No. 20-2159

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

APPALACHIAN VOICES, ET AL.,
Petitioners,

v.

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

and

MOUNTAIN VALLEY PIPELINE, LLC,
Intervenor-Respondent.

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

PETITION FOR REHEARING EN BANC

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GROUNDS FOR REHEARING EN BANC

Mountain Valley Pipeline, LLC ("Mountain Valley") seeks rehearing en banc to secure uniformity in the Court's decisions and because the case presents questions of paramount importance. In this case, like many "pipeline cases" decided by this panel over the past four years, the panel has not faithfully applied the well-settled precepts governing review of agency action under the Administrative Procedure Act (APA). It instead has second-guessed and "fly-specked" the comprehensive Biological Opinion for the Mountain Valley Pipeline project (the "Project") prepared by the U.S. Fish & Wildlife Service (the "Service") without regard for this Court's precedent governing review under the arbitrary-and-capricious standard. The panel compounds that error by refusing to resolve fully briefed issues so that the agency can correct on remand any additional errors it might identify.

These errors present issues of supreme importance. The panel's persistent misapplication of the arbitrary-and-capricious standard of review in these "pipeline cases" has put this Court well outside the lane Congress created for courts under the APA. Precisely when energy infrastructure like the Project should be coming online to secure energy independence and support allies around the world, the panel's errors have put Mountain Valley and the agency in a perpetual loop, ordered to redo complex scientific work that is

neither arbitrary nor capricious, knowing that revised analyses will be subject to extralegal review when complete. The consequences of these errors could not be more dire—they jeopardize billions of dollars of completed construction, frustrate national security objectives, and imperil the very environmental resources the panel claims to protect. The full Court should rehear this case now and correct the panel's manifest errors.

BACKGROUND

Mountain Valley adopts by reference its discussion in the first two numbered points in the Background section of its petition for rehearing en banc in *Wild Virginia v. United States Forest Service*. No. 21-1039, ECF No. 94 at 2-6.

The Project crosses habitat for several species listed as threatened or endangered under the federal Endangered Species Act (ESA). So the Federal Energy Regulatory Commission (FERC) engaged the Service to evaluate the Project's impacts on those species. The Service issued its original biological opinion and incidental take statement for the Project in 2017. But after this Court vacated biological opinions and incidental take statements for the unrelated Atlantic Coast Pipeline in 2018 and 2019 and the Service listed the candy darter as endangered in 2018, FERC and the Service reinitiated consultation. In September 2021, after a full year of study and rigorous peer-review by independent experts at five federal agencies, the Service issued a

comprehensively revised Biological Opinion (BiOp) and Incidental Take Statement (ITS) for the Project.

The Service focused on the Project's potential to increase sediment delivery to streams during construction, which could affect two listed fish species—the Roanoke logperch and the candy darter. Like every other State and federal agency to study the problem,[1] the Service concluded that such effects would be minor and temporary—dissipating within six months to a year under expected conditions and lasting no longer than four years at worst.

To ensure it fully accounted for the potential for transient sediment to affect those species, the Service used state-of-the-art modeling tools to predict Project-related sediment increases in logperch and darter streams under extreme conditions. Even that "worst case" analysis predicted largely inconsequential sediment increases from the Project.[2] For example, no candy darter streams are expected to experience even momentary Project-related sediment increases > 20 mg/L, which the Service concluded darters must

[1] *See, e.g.*, FERC's Final Environmental Impact Statement for the Project (June 23, 2017), https://tinyurl.com/mvwbb6d9; West Virginia's registration for the Project under its construction stormwater permit for oil and gas projects, https://tinyurl.com/mr84krrf.

[2] The Service's full approach is concisely described in Mountain Valley's response brief. *See* ECF No. 67 at 6–12.

endure for hours before experiencing adverse effects. But, to be safe, the Service assumed that darters might experience some Project-mobilized sediment where three affected tributaries feed into darter streams, even though modeling showed otherwise.

Project opponents, who oppose the Project for reasons independent of its effects on species,[3] immediately petitioned this Court to review the Service's work. Petitioners challenged only the Service's findings and conclusions as to three species—the logperch, candy darter, and Indiana bat. And for logperch and candy darter, Project opponents never questioned the Service's evaluation of the Project's effects. Instead, they claimed the Service failed to adequately evaluate how other (non-Project) activities have affected the condition of these species in Project-impacted areas or may do so in the future.

The panel granted the petition. *Appalachian Voices v. U.S. Dep't of Interior*, 25 F.4th 259, 263–64 (4th Cir. 2022). Without applying the specific criteria for finding agency action arbitrary or capricious, the panel found the Service's

[3] *See, e.g.*, Sierra Club Policy Statement, Fracking for Natural Gas and Oil, https://tinyurl.com/mr3uecux ("There are no 'clean' fossil fuels. The Sierra Club is committed to eliminating the use of fossil fuels, including coal, natural gas and oil, as soon as possible. We must replace all fossil fuels …."); Appalachian Voices, Mountain Valley Pipeline, https://tinyurl.com/2p96uzdh ("Appalachian Voices has partnered with legal teams at Appalachian Mountain Advocates and Sierra Club to challenge MVP's actions in court to … stop this ill-conceived, dangerous and unneeded project.").

evaluation of the "environmental baseline" and "cumulative effects" for logperch and candy darter to be "inadequate." *Id.* at 272. Based on these errors, the panel concluded that the Service's jeopardy analysis for those species was inadequate, too. *Id.* at 278–79.

Even though the panel found fault only with the Service's study of logperch and candy darter, it vacated the BiOp and ITS in their entirety. The panel declined to address several other issues Petitioners raised and the parties briefed. *Id.* at 266 n.4, 280 n.16, 283. Instead, it invited Project opponents to raise those issues and any others in a subsequent challenge to a re-issued biological opinion for the Project. *Id.* at 283. And, for good measure, the panel offered its unsolicited view that the Project probably will jeopardize the continued existence of the candy darter. *Id.* at 282–83.

ARGUMENT

I. The panel disregarded Supreme Court and Fourth Circuit precedent governing judicial review of agency action under the APA.

A. The highly deferential arbitrary-and-capricious standard

Under the APA, courts may set aside an agency action only if it is arbitrary, capricious, or contrary to law. This standard is deferential. "[A] court may not substitute its own policy judgment for that of the agency." *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021). That deference is particularly appropriate "with environmental statutes … [where] the regulatory

framework is exceedingly complex and requires sophisticated evaluation of complicated data." *Crutchfield v. County of Hanover*, 325 F.3d 211, 218 (4th Cir. 2003) (internal quotation marks omitted). Indeed, the Court is at its most deferential when the agency action involves "complex predictions within the [agency]'s area of special expertise." *Nat'l Audubon Soc'y v. U.S. Army Corps of Eng'rs*, 991 F.3d 577, 581 (4th Cir. 2021). Accordingly, the Court does not "'sit as a scientific body'" in such cases, "'meticulously reviewing all data under a laboratory microscope.'" *Id.* at 583 (quoting *Natural Res. Def. Council, Inc. v. EPA*, 16 F.3d 1395, 1401 (4th Cir. 1993). Nor may courts "'flyspeck' an agency's environmental analysis, looking for any deficiency, no matter how minor." *Nat'l Audubon Soc'y v. Dep't of Navy*, 422 F.3d 174, 186 (4th Cir. 2005). Instead, the Court "simply ensures that the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision." *Prometheus Radio*, 141 S. Ct. at 1158.

Applying this standard, a court may set aside agency action as arbitrary or capricious only where the agency:

1. "has relied on factors which Congress had not intended it to consider";
2. "*entirely* failed to consider an important aspect of the problem";
3. "offered an explanation for its decision that runs counter to the evidence before [it]"; or

4. "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."

Nat'l Ass'n of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 658 (2007) (emphasis added). Conversely, an agency's action should *not* be set aside because the agency might have "explore[d] a subject more deeply … [or] discuss[ed] it more thoroughly." *Sierra Club, Inc. v. United States Forest Serv.*, 897 F.3d 582, 597 (4th Cir. 2018).[4] Nor should an agency's decision be set aside if it is of "less than ideal clarity," so long as "the agency's path may reasonably be discerned." *Sanitary Bd. of City of Charleston v. Wheeler*, 918 F.3d 324, 333 (4th Cir. 2019) (citation omitted).

The panel did not apply this standard in reviewing the Service's evaluation of the environmental baseline and cumulative effects for logperch and candy darter.

B. The panel violated Supreme Court and Fourth Circuit precedent in finding the Service's evaluation of environmental baseline and cumulative effects arbitrary and capricious.

ESA regulations require the Service to put the effects of a proposed action in context of other past and future actions. Specially, the Service must consider a Project's effects in light of the "environmental baseline"—the

[4] *See also Prometheus Radio*, 141 S. Ct. at 1160 ("The APA imposes no general obligation on agencies to conduct or commission their own empirical or statistical studies.").

condition of the species in light of the effects of *past* and *ongoing* actions—and then account for the effects on species of *future nonfederal* actions[5] that may cumulate with those of the Project. 50 C.F.R. §402.14(g)(4). To evaluate the environmental baseline, the agency need not catalog other activities or subject them to their own jeopardy analyses, a point even this panel concedes. *Appalachian Voices*, 25 F.4th at 273. But the Service must understand the condition of the species where it would feel a project's effects.

The Service here described at length the condition of logperch and candy darter in the Project's action area, drawing on the substantial available science studying the status and resilience of these species in these locations. For logperch, the Service discussed the population size and stability of the two populations the Project affects—one in the Roanoke River and one in the Pigg River. JA-47–49. It identified the proposed waterbody crossings within the action area that contain suitable logperch habitat, described that habitat, and the expected level of species use in those areas. JA-69–71. It further explained how the microhabitats in the Roanoke and Pigg rivers differ, with the Roanoke having the highest gradient, largest substrates, and the highest bottom velocities in riffle microhabitats, while the Pigg is most heavily embedded with

[5] Federal actions would be subject to their own ESA reviews.

silt. JA-72. The Service explained that, unlike some areas within the Roanoke and Pigg rivers, the portions the Project would affect are not impaired for benthic macroinvertebrates, a food source for logperch. JA-72, 100. And the Service described the causes of logperch decline within the action area, including the causes of habitat degradation. JA-72–73.

Based on these findings, the Service emphasized the importance of the Roanoke and Pigg rivers, which "provide feeding, breeding, and sheltering for the [logperch]." JA-73. And, "[b]ecause these systems cover a large geographic extent, contain an estimated large population, and run a lower risk of being susceptible to extirpation (Roberts et al. 2016b) we expect they underpin the recovery of the species." *Id.*

The Service's discussion of the candy darter's condition within the action area is similarly robust. The Project affects two populations of candy darter—one in Stony Creek in the Middle New River watershed, and one in the Upper Gauley River. JA-90. The Service noted that, "[b]ased on a review of physical habitat metrics, non-native competition metrics, and population demographic metrics," it recently concluded that the populations in Stony Creek and the Gauley River were "generally secure," and thus "*are considered so in the action area* for the purposes of this Opinion." JA-75 (emphasis added). Following this review, the Service concluded that "[t]he *role of the action area* with regards

to conservation/recovery of the species is that the *project area* provides habitat for feeding, breeding, and sheltering of [candy darter] in two metapopulations." *Id.* (emphases added). The Service then explained that the habitat in the Upper Gauley supports feeding, breeding, and sheltering for "the majority of extant [candy darter] populations [within the Gauley River metapopulation] with a 'good' population condition score." *Id.* In the expert judgment of the scientists at the Service, this means "their continued existence and connectivity within the watershed is critical to the recovery of the species." *Id.* The Service further explained the importance of the darter population in Stony Creek. It is the only population in the Middle New and Upper New River metapopulations with a "good" condition score and, like the Upper Gauley population, is "relatively free from hybridization" and thus is "essential to the recovery of the species." *Id.*

The panel held this discussion to be "inadequate" because the Service did not dive deeper into the specific activities that have adversely affected these species. For example, the panel faulted the agency for not quantifying the degree of woody-debris loss in the watersheds of affected streams. *Appalachian Voices*, 25 F.4th at 272–74. And it seems to suggest that the agency needed to fully describe benthic conditions over every square inch of the Project's action area. *Id.* at 274–75.

That is textbook fly-speckery. Even if these details would have made the agency's discussion richer and more textured, their absence does not make the BiOp arbitrary or capricious.

Worse, the panel's criticisms in key respects are just wrong. For example, the panel pointedly accuses the agency of not specifically acknowledging that the "lower reaches of Stony Creek—precisely where the pipeline will cross … dry up periodically" due to the effects of a limestone mine. *Id.* at 273. That is wrong in multiple respects. Initially, Mountain Valley will complete the crossing using a conventional bore, so no effects from instream work are expected at that location. And the Service concluded that sediment from upland Project areas would be insignificant or discountable and would not affect areas downstream precisely because Stony Creek dries up periodically. JA-91–92. The agency was aware of and accounted for the effects of the limestone mine. The panel appears to have simply overlooked that discussion. That likely is because the judges are not experts and cannot explore these issues to the same degree as the agency. And that is why the APA limits the scope of judicial review.

Significantly, the panel does not—because it could not—find that the Service considered factors Congress put off-limits or rendered conclusions about the condition of logperch and candy darter that were implausible or

contrary to the evidence before the agency. Nor does the panel conclude that the Service "entirely failed" to consider the condition of the species or its habitat. Ultimately, the panel's only critique is that the Service did not study the question more closely or in the way the panel would have preferred. That is never enough to make agency action arbitrary or capricious. *Sierra Club*, 897 F.3d at 597; *Wheeler*, 918 F.3d at 333.

C. The panel's review of the Service's evaluation of cumulative effects is wholly untethered from the law.

The panel's review of the agency's evaluation of cumulative effects is even worse than its review of the agency's consideration of the environmental baseline. The definition of "cumulative effects" in the ESA regulations captures the effects of a narrow category of activities. It focuses only on future (not on-going) non-federal activities that will cumulate with the Project's effects on listed species. 50 C.F.R. §402.02. The agency engaged that question and—unsurprisingly, given the remote areas the Project traverses—identified few activities that qualified. JA-141.

The panel's critique of this analysis is pure speculation. It posits that, because the Project's Final Environmental Impact Statement (FEIS) identified more activities in its analysis of cumulative effects, "the action area is likely to be impacted by numerous non-Federal activities" the Service did not discuss. *Appalachian Voices*, 25 F.4th at 276. But the ESA cumulative-effects regulation

is not the same as NEPA's. The ESA regulation directs the agency to answer a different and much narrower question than NEPA directs FERC to answer,[6] so the BiOp naturally would capture a narrower list of activities. Tellingly, the panel identifies no specific activity addressed in the FEIS that satisfies the ESA's narrow cumulative-effects definition. It just speculates that there must be one.

The panel here identified no error at all, let alone one that rendered the Service's analysis arbitrary or capricious.

D. The panel substituted its judgment for that of the agency in evaluating potential effects of climate change.

The panel also faults the Service for inadequately evaluating the effects of climate change. But here, too, the panel disregards the actual legal rules governing the Service's review.

The panel confidently asserts at the outset of its discussion that it need not bother deciding whether effects of climate change should be evaluated as part of the environmental baseline or if they qualify as cumulative effects. Such distinctions are immaterial for this panel, because it knows that such

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[6] *See Conservation Cong. v. U.S. Forest Serv.*, 720 F.3d 1048, 1055 (9th Cir. 2013) ("In essence, [plaintiff] demands that Defendants conduct a more extensive, NEPA-like cumulative impacts analysis. But NEPA and ESA call for different regulatory review, and we must defer to the procedural mechanisms established by the implementing agency.").

effects must be considered somewhere. *Appalachian Voices*, 25 F.4th at 270–71, 276. Nothing better demonstrates how far the panel strayed from the APA and this Court's precedent.

Climate change is only important if it causes effects the regulations direct the agency to consider. *See Or. Nat. Res. Council v. Thomas*, 92 F.3d 792, 798 (9th Cir. 1996) ("Whether an agency has overlooked 'an important aspect of the problem,' … turns on what a relevant substantive statute makes 'important.' In law, unlike in religion or philosophy, there is nothing which is necessarily important or relevant."). Under the ESA regulations, the future effects of climate change on logperch and candy darter, which the panel says the Service failed to consider,[7] are important only if they would cumulate with those of the Project, which are fleeting—a minor increase in suspended sediment (under a worst case scenario) during construction that results in no degradation of existing habitat. Nothing in the record demonstrates that any specific climate-change effect is reasonably certain to occur during the short period when Project effects would be felt.

[7] Existing effects of climate change on logperch and candy darter are part of the environmental baseline. As discussed above, the Service evaluated the conditions of the logperch and candy darter populations the Project affects. That analysis is not arbitrary or capricious because the agency might have provided more in-depth analysis of specific factors, like climate change, that influence the current condition of the species.

To be sure, the agency was aware of effects associated with climate change, such as increased water temperatures and increased environmental stochasticity, that might affect these species. It referenced substantial studies that identify and discuss such effects. JA-48, 53, 1441–42, 1612, 1627.[8] But the regulations do not direct the agency to comprehensively analyze in every biological opinion the effects on species of *all* future activities. They instead require the agency to consider only those activities the regulations say are important—non-federal activities reasonably certain to cause effects that will cumulate with those of the Project. And the panel never finds that climate-change effects are reasonably certain to occur within the very limited period of time the Project may affect logperch and candy darter. Indeed, it never even engages the question.

The panel may consider climate change an important problem that deserves greater study as it relates to these fish species. But its policy preferences do not control.

[8] The panel, of course, subjects those studies to the strict-scrutiny review it has invented for pipeline cases. *Appalachian Voices*, 25 F.4th at 276–78.

II. The panel's erroneous decision presents issues of exceptional importance.

The panel's decision presents at least four interrelated issues of exceptional importance.

1. By persistently misapplying Supreme Court and Circuit precedent governing review of agency action in "pipeline cases," this panel has assumed a role well outside the one Congress reserved for Courts in the APA. And by both second-guessing the Service's judgment regarding how deeply to analyze questions and then casually disregarding the actual legal standards prescribed by law, the panel has left Mountain Valley and the relevant agencies to guess what might be required to cure errors on remand. What's more, although it vacated the BiOp and ITS in their entirety, the panel refused to resolve fully briefed issues and invited Project opponents to raise them again in challenges to re-issued authorizations. All of this seems designed to maximize the panel's flexibility to rule against revised actions taken on remand. This perversion of the judicial role demands correction.

2. The Natural Gas Act charges FERC with weighing the pros and cons of major infrastructure like the Project and deciding whether it would serve the public interest. That agency repeatedly has found the Project to be in the nation's interest, and the wisdom of that decision has been validated by world events. While the U.S. and its allies have imposed heavy sanctions on Russia

for its norm-shattering invasion of Ukraine, they have tiptoed around one category of Russian commerce—Russia's exports of natural gas, on which many allies regrettably depend. And because the U.S. has now banned new shipments of Russian natural gas, domestic supplies will become all the more important to the nation's energy needs. Completing the Project indisputably would provide a meaningful step toward building out U.S. oil and gas infrastructure, freeing up additional natural gas for domestic consumption and export to Europe.

If the panel's manifest errors are allowed to stand, that objective will be frustrated. Obviously, the decision here prevents construction in the near term. And this panel's consistent pattern of extralegal review, if uncorrected, will imperil future actions too.

3. The decision actually puts at risk the very resources the panel seems so concerned about protecting. Project construction is already complete, save for final restoration, in nearly all areas that affect logperch and candy darter. The panel's erroneous decision forces these areas to remain in a disturbed condition for at least another year. Environmental regulators in both Virginia

and West Virginia have concluded that this poses substantial risk for the environment.[9]

4. The economic stakes are staggering. Mountain Valley has invested more than $5 billion in the Project to date, and the panel's decision in this case alone means the project will incur at least another $250 million.[10]

CONCLUSION

The Court should grant rehearing en banc.

Respectfully submitted,

/s/ George P. Sibley, III

[9] Declaration of Melanie D. Davenport, *Sierra Club v. State Water Control Bd.*, No. 21-2425, ECF No. 33-2, ¶¶ 2–6 (4th Cir. Jan. 11, 2022); Declaration of Jeremy Bandy, *Sierra Club v. West Virginia Dep't of Envtl. Prot.*, No. 22-1008, ECF No. 32-5, ¶¶ 2–5 (4th Cir. Jan. 19, 2022).

[10] Declaration of Robert J. Cooper, *Sierra Club v. State Water Control Bd.*, No. 21-2425, ECF No. 34-9, ¶16 (Jan. 11, 2022).

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 40(b)(1) because the portion of the brief subject to that rule is 3,888 words, according to the count of Microsoft Word, and therefore does not exceed the 3,900-word limit.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. 32(a)(6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font.

/s/ George P. Sibley, III
George P. Sibley, III

CERTIFICATE OF SERVICE

I hereby certify that on March 11, 2022, I electronically filed this document with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ George P. Sibley, III
George P. Sibley, III