant contrary expert opinion in the record.

FERC's conclusion that the aquatic impacts of the Southgate Project and the Mainline would not overlap in time or space, such that there would be no significant cumulative impacts, was contrary to the evidence in the record and to FERC's own findings. Despite acknowledging that sediment from the projects would travel "a few miles" downstream, and despite record evidence showing that sediment can travel significantly further, FERC concluded that there would be no additive impacts from the two projects crossing the same waterbody just 3.5 miles apart. Finally, FERC's determination that construction of the two projects would not overlap in time is critically undermined by the Southgate Project's Certificate Order, which conditions commencement of construction of the Southgate Project

on the Mainline's receipt of necessary federal permits and associated resumption of construction.

ARGUMENT

I. FERC'S TREATMENT OF MOUNTAIN VALLEY AS A NEW MARKET ENTRANT JUSTIFYING A 14 PERCENT RETURN ON EQUITY WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND WAS THUS ARBITRARY AND CAPRICIOUS

Petitioners acknowledge that when setting initial rates under Section 7 of the Natural Gas Act, FERC is not required to hold the same type of full evidentiary hearing necessary to set just and reasonable rates under sections 4 and 5. *See* FERC Br. 5, 24 (citing *Mo. Pub. Serv. Comm'n v. FERC*, 337 F.3d 1066, 1070 (D.C. Cir. 2003)). However, the fact that section 7's "public interest" standard is "less exacting" than the just and reasonable standard does not render it meaningless. To the contrary, as the Supreme Court has explained,

> It is true that the Act does not require a determination of just and reasonable rates in a [section] 7 proceeding as it does in one under either [section] 4 or [section] 5. Nor do we hold that a 'just and reasonable' rate hearing is a prerequisite to the issuance of producer certificates. What we do say is that the inordinate delay presently existing in the processing of [section] 5 proceedings *requires a most careful scrutiny and responsible reaction to initial price proposals* of producers under [section] 7. Their *proposals must be supported by evidence* showing their necessity to 'the present or future public convenience and necessity' before permanent certificates are issued.

Atl. Ref. Co. v. Pub. Serv. Comm'n of State of N.Y., 360 U.S. 378, 390–91 (1959) (emphasis added). Granting a company's requested rates absent such careful

scrutiny "would provide a windfall for the natural gas company with a consequent squall for the consumers. This the Congress did not intend." *Id.* at 390. *See also id.* at 388 (explaining that "it was 'the intention of Congress that natural gas shall be sold in interstate commerce … *at the lowest possible reasonable rate* consistent with the maintenance of adequate service in the public interest.'") (quoting 52 Stat. 825) (emphasis added).

Indeed, in the very next sentence after this Court acknowledged that the public interest standard is "less exacting" than the just and reasonable standard, *see* FERC Br. 5, 24, it explained that,

> both the Supreme Court and this circuit have made clear that the Commission has a duty to use its § 7 power to protect consumers. … Indeed, the Commission's "usual practice in Section 7 certificate proceedings" is to "apply[ ], to the extent practicable, the same ratemaking policies that it applies in Section 4 rate cases in determining just and reasonable rates on a cost of service basis."

Mo. Pub. Serv. Comm'n, 337 F.3d at 1070–71 (quoting *Kansas Pipeline Co.*, 97 FERC ¶ 61,168, 61,785 (2001))[1]; *see also Consumer Fed'n of Am. v. Federal*

[1] The courts in both of those cases rejected FERC's rate decisions as insufficiently protective of the public interest. *Atlantic Ref. Co.*, 360 U.S. at 392–94; *Mo. Pub. Serv. Comm'n*, 337 F.3d at 1071. And, in contrast to FERC's decision here to rely solely on its classification of Mountain Valley as a new market entrant to grant the company's requested 14 percent return on equity, in *City of Oberlin, Ohio v. FERC*, 937 F.3d 599, 608–10 (D.C. Cir. 2019), FERC and the court also relied on pipeline-specific evidence, such as the fact that that the company bears the risk for unsubscribed capacity on the pipeline. That case is thus distinguishable and does not "foreclose" Petitioners' claims. *Cf.* Mountain Valley Br. 8. *See also id.* at 11

Power Comm'n, 515 F.2d 347, 356 (D.C. Cir. 1975) (declaring that "preservation of the statutory scheme depends on diligent enforcement of the § 7 certification requirement as a holding operation on initial rates").

FERC has not provided the evidence necessary to demonstrate that it subjected Mountain Valley's proposed 14 percent return on equity to the "careful scrutiny" that the Supreme Court has made clear is necessary to protect the public interest. First, FERC and Mountain Valley in their briefs provide justifications for FERC's decisions that are not contained in the record and thus cannot support FERC's findings before this Court. Second, as to the justifications actually provided in FERC's Orders, FERC and Mountain Valley rely almost exclusively on citations to past FERC decisions to support the proposition that Mountain Valley should be treated as a new market entrant entitled to an elevated return on equity with respect to its Southgate Project, despite the fact that it owns a fully certificated, substantially complete[2] major interstate gas pipeline for which it has long-term capacity contracts with attendant 20 years of revenue. But the past precedents that FERC and Mountain Valley cite simply do not say what FERC and

(arguing, contrary to *City of Oberlin*, that the fact that its Mainline is fully subscribed is irrelevant to FERC's consideration of risk).

[2] Though Mountain Valley's representations regarding the percentage of completion of the Mainline have been subject to dispute, FERC considered the Mainline to be substantially complete at the time it issued the Certificate Order for the Southgate Project. *See* FERC Br. 50–51.

Mountain Valley allege that they do, nor do they contain the type of analysis that would satisfy the public interest standard. Instead, they support the conclusion reached by Commissioner (now Chairman) Glick in his dissents to the Certificate Order and Rehearing Order for the Project, that Mountain Valley is more like an existing pipeline company constructing an expansion than a new market entrant. *See* Certificate Order, Comm'r Glick, dissenting, ¶22 [JA-____]; Rehearing Order, Comm'r Glick, dissenting, ¶4 [JA-____]. As such, FERC's grant of the higher 14 percent return on equity lacked substantial evidence and was arbitrary and capricious.

a. Many of the justifications for treating Mountain Valley as a new market entrant that FERC and Mountain Valley present in their briefs are post-hoc rationalizations that cannot support FERC's decision

Many of the factors that FERC and Mountain Valley argue in their briefs demonstrate the elevated risks faced by entities constructing expansions of certificated but non-operational pipelines do not appear anywhere in the Certificate Order or Rehearing Order. Rather, they are post-hoc rationalizations that cannot justify the agency's decision. *See Michigan v. EPA*, 576 U.S. 743, 758 (2015) (explaining that it is a "foundational principle of administrative law that a court may uphold agency action only on the grounds that the agency invoked when it took the action.") (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943)); *Oceana, Inc. v. Evans*, 384 F. Supp. 2d 203, 224–25 (D.D.C. 2005), *order clarified*, 389 F.

Supp. 2d 4 (D.D.C. 2005) ("In evaluating whether the agency articulated a basis for its decision, the Court cannot rely on post-hoc rationalizations. Instead, it must look to the justification provided by the agency in the record.") (citing *El Rio Santa Cruz Neighborhood Health Ctr., Inc. v. U.S. Dep't of Health and Human Servs.*, 396 F.3d 1265, 1276 (D.C.Cir.2005)).

For example, FERC in its brief argues that "regulatory" and "contractual" risks, as well as risks associated with "increased construction costs," justify higher returns on equity for new market entrants. FERC Br. 27. But FERC did not rely on nor even mention those factors when it granted Mountain Valley's certificate and denied Petitioners' rehearing request. Rather, in the orders currently under review, FERC relied exclusively on the fact that the Mainline was not yet in service such that Mountain Valley lacks an "existing revenue base" and a "proven track record." Certificate Order, ¶57 [JA-____]. *See also* Rehearing Order, ¶14 (citing identical factors) [JA-____]. Because FERC did not mention nor rely on Mountain Valley's regulatory and contractual risks or risks associated with increased construction costs when it issued the challenged orders, it may not now cite them to justify its decision to the Court.

Moreover, even if FERC's claim of risks associated with "increased construction costs" were properly before the Court, such a claim could not support FERC's position. That is because the Project's construction costs are already

accounted for in the recourse rates that Mountain Valley may charge, separately from the return on equity. The return on equity is a component of the rate of return, which FERC permits Mountain Valley to include in its recourse rates *in addition to* the "rate base" component that allows Mountain Valley to fully recoup its construction costs. *See, e.g.*, *Gulf S. Pipeline Co., LP v. FERC*, 955 F.3d 1001, 1013 (D.C. Cir. 2020) ("Gulf South challenges FERC's denial of its proposed initial rate of return—i.e., the amount the company is permitted to charge *in addition to* its rate base and operating costs 'to ensure that pipeline investors are fairly compensated.'" (emphasis added) (citing *N.C. Utils. Comm'n v. FERC*, 42 F.3d 659, 661 (D.C. Cir. 1994)). Thus, FERC may not rely on the prospect of increased construction costs to justify granting Mountain Valley an elevated return on equity.

For its part, Mountain Valley makes much of the litigation risks faced by new market entrants, suggesting that they are a major factor upon which FERC relied when granting Mountain Valley's requested return on equity. *See* Mountain Valley Br. 12–13. But, again, FERC made no mention of such litigation risks in either the Certificate Order or the Rehearing Order. And, indeed, it would have made no sense to do so. That is because litigation risks are inherent in nearly *all* pipeline construction projects, regardless of whether an entity is a new market entrant or an existing company with operational facilities. The requirements to

obtain Clean Water Act permits to cross streams and wetlands, Clean Air Act permits to build or expand compressor stations, and various federal authorizations to cross public lands are not contingent upon on the applicant's revenue streams or ownership of other facilities. The permitting processes for expansions of existing facilities present the same potential for agency error and resultant litigation as the processes for pipelines by new market entrants. With regard to this particular risk, new market entrants are thus indistinguishable from entities with operational facilities.

b. FERC has not supported its conclusion that the remaining factors justify treating Mountain Valley as a new market entrant

As for the factors that FERC actually relied upon in its orders, FERC has failed to provide the substantial evidence necessary to support its conclusion that those factors justify treating Mountain Valley as a new market entrant deserving of an elevated return on equity. Neither in the challenged orders nor in its brief does FERC expound upon its conclusory assertion that the lack of operational facilities and existing revenue streams makes it more difficult to attract sufficient capital to permit a project to go forward, thus justifying an elevated return on equity. Rather, FERC relies on bare citations to past precedents. But those precedents likewise do not contain any meaningful discussion of how a lack of "revenue streams" prevents pipeline companies from attracting capital in the absence of an elevated return on equity.

FERC primarily relies on *PennEast Pipeline Co*., 162 FERC ¶ 61,053 (2018), for the proposition that Mountain Valley's lack of existing revenue streams necessitates an elevated return on equity. *See* FERC Br. 27 (citing Rehearing Order P 14 and n.40). But FERC did not mention revenue streams in that order. Rather, it relied on the company's lack of "historical cost data on which to base its cost-of-service estimates." *PennEast Pipeline Co*., 162 FERC ¶ 61,053, ¶59. It offered no additional support for its choice of return on equity other than its oft-repeated but unsubstantiated claim that new market entrants face "higher risks in securing financing than an existing pipeline." *Id.*

FERC also cites to *Rockies Express Pipeline LLC*, 116 FERC ¶ 61,272 (2006), claiming that it provides an example of where FERC distinguished expansions of existing certificated pipelines that are not operational, like the Southgate expansion, from expansions of operational systems. FERC Br. 28; Rehearing Order, ¶16 [JA-____]. But *Rockies Express* does not include any discussion of the different risks faced by companies expanding operational systems versus companies expanding non-operational systems. The company there alleged only that its proposed rate "is reasonable considering the higher risk attendant with a pipeline project of this size and is consistent with the allowed rates of return on equity that the Commission has granted in major construction projects for other pipelines with similar capital structures." *Rockies Express Pipeline LLC*, 116

FERC ¶ 61272, ¶44. In approving that proposal, FERC stated only that the company's proposed rates "reasonably reflect current Commission policy" and that "no party has raised any issues associated with Rock[ies] Express' proposed recourse rates." *Id.*, ¶47.[3] It did not mention a lack of revenue streams, nor would it have made sense to do so, given that at least portions of Rockies Express' system *was* operational at the time of FERC's order. *Id.*, ¶4 ("Rockies Express states that construction of Segment 1 has been completed and is in interim service.").

Finally, FERC cites to its order in *Rate Regulation of Certain Natural Gas Storage Facilities*, 115 FERC ¶ 61343, ¶127 (2006), a case not cited by FERC in

[3] FERC in footnote 26 to the *Rockies Express* order cited two past precedents to establish the "current Commission policy" with which it determined Rockies Express's proposed rates were consistent. Those orders contain no discussion of why a lack of revenue streams or existing customers justifies a higher return on equity, but instead rely on other factors or are entirely inapposite. *See Corpus Christi Lng, L.P. Cheniere Corpus Christi Pipeline Co.*, 111 FERC ¶ 61081, ¶33 (2005) (approving the proposed return on equity, which the company argued was appropriate due to "its form of incorporation, project risks, proposed capital structure of 50 percent debt and 50 percent equity, and anticipated capital market conditions," the fact that that the pipeline's parent company "is a small company with a substantially leaner capitalization than that generally found for other much larger capitalized parents of Commission-regulated pipelines," and the fact that "the major source of gas receipts for the pipeline will come from a single source … which can lead to variability in the quantities of gas transported and higher uncertainty of receiving operating income."); *Midwestern Gas Transmission Co.*, 114 FERC ¶ 61257, ¶2 (2006) (explaining that the applicant operates an existing pipeline system and failing to even mention return on equity or the factors that would contribute to a determination that a proposed return is in the public interest.)

either its Certificate Order or Rehearing Order. FERC Br. 27. That order likewise makes no mention of "cash flows," "revenue streams," or a "proven track record." *See* Certificate Order, ¶57 [JA-____]; Rehearing Request, ¶14 [JA-____]. It says only that existing pipelines face lower risk because of "existing customers and financial relationships." *Rate Regulation of Certain Natural Gas Storage Facilities*, 115 FERC ¶ 61343, ¶127 (2006). Those factors, in addition to not being mentioned in the challenged orders, would not justify a higher return for Mountain Valley, which itself has existing contractually-obligated customers (even if those customers have not begun payments due to the Mainline not yet being in service) and financial relationships with the entities that provided equity to facilitate construction of the Mainline.

Thus, neither FERC's discussion in the Certificate Order and Rehearing Order, nor the precedents cited therein, demonstrate that FERC applied the "careful scrutiny" required by Natural Gas Act section 7's public interest standard when it treated Mountain Valley as a new market entrant deserving of an elevated return on equity.

II. FERC'S CONCLUSION THAT IMPACTS TO AQUATIC RESOURCES WOULD BE MINIMAL IS NOT SUPPORTED BY THE RECORD

FERC's reliance on the EIS for the Project was arbitrary and capricious because FERC failed to rationally grapple with evidence undermining its conclusion that the Project's aquatic impacts would be short-term and minimal.

As an initial matter, FERC and Mountain Valley in their briefs appear to counter an argument that Petitioners do not make, *i.e.*, that FERC was *required* to include detailed mitigation plans that would reduce the Project's aquatic impacts to insignificant levels. *See* FERC Br. 32 (citing *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 206 (D.C. Cir. 1991)); Mountain Valley Br. 13–14. That is not Petitioners' position.

Instead, Petitioners argue that if FERC relies on the imposition of certain mitigation measures to conclude that aquatic impacts will be minimal, that reliance must be reasonably supported by evidence in the record demonstrating that the chosen measures will successfully minimize those impacts. *See* Pet'r Br. 29–30. A bare reference to agency expertise will not suffice. Because the record demonstrates that the mitigation measures that FERC relies on have not proven effective, and because FERC failed to respond to many of Petitioners' critiques, its reliance on those measures was arbitrary and capricious.

a. The sedimentation impacts to aquatic resources associated with construction on the Mainline were significant

Both FERC and Mountain Valley repeat FERC's claim—asserted in an order that post-dates the orders challenged here—that the aquatic effects of Mountain Valley's construction on the Mainline amounted to only "slightly different outcomes" than predicted in the EIS for that project. *See* FERC Br. 40 (citing *Mountain Valley Pipeline, LLC*, 173 FERC ¶ 61,027, ¶39 (2020))[4]; Mountain Valley Br. 14, 17. This assertion should not be taken seriously. As Petitioners documented in their opening brief, construction on the Mainline has been subject to near constant erosion and sedimentation failures, of which only a subset are reflected in the hundreds of notices of violation issued by state regulatory agencies. Pet'r Br. 4–8.[5] *See also* Rehearing Request at 38–40 [JA-

[4] FERC's conclusion that the differences in outcome were minimal such that a supplemental EIS for the Mainline was not required is currently subject to challenge in this Court in *Sierra Club v. FERC*, Nos. 20-1512 & 21-1040 (D.C. Cir.).

[5] Mountain Valley takes issue with Petitioners' use of photos to demonstrate the severity of these erosion and sedimentation failures, citing *Minisink Residents for Envtl. Pres. & Safety v. FERC*, 762 F.3d 97, 106 n.4 (D.C. Cir. 2014). Mountain Valley Br. 15 n.4. Mountain Valley's reliance on *Minisink* to discount the adverse impacts that the photos in Petitioners' brief clearly depict is misplaced. In *Minisink*, the petitioners had attempted to establish standing by reference to video testimonials that were not part of the record and were not replicated in the brief. 762 F.3d at 106 n.4. Here, by contrast, the photos were part of the record before FERC and were reproduced and discussed in Petitioners' brief. *See* Pet'r Br. 6–7 (reproducing photographs and citing to the portion of the record where they originally appeared). Thus, none of the *Minisink* court's concerns regarding extra-record evidence, word limits, and briefing schedules are implicated here.

____-____]. These violations were not minor, but rather resulted in miles of stream beds buried under inches of sediment, among other impacts. *Id.* at 5–6.

Further, contrary to Mountain Valley's assertions, the fact that the enforcement actions regarding Mountain Valley's hundreds of identified violations were "settled consensually with state authorities," Mountain Valley Br. 15, does not lessen the severity of the underlying sedimentation events. The Virginia Attorney General noted that the more than $2 million dollar fine levied against Mountain Valley constituted "one of the most significant financial penalties ever imposed in Virginia for this kind of case." Mark Herring, Press Release, "MVP, LLC to Pay More Than $2 Million, Submit To Court-Ordered Compliance And Enhanced, Independent, Third-Party Environmental Monitoring,"[6] The Attorney General made clear that the choice to settle Virginia's enforcement action was not based on the lack of severity of the violations. *Id.* ("By utilizing the consent decree approach of the EPA under the Obama Administration, we were able to quickly secure a major civil penalty, force significant concessions, and impose important environmental, health, and safety protections on the project that may not have been attainable if this had gone to trial.").

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[6] *Available at* https://www.oag.state.va.us/media-center/news-releases/1548-october-11-2019-mvp-llc-to-pay-more-than-2-million-submit-to-court-ordered-compliance-and-enhanced-independent-third-party-environmental-monitoring.

In sum, describing the Mainline's severe aquatic impacts as only "slightly different" than the minimal impacts FERC predicted in the EIS for the project is a gross understatement that should not be credited.

b. FERC's listing of mitigation measures does not demonstrate that those measures will successfully prevent significant aquatic impacts

In attempting to convince the Court that its determination that Mountain Valley's mitigation measures will render the Southgate Project's aquatic impacts minimal, FERC embodies the common adage that "the definition of insanity is doing the same thing over and over and expecting different results." In support of its claim that the Project is subject to a robust erosion and sediment control regime, FERC merely lists the same measures that proved unsuccessful on other FERC-regulated pipelines including the Mainline.[7] This mere listing, however, does not satisfy NEPA's requirement that an agency rationally assess whether the chosen measures will be effective, especially in the face of substantial contrary evidence. As the Ninth Circuit has explained,

> [a]n essential component of a reasonably complete mitigation discussion is an assessment of whether the proposed mitigation measures can be effective. *Compare Neighbors of Cuddy Mountain v.*

[7] Petitioners have repeatedly explained that the failures of the mitigation measures FERC relied on in the EIS for the Southgate Project are not limited to the Mainline, but rather have occurred on multiple other FERC-regulated projects subject to the same controls. *See* Pet'r Br. 32 n.4; Pet'rs' Draft EIS Comments at 28-31 [JA-____-____]; Rehearing Request at 42 [JA-____]. Neither FERC nor Mountain Valley have offered any response regarding those failures.

> *U.S. Forest Service*, 137 F.3d 1372, 1381 (9th Cir.1998) (disapproving an EIS that lacked such an assessment) *with Okanogan Highlands Alliance v. Williams*, 236 F.3d 468, 477 (9th Cir.2000) (upholding an EIS where "[e]ach mitigating process was evaluated separately and given an effectiveness rating"). The Supreme Court has required a mitigation discussion precisely for the purpose of evaluating whether anticipated environmental impacts can be avoided. *Methow Valley*, 490 U.S. at 351–52, 109 S.Ct. 1835(citing 42 U.S.C. § 4332(C)(ii)). A mitigation discussion without at least *some* evaluation of effectiveness is useless in making that determination.

S. Fork Band Council of W. Shoshone of Nevada v. U.S. Dep't of Interior, 588 F.3d 718, 727 (9th Cir. 2009) (emphasis original). *See also Colorado Env't Coal. v. Dombeck*, 185 F.3d 1162, 1173 (10th Cir. 1999) (explaining that "[i]t is not enough to merely list possible mitigation measures" and approving an EIS's mitigation discussion where the agency "identified nearly 150 project-specific mitigation measures, and, as evidenced by the numerical effectiveness ratings, separately analyzed and evaluated each"); *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 734 (9th Cir. 2001) (contrasting an inadequate discussion of mitigation with one in which the agency "conducted computer modeling to predict the quality and quantity of environmental effects, … ranked the probable efficacy of the different measures, detailed steps to achieve compliance should the measures fail, and identified the environmental standards by which mitigation success could be measured"); *High Sierra Hikers Ass'n v. U.S. Dep't of Interior*, 848 F. Supp. 2d 1036, 1054 (N.D. Cal. 2012) (explaining that a mitigation assessment must "provide supporting analytical data discussing the effectiveness of the relevant

mitigation measures") (citing *Sierra Club v. Bosworth*, 510 F.3d 1016, 1027 (9th Cir. 2007); *Wyoming Outdoor Council v. U.S. Army Corps of Engineers*, 351 F. Supp. 2d 1232, 1251–52 (D. Wyo. 2005).

Here, FERC did not evaluate, analyze, or study the effectiveness of its chosen mitigation measures, but merely asserted it. For example, FERC touts the requirements that Mountain Valley "install[] erosion and sediment controls (e.g., trench breakers and water bars) to inhibit water flow along the trench and right-of-way," and "monitor[] and adjust[] as needed erosion controls to account for weather conditions and heavy precipitation events …." FERC Br. 35. Other than two unconvincing justifications that Petitioners address below, FERC does not explain why these same measures that failed on the Mainline and on numerous other pipelines will be successful here.

FERC also claims that its inspectors "will review and ensure compliance with all mitigation measures and have the authority to 'stop work' immediately." FERC. Br. 36. FERC does not, however, offer any explanation for why its inspectors (as well as the third-party "compliance monitors" paid by Mountain Valley) failed repeatedly to ensure compliance on the Mainline or why FERC never exercised its "stop work" authority or took any other formal enforcement action, despite the widespread and significant failures and resulting aquatic impacts on that pipeline. In light of FERC's past pattern of non-existent enforcement, its

assurance that "if the certificate holder fails to adhere to the mandatory conditions of the certificate, the Commission stands ready to take any necessary and immediate corrective actions, including initiating enforcement proceedings to protect the public," FERC Br. 43, rings hollow.

Similarly, the agency notes that "Mountain Valley must file weekly status reports with the Commission to document compliance with erosion control requirements," FERC Br. 42, but fails to explain why it took no corrective action to dissuade future non-compliance despite Mountain Valley's status reports regularly documenting failed erosion and sediment control devices (and resulting aquatic impacts) along the Mainline. *See* Rehearing Request at 40 (providing examples of status reports documenting erosion and sedimentation failures) [JA-____].

Critically, FERC makes no attempt to rebut the specific critiques of the chosen mitigation measures identified in Petitioner's expert report. *See* Pet'r Br. 31-32. Mountain Valley seeks to minimize the impact of that report and impugn its PhD author by placing the word "expert" and her title of "Licensed Professional Geologist" in quotation marks, but does not actually allege that Dr. Dodds was not qualified to make the assessments contained in the report. *Compare* Mountain Valley Br. 18 *with* Dodds Report at 32–33 (*curriculum vitae* describing Dr. Dodds' substantial qualifications and experience). Rather, the company merely argues that FERC's staff—the qualifications of which go unstated beyond repeating FERC's

assertion of "experience monitoring pipeline construction for thousands of projects"—disagree. While FERC of course may rely on its own staff's well-founded opinions, the agency must offer more than a bare assertion of expertise unsupported by any analytical data to overcome specific critiques by a qualified expert. *See O'Reilly v. U.S. Army Corps of Engineers*, 2004 WL 1794531, *5 (E.D. La. 2004) ("The discretion afforded the Corps under the law to make the mitigation determination in the first instance does not mean that a decision is unimpeachable simply because the Corps has reached a particular conclusion. The Corps must provide enough analysis and data so that a reviewing court can insure that the Corps has complied with NEPA."). It's failure to do so here is fatal.

c. FERC's professed reasons for dismissing the overwhelming evidence from the Mainline that its chosen measures will not be effective are unconvincing

Lacking any analytical data to support its conclusion that the same measures that failed to prevent significant sedimentation impacts along the Mainline will be successful for the Southgate Project, FERC relies on two simplistic distinctions. Neither are sufficient to support its conclusions regarding the Southgate Project's likely impacts to aquatic resources.

First, FERC claims that the failures on the Mainline are unlikely to be repeated because the precipitation associated with some of the most egregious incidents in 2018 was an "outlier." FERC Br. 39. To support that assertion, it cites

rainfall data for a single county along the route of the Mainline (Roanoke County) and points to rainfall events in "September and October from Hurricanes Florence and Michael, and Subtropical Storm Alberto storms." EIS at 1-12 [JA-____].

That explanation, however, fails to account for the many significant sedimentation events that occurred outside the months of September and October 2018. Indeed, the hundreds of violations that formed the basis for Virginia's enforcement action occurred in May and June 2018. Pet'r Br. at 5. Those violations occurred not only in Roanoke County but also in Craig, Franklin, Giles, Montgomery, and Pittsylvania counties. *Id.*

Moreover, Petitioners repeatedly noted the settled science that climate change causes more frequent severe storms and abnormal precipitation patterns. Pet'r Br. 34–35. Although FERC characterizes Petitioners' source for that proposition as "generic," FERC Br. 40, the agency makes no attempt to rebut it. Nor could it, given that such "outlier" rain events continue to cause severe aquatic impacts along the Mainline. *See, e.g.*, Mike Tony, *Flooding effects of Mountain Valley Pipeline under scrutiny after weekend damage in central WV*, The Charleston Gazette, June 14, 2021[8] ("Environmental control devices installed

[8] *Available at* https://www.wvgazettemail.com/news/energy_and_environment/flooding-effects-of-mountain-valley-pipeline-under-scrutiny-after-weekend-damage-in-central-wv/article_8e4aba6a-7d27-5955-bdc6-0a6c40ea21fb.html.

along the route were overwhelmed by a large amount of rain in a short period of time, said Natalie Cox, spokeswoman for Equitrans Midstream Corp., the Canonsburg, Pennsylvania-based developer of the pipeline. Cox noted that rainfall averaged 4 to 6 inches across all areas of the route from Monday through Sunday."). *See also Gov't of Province of Manitoba v. Norton*, 398 F. Supp. 2d 41, 58 (D.D.C. 2005), *modified in part sub nom. Gov't of the Province of Manitoba v. Salazar*, 926 F. Supp. 2d 189 (D.D.C. 2013) ("Claimed reliance upon studies that fail to consider current environmental concerns and standards is, therefore, not persuasive evidence that the agency took a hard look at the problem.").

FERC's sole remaining justification for ignoring the past failures of its chosen mitigation measures is a citation to one clause in one sentence of the EIS stating that that the Southgate Project will traverse "flatter terrain" than the Mainline. FERC Br. 40-41; EIS at 1-12 [JA-____] ("Because 2018 was an unusual year yielding record breaking precipitation amounts and given the flatter terrain where the Southgate Project would be constructed, we do not anticipate the Southgate Project would experience the same issues with erosion and sediment control."). FERC does not present any data showing that the failures along the Mainline occurred only on steep slopes, nor any data demonstrating the effectiveness of its chosen measures on the slope gradients present on the Southgate Project. Moreover, FERC fails to acknowledge that the Southgate

Project, despite generally crossing "flatter terrain" than the Mainline, would nonetheless disturb significant areas of steep, highly erodible slopes. *See* Pet'r Br. 26 (citing EIS Appx. C.3, C.4); Dodds Report at 17 [JA-____] (noting one example of a crossing with a slope of 30-50 percent on either side of the stream for which FERC's mitigation measures would be inadequate to minimize impacts). FERC has thus failed to adequately support its conclusion that its mitigation measures will reduce the aquatic impacts in these areas to the minimal level claimed in the EIS. *See Nat'l Audubon Soc. v. Hoffman*, 132 F.3d 7, 17 (2d Cir. 1997) (explaining that "[i]n practice, mitigation measures have been found to be sufficiently supported when based on studies conducted by the agency" and emphasizing "the requirement that mitigation measures be supported by substantial evidence").

III. FERC Has Not Supported Its Conclusion That the Southgate Project and the Mainline Are Spatially and Temporally Separated So As to Preclude Significant Cumulative Impacts

a. FERC's conclusions based on the projects' spatial separation are contradicted by the record

FERC's conclusion that the distance between the Mainline and the Southgate Project's crossings of the same waterbodies preclude any significant cumulative impacts is arbitrary and capricious because it "runs counter to the evidence before the agency." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983). Contrary to FERC's contentions, FERC Br. 48–49, the presentation created by the City of Roanoke, which the City

labels a "briefing," does indeed show that significant amounts of sediment can travel much further than the 3.5 miles that FERC claims will separate any impacts of the Mainline from those of the Southgate Project. FERC Br. 48 (citing EIS at 4-243). As the City's presentation explains, that conclusion is derived from a study conducted by Mountain Valley's own consultants. *See* Rehearing Request, Ex. B at 7 [JA-____]. Mountain Valley's consultant's study concluded that just one segment of the Mainline, which does not include all of the pipeline's crossings in the Roanoke River drainage, would contribute over 1,000 tons of sediment per year, some of which would travel many miles downstream from the pipeline's nearest crossing location all the way to the Niagara Dam on the Roanoke River, and potentially many more miles downstream to Smith Mountain Lake. *Id.*[9]

Mountain Valley claims that FERC's conclusion that the aquatic impacts of the two projects would not overlap spatially is supported by FERC's "analysis of scientific evidence concerning turbidity plume dispersal." Mountain Valley Br. 19. But, as Petitioners explained in their opening brief, FERC's EIS does not contain any scientific analysis of turbidity plume dispersal. Pet'r Br. 38. FERC in the EIS identifies the types of "scientific evidence" that it would need to analyze, stating

[9] As, FERC correctly notes, the City of Roanoke briefing does not support the contention that sediment can travel "hundreds of miles" downstream. FERC Br. 49. But it need not do so to undermine FERC's conclusions that the impacts of the Mainline and Southgate projects will not overlap, given that the projects cross the same waterbody only 3.5 miles apart.

that factors such as "sediment loads, stream velocity, turbidity, bank composition, and sediment particle size … would determine the density and downstream extent of the turbidity plume." EIS at 4-49 [JA-____]. But the agency does not proceed to analyze any of those factors. Instead, it merely states, quite illogically, that although turbidity plumes can travel downstream "for a few miles," the two project's turbidity impacts would not overlap because the closest crossing locations are at least 3.5 (*i.e.*, "a few") miles apart. EIS at 4-242–4-243 [JA-____-____]. Unlike an agency's expert determinations based on actual scientific analysis, such "cursory statement[s]" and "conclusory terms" do not deserve deference and do not satisfy NEPA's requirement to take a hard look at cumulative impacts. *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1319–20 (D.C. Cir. 2014).

b. FERC's conclusions based on the projects' temporal separation are contradicted by the record

FERC claims that its determination that the impacts of the Mainline and the Southgate Project would not overlap in time was reasonable because construction on the Mainline was "largely complete" at the time FERC reached its conclusion. FERC Br. 50. But FERC fails to mention that the portion of construction yet to be completed consists primarily of waterbody crossings,[10] which in-stream activity

[10] *See* FERC Br. 12, 19 (explaining that Mountain Valley has been unable to complete most waterbody crossings due to the Court of Appeals for the Fourth Circuit twice rejecting the company's attempts to utilize the streamlined nationwide permit process to auhtorize its crossings).

FERC concluded would be the primary source of sedimentation contributing to cumulative impacts. *See* EIS at 2-242 [JA-____] ("In-stream activities, such as dredging, open-cut pipeline crossing techniques, and other in-stream activities have the greatest potential to contribute to cumulative impacts on surface water resources through increased turbidity.").

Additionally, FERC and Mountain Valley wrongly contend that any temporal overlap between the two projects' in-stream construction is mere "speculation." *See* FERC Br. 51; Mountain Valley Br. 23. FERC's Certificate Order makes such overlap likely by conditioning authorization to commence construction of the Southgate Project on the receipt of necessary federal permits and resumption of construction on the Mainline, which construction consists primarily of in-stream activities. Pet'r Br. 40 (citing Certificate Order, ¶9). While that condition does not make *certain* that construction affecting the same waterbodies will overlap temporally,[11] it nonetheless undermines FERC's unqualified conclusion that "the stream crossings would not occur within the same time frame due to the construction schedules for both projects." EIS at 4-243 [JA-____]. FERC has thus failed to provide a "realistic evaluation" of the projects'

[11] As Petitioners explained and FERC acknowledged, due to the long-term impacts of sediment deposition, construction in the same waterbody need not occur at the same time for cumulative impacts to aquatic resources to occur, such that significant impacts could result even if construction were temporally separated. Pet'r Br. 40–41. FERC's conclusion fails to account for this important fact.

potential cumulative impacts, such that its reliance on the EIS was arbitrary and capricious. *See 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)).

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court vacate FERC's orders and EIS and remand to FERC.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation in Fed. R. App. P. 32(a)(7)(B)(ii) because this brief contains 6,497 words, excluding the parts of the brief exempted by FRAP 32(f) 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.

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CERTIFICATE OF SERVICE

I hereby certify that on July 28, 2021, I electronically filed the foregoing Petitioners' Page-Proof Reply 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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