ORAL ARGUMENT NOT YET SCHEDULED

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

APPALACHIAN VOICES, *et al.*, Petitioners	)	
v.	)	
FEDERAL ENERGY REGULATORY COMMISSION, Respondent	)	No. 17-1271 (Consolidated with Nos. 18-1002, 18-1175, 18-1177, 18-1186, 18-1216, and 18-1223)

On Petition for Review of Orders of the Federal Energy Regulatory Commission, 161 FERC ¶ 61,043 (October 13, 2017) and 163 FERC ¶ 61,197 (June 15, 2018)

PETITIONERS' JOINT 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, Chesapeake Climate Action Network, Sierra Club, West Virginia Rivers Coalition, Wild Virginia, Blue Ridge Environmental Defense League, Preserve Montgomery County, VA, Inc., Elizabeth Reynolds, Michael Reynolds, Steven Vance (in his official capacity as Tribal Historic Preservation Officer of the Cheyenne River Sioux Tribe), Ben Rhodd (in his official capacity as Tribal Historic Preservation Officer of the Rosebud Sioux Tribe), Preserve Craig, Inc., Protect Our Water, Heritage, Rights, Indian Creek Watershed Association, Greater Newport Rural Historic District Committee, Jerry and Jerolyn Deplanes, Karolyn Givens, Frances Collins, Michael Williams, Miller Williams, Tony Williams, Bold Alliance, Bold Education Fund

Respondent: Federal Energy Regulatory Commission

Respondent-Intervenors: Mountain Valley Pipeline, LLC; EQT Energy, LLC; Equitrans, L.P.; Consolidated Edison Company of New York, Inc.; NextEra Energy Marketing, LLC; WGL Midstream, Inc.

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

Rule 26.1 Disclosure Statement

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

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.

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

West Virginia Rivers Coalition is a statewide non-profit organization dedicated to conserving and restoring West Virginia's exceptional rivers and streams.

Wild Virginia is a statewide organization that works to preserve and support the complexity, diversity and stability of natural ecosystems by enhancing connectivity, water quality and climate in the forests, mountains, and waters of

Virginia.

Blue Ridge Environmental Defense League certifies that it has no parent company, and there are no parent companies that have a ten percent or greater ownership interest in them. Blue Ridge Environmental Defense League, a corporation organized and existing under the laws of the State of North Carolina, is a regional, community-based, non-profit environmental organization founded to serve the principles of earth stewardship, environmental democracy, social justice, and community empowerment.

Preserve Montgomery County, VA, Inc. certifies that there are no parent companies that have a ten percent or greater ownership interest in it. PMCVA is a non-stock Virginia corporation organized to provide public awareness and education for the citizens of Montgomery County, Virginia, regarding local issues related to Montgomery County, Virginia PMCVA is fiscally sponsored by Virginia Organizing, a Virginia non-stock corporation that is exempt from federal income tax under Section 501(c)(3) of the Internal Revenue Code.

The Greater Newport Rural Historic Committee certifies that its members manage "Preserve Newport Historic Properties" and that there are no parent companies that have a ten percent or greater ownership in it. Preserve Newport Historic Properties is a non-stock Virginia Corporation organized to focus on historic preservation and is exempt from federal income tax under Section

501(c)(3) of the Internal Revenue Code.

The Bold Alliance, a 501(c)(4) organization formed under Nebraska Law, advocates on behalf of impacted landowners and the general public to stop the use of eminent domain for private gain. Bold Alliance has no parent companies, and there are no publicly held corporations that have a ten-percent or greater ownership interest in Bold Alliance.

The Bold Education Fund is a 501(c)(3) organization formed under Nebraska law to educate the public about eminent-domain issues and the protection of water and climate. The Bold Education Fund includes as members landowners in the Appalachia Region whose property will be subject to eminent domain by the MVP and ACP Projects. Bold Education Fund has no parent companies, and there are no publicly held corporations that have a ten-percent or greater ownership interest in Bold Education Fund.

Indian Creek Watershed Association, Preserve Craig, Inc., and **Preserve Our Water, Heritage, Rights**, 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.

Preserve Craig, Inc. is a non-profit corporation dedicated to studying, protecting, and educating others about the natural, historical, and cultural resources of Craig County, Virginia and the surrounding area.

The *Indian Creek Watershed Association* is a nonprofit corporation with a mission to preserve and protect Monroe County, West Virginia's abundant, pure water.

Preserve Our Water, Heritage, Rights, is an unincorporated coalition in Virginia and West Virginia dedicated to protecting the water, local ecology, heritage, land rights, and human rights of individuals, communities, and regions from harms related to the expansion of fossil fuel infrastructure.

B. Rulings Under Review

The following orders issued by Respondent Federal Energy Regulatory Commission are under review:

1. *Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043 (October 13, 2017) ("Certificate Order") [JA-___]
2. *Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197 (June 15, 2018) ("Rehearing Order") [JA-___]

C. Related Cases

This case has not previously been before this Court or any other court.

On January 8, 2018, Appalachian Voices, Chesapeake Climate Action Network, Sierra Club, West Virginia Rivers Coalition, and Wild Virginia filed a Petition for a Writ Staying the FERC Order (Case No. 18-1006). This Court denied the petition on February 2, 2018.

In a case involving some of the same petitioner groups and Mountain Valley Pipeline, LLC as respondent-intervenor, the Fourth Circuit recently vacated the U.S. Forest Service's and Bureau of Land Management's authorizations for this project. The court held that the analysis of sedimentation in FERC's Environmental Impact Statement was inadequate to satisfy the U.S. Forest Service's National Environmental Policy Act obligations in connection with that agency's authorization of the project across National Forest lands. *Sierra Club v. U.S. Forest Serv.*, 897 F.3d 582 (4th Cir. 2018).

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Blue Ridge Petitioners	Blue Ridge Environmental Defense League, Preserve Montgomery County, VA, Inc., Elizabeth Reynolds, Michael Reynolds, Steven Vance (in his official capacity as Tribal Historic Preservation Officer of the Cheyenne River Sioux Tribe), and Ben Rhodd (in his official capacity as Tribal Historic Preservation Officer of the Rosebud Sioux Tribe)
Bold Petitioners	Bold Alliance and Bold Education Fund
Certificate	certificate of public convenience and necessity
Certificate Order	*Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043 (October 13, 2017)
the Commission	Federal Energy Regulatory Commission
Craig Petitioners	Preserve Craig, Inc., Protect Our Water, Heritage, Rights, and Indian Creek Watershed Association
EIS	Environmental Impact Statement
EPA	U.S. Environmental Protection Agency
FAA	Federal Aviation Authority
FERC	Federal Energy Regulatory Commission
Forest Service	United States Forest Service
GHGs	greenhouse-gas emissions

Glick Dissent	Rehearing Order (Glick, Comm'r, *dissenting*)
JA	Joint Appendix
Karst Erosion Plan	*Karst-specific Erosion and Sediment Control Plan*
Mountain Valley	Mountain Valley Pipeline, LLC
NCUC	North Carolina Utilities Commission
NEPA	National Environmental Policy Act
Newport Petitioners	Greater Newport Rural Historic District Committee, Jerry and Jerolyn Deplanes, Karolyn Givens, Frances Collins, Michael Williams, Miller Williams, and Tony Williams
NHPA	National Historic Preservation Act
Policy Statement	Certification of New Interstate Natural Gas Pipeline Facilities, 88 FERC ¶61,227, 61,747 (Sept. 15, 1999), *clarified*, 90 FERC ¶61,128 (Feb. 9, 2000), *further clarified*, 92 FERC ¶61,094, 61,373 (July 28, 2000)
the Project	Mountain Valley Pipeline
Rehearing Order	*Mountain Valley Pipeline, LLC,* 163 FERC ¶ 61,197 (June 15, 2018)
Sierra Petitioners	Appalachian Voices, Chesapeake Climate Action Network, Sierra Club, West Virginia Rivers Coalition, Wild Virginia
State Officer	State Historic Preservation Officer
Stay Mot.	Petitioners Appalachian Voices, *et al.*'s Motion for Stay, Doc. No. 1741782

Tribal Officer Tribal Historic Preservation Officer

JURISDICTIONAL STATEMENT

In accordance with 15 U.S.C. § 717r(b), Appalachian Voices, Chesapeake Climate Action Network, Sierra Club, West Virginia Rivers Coalition, and Wild Virginia (collectively "Sierra Petitioners"); Blue Ridge Environmental Defense League, Preserve Montgomery County, VA, Inc., Elizabeth Reynolds, Michael Reynolds, Steven Vance (in his official capacity as Tribal Historic Preservation Officer of the Cheyenne River Sioux Tribe), and Ben Rhodd (in his official capacity as Tribal Historic Preservation Officer of the Rosebud Sioux Tribe) (collectively "Blue Ridge Petitioners"); Preserve Craig, Inc., Protect Our Water, Heritage, Rights, and Indian Creek Watershed Association (collectively "Craig Petitioners"); Greater Newport Rural Historic District Committee, Jerry and Jerolyn Deplanes, Karolyn Givens, Frances Collins, Michael Williams, Miller Williams, and Tony Williams (collectively "Newport Petitioners"); and Bold Alliance and Bold Education Fund (collectively "Bold Petitioners"), who were intervenors in the proceedings below,[1] seek review of two orders issued by the Federal Energy Regulatory Commission ("FERC" or "the Commission").

The first order, issued on October 13, 2017 under Section 7 of the Natural Gas Act ("the Act"), 15 U.S.C. § 717f(c), authorized Mountain Valley Pipeline,

[1] Petitioners Vance and Rhodd sought to intervene but FERC denied their motion. FERC's denial was improper, as addressed in Section VI.B, *infra*.

LLC ("Mountain Valley") to construct and operate the Mountain Valley Pipeline ("Project"). *See Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043 (October 13, 2017) ("Certificate Order") [JA-___].[2] Petitioners timely filed requests for rehearing and motions to stay the effectiveness of the Certificate Order. [JA-___], [JA-___], [JA-___], [JA-___], [JA-___]. On December 13, 2017, the Commission Secretary issued an Order Granting Rehearing for Further Consideration, or "tolling order," that purported to grant rehearing for the limited purpose of further consideration. [JA-___]. Because the tolling order was invalid such that the requests for rehearing were denied by operation of law pursuant to 15 U.S.C. § 717r(a), Sierra Petitioners and Blue Ridge Petitioners considered the Certificate Order to be final and timely filed petitions for review.[3] FERC filed a motion to dismiss for lack of jurisdiction, arguing that the Certificate Order was not final. On

[2] "[JA-___]" refers to pages of the Joint Appendix.

[3] Those Petitioners considered the Secretary's tolling order invalid because, under 15 U.S.C. § 717r(a), only *the Commission* may act on requests for rehearing; the Act explicitly authorized FERC to delegate certain functions to its Secretary and staff, s*ee, e.g.*, 42 U.S.C. §§ 7171(g), 717m(c), 717n(e), but did not authorize the delegation of authority to act on rehearing requests, demonstrating "a legislative intention to withhold the latter." *Cudahy Packing Co. of La. v. Holland*, 315 U.S. 357, 364 (1942). Though FERC issued a regulation delegating tolling authority to the Secretary, 18 C.F.R. § 375.302(v), its contemporaneous interpretation of that regulation made clear that such authority applies only to "stand alone" requests for rehearing and not those, like Petitioners', that are combined with a motion for stay. Delegation of Authority to the Secretary, 60 Fed. Reg. 62,326, 62,327 (Dec. 6, 1995).

February 2, 2018, the Court ordered that those motions be referred to the merits panel, and directed the parties to address the jurisdictional issues in their briefs. Order, Doc. No. 1716262.

On June 15, 2018, FERC issued an order denying Petitioners' rehearing requests and motions for stay.[4] No party disputes that FERC has issued a final order in the proceedings below and that FERC's Certificate Order is now properly subject to judicial review in this Court pursuant to Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717(b).[5] Following FERC's issuance of its Rehearing Order, all Petitioners timely filed petitions for review.

STATUTES AND REGULATIONS

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

STATEMENT OF ISSUES

1. Whether FERC's finding under the Natural Gas Act that the Project is required by the public convenience and necessity is supported by substantial evidence where FERC relied solely on Mountain Valley's precedent agreements with its own corporate affiliates to establish the public benefits of the Project and failed to meaningfully weigh adverse impacts to landowners and communities, in

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[4] Order on Rehearing, *Mountain Valley Pipeline, LLC,* 163 FERC ¶61,197 (June 15, 2018) ("Rehearing Order") [JA-___].

[5] Because the Court's jurisdiction over the Certificate Order is no longer in question, Petitioners do not further address the jurisdictional issues in this brief.

contravention of its own polices.

2. Whether FERC's approval of a fourteen percent return on equity is supported by substantial evidence where FERC relied exclusively on its approval of the same rate for past projects without determining whether the projects' financial risks were equivalent.

3. Whether Mountain Valley's exercise of eminent domain pursuant to FERC's conditional Certificate Order violates the Natural Gas Act where Mountain Valley failed to maintain permits that federal law and the Certificate require, the Certificate imposed conditions, such as holding certain permits, that were conditions precedent to the determination of public convenience and necessity, and neither FERC nor the district courts have confirmed Mountain Valley's ability to pay for the takings related to the Project.

4. Whether FERC's and the judiciary's refusal to consider landowners' statutory and constitutional arguments before the taking of their property—or to provide a prompt post-deprivation hearing on those arguments—violates landowners' procedural due process rights.

5. Whether FERC's failure to adequately analyze downstream greenhouse-gas effects from burning 2.0 billion cubic feet per day of gas for several decades, including their significance and cumulative impact, is arbitrary and capricious and violates the National Environmental Policy Act ("NEPA"); and

whether FERC's refusal to weigh these impacts in its public interest determination violates the Natural Gas Act.

6. Whether FERC's failure to support its conclusion that Mountain Valley's erosion and sedimentation control measures would be effective in the steep, highly erodible terrain crossed by the Project, and its failure to consider increased sedimentation from permanent changes to vegetation, renders its conclusion that the Project would not have significant adverse impacts on water quality arbitrary and capricious and violates NEPA.

7. Whether FERC's failure to adequately analyze the Project's impacts on groundwater recharge in karst terrain or assess the effectiveness of specific measures to protect groundwater quality and quantity renders its conclusion that the Project would not have significant adverse impacts on karst groundwater arbitrary and capricious and violates NEPA.

8. Whether FERC's failure to adequately analyze the Project's impacts on residents' cultural attachment to the landscape of Peters Mountain, an area of well-documented historical and cultural significance, renders its conclusion that the Project would not have significant adverse impacts on cultural attachment arbitrary and capricious and violates NEPA.

9. Whether FERC's failure to adequately evaluate all proposed feasible alternative routes for the pipeline, such as Hybrid Alternative 1A, violates NEPA's

requirement that the EIS rigorously explore and objectively evaluate all reasonable alternatives.

10. Whether FERC's issuance of the Certificate Order prior to the completion of the National Historic Preservation Act ("NHPA") Section 106 process violates the NHPA.

11. Whether FERC's failure to identify the Rosebud and Cheyenne River Sioux Tribes as Tribes attaching traditional religious and cultural importance to the area that will be affected by the Project, and its failure to consult with those tribes on the pipeline's effects on these sites violates the NHPA and the implementing regulations of the Advisory Council on Historic Preservation.

12. Whether FERC erred in denying the motions to intervene of the Tribal Historic Preservation Officers seeking to protect their tribes' consultation rights under the NHPA.

13. Whether FERC's refusal to grant consulting party status to persons and organizations who intervened in the FERC proceeding, forcing parties to choose between protecting their demonstrated interests through the Section 106 process and protecting their interests through intervening as a party in the FERC proceeding, violates the NHPA and its implementing regulations, and the Due Process Clause of the U.S. Constitution.

14. Whether FERC's refusal to allow Newport Petitioners to meaningfully participate as consulting parties to develop alternative routes that would avoid adverse effects on their historic farm complexes, and the Greater Newport Rural Historic District as a whole, violates Section 106 of the NHPA.

15. Whether FERC's determination of the "area of potential effects" under the NHPA is deficient because FERC failed to the address the adverse effects for the two pipelines being sought by Mountain Valley in contract offers to landowners to purchase easements, although the Certificate Order only grants Mountain Valley an easement to construct one pipeline.

16. Whether FERC's failure to address Section 4(f) of the Department of Transportation Act and evaluate the potential use of the Newport Petitioners' property "as early as practicable" when studying proposed alternative routes violates the Department of Transportation Act.

STATEMENT OF THE CASE

In October 2015, Mountain Valley Pipeline, LLC ("Mountain Valley") filed an application with FERC for a certificate of public convenience and necessity for the Mountain Valley Pipeline ("the Project"). [JA-___]. The Project involves constructing and operating approximately 303 miles of new 42-inch-diameter gas pipeline and associated facilities, including three new compressor stations, in West

Virginia and Virginia. The Project "is designed to transport about … 2.0 billion cubic feet per day" of gas. EIS at ES-2 [JA-___].

FERC issued a Draft Environmental Impact Statement ("Draft EIS") on September 16, 2016. On October 19, 2016, various Petitioners filed comments regarding the need for a revised or supplemental Draft EIS, [JA-___.], and in December 2016, various Petitioners filed responsive comments on the Draft EIS. *See, e.g.*, [JA-___], [JA-___], [JA-___].

On June 23, 2017, FERC issued a Final EIS. [JA-___]. In the EIS, FERC concluded that the pipeline would not significantly impact surface waters or groundwater, aquatic resources, or cultural attachment. EIS at 4-115, 4-149, 4-224, 4-476 [JA-___, ___, ___, ___]. FERC estimated the greenhouse-gas emissions from burning 2.0 billion cubic feet of gas per day but, despite the magnitude of these emissions, FERC's EIS addressed downstream effects in a single conclusory paragraph devoid of supporting data or reasoned analysis. EIS at 4-620 [JA-___].

On September 18, 2017, several Petitioners also filed comments notifying FERC of new authority and requesting a supplemental EIS. [JA-___].

On October 13, 2017, FERC issued its Certificate Order granting Mountain Valley's application. [JA-___]. In evaluating the public benefits of the Project, FERC relied exclusively on the fact that Mountain Valley has entered into contracts for pipeline capacity, known as "precedent agreements," with five

shippers, all of whom are corporate affiliates of Mountain Valley, for the Project's full design capacity. *Id.* at ¶41 [JA-___]. FERC stated that it did not give additional scrutiny to the affiliate precedent agreements, despite evidence in the record demonstrating that such agreements are not reliable indicia of market demand. *Id.* at ¶45 [JA-___]. As part of its rate determination, FERC approved Mountain Valley's requested fourteen percent return on equity. *Id.* at ¶82 [JA-___]. Commissioner LaFleur dissented, noting that end users had been identified for only thirteen percent of the Project's capacity and explaining that "evidence of the specific end use of the delivered gas within the context of regional needs is relevant evidence that should be considered as part of [FERC's] overall needs determination." [JA-___].

Regarding environmental impacts, the Certificate Order found that the aquatic resources, surface waterbodies, and groundwaters would be adequately protected. Certificate Order ¶¶175, 176, 185 [JA-___, -___]. Like the EIS, FERC's Certificate Order also failed to meaningfully assess downstream effects, repeating the EIS's claim that FERC cannot determine whether the Project's contribution to cumulative impacts on climate change would be significant. Certificate Order ¶295 [JA-___].

As FERC's Certificate acknowledged, Certificate Order ¶269 [JA-___], FERC had not completed the reviews and consultations mandated by Section 106

of the NHPA at the time the Certificate was issued. Instead, the Certificate included Environmental Condition No. 15, which purports to restrict construction until completion of "remaining cultural resources survey reports; ... and comments on the reports and plans from the appropriate State Historic Preservation Offices, federal land managing agencies, interested Indian tribes, and other consulting parties. Certificate Order, Appendix C, at 6-7 [JA-___–___].

The Petitioners timely filed requests for rehearing and stay. *See, e.g.*, [JA-___], [JA-___], [JA-___]. On December 13, 2017, FERC issued a "tolling order" purporting to grant the rehearing requests for purposes of further consideration. [JA-___]. Because the tolling order was invalid, Sierra Petitioners and Blue Ridge Petitioners filed petitions for review of the Certificate Order on December 22, 2017, and January 3, 2018, respectively. *See* Jurisdictional Statement, *supra*. Sierra Petitioners and Blue Ridge Petitioners filed motions for stay on January 8, 2018 and January 11, 2018, respectively, which this Court denied on February 2, 2018. Doc. No. 1716262.

On June 15, 2018, FERC issued an order denying Petitioners' rehearing requests. [JA-___]. Commissioners LaFleur and Glick filed separate statements of dissent. [JA-___], [JA-___]. In the Rehearing Order, FERC once again relied exclusively on the existence of Mountain Valley's precedent agreements to establish the Project's public benefits and refused to "look behind" those

agreements. Rehearing Order ¶¶35-44 [JA-___–___]. FERC also reiterated its prior conclusions regarding impacts on surface and groundwater, aquatic, and cultural resources. *Id.* at ¶¶181, 267 [JA-___, ___]. FERC also made clear it did not consider downstream emissions to be an indirect effect, and did not include these impacts in its public interest balancing. *Id.* at ¶¶270, 309 [JA-___, -___].

The Rehearing Order also summarily dismissed a host of objections raised by the Blue Ridge Petitioners and others to FERC's post-certificate compliance with the NHPA, including the objections concerning FERC's failure to identify and consult with the Rosebud and Cheyenne River Sioux Tribes, whose tribes' occupation and historic interest in the project area was readily determinable through objectively verifiable sources, characterizing these issues as "untimely requests for rehearing." Rehearing Order ¶15 [JA-___]. The Rehearing Order also denied on timeliness grounds the motions to intervene filed by the Tribal Historic Preservation Officers ("Tribal Officers") of the Rosebud and Cheyenne River Sioux Tribes. Rehearing Order ¶14 [JA __].

After FERC issued the Rehearing Order, Petitioners filed petitions for review of the Certificate and Rehearing Orders. Sierra Petitioners and Blue Ridge Petitioners filed motions for stay, which this Court denied on August 30, 2018.

SUMMARY OF ARGUMENT

These consolidated Petitions raise claims under the Natural Gas Act ("the Act"), the National Environmental Policy Act (NEPA), the National Historic Preservation Act (NHPA), the Department of Transportation Act, and the due process and takings clauses of the U.S. Constitution relating to FERC's issuance of a certificate of public convenience and necessity authorizing Mountain Valley to construct its Project, including the taking of private property through eminent domain.

FERC lacked substantial evidence for its determination under the Act that the Project is required by the public convenience and necessity, which determination requires a finding that the Project's public benefits outweigh its adverse effects. FERC improperly relied exclusively on the existence of precedent agreements between Mountain Valley and its own corporate affiliates to establish the Project's public benefits, in the face of significant record evidence showing a lack of market need for the Project's additional capacity and in contravention of its own guidance documents. FERC also failed to meaningfully weigh adverse impacts to landowners and communities against those alleged public benefits, instead simply concluding that Mountain Valley had taken sufficient steps to minimize such impacts.

Also under the Act, FERC lacked substantial evidence for its approval of Mountain Valley's requested fourteen percent return on equity. FERC's only support for its approval of the rate, which exceeds that available in comparable markets and thus is likely to incentivize the construction of unnecessary pipeline infrastructure, was citation to past precedent in which it awarded the same rate for new market entrants constructing new pipelines. That past precedent itself lacked substantial evidence, and FERC failed to otherwise analyze the actual risk faced by Mountain Valley under current market conditions.

Furthermore, Mountain Valley's exercise of eminent domain based on the Certificate Order is improper for several reasons. First, the Certificate, which establishes the public necessity for the Project, requires Mountain Valley to maintain several permits that it has lost. Without those permits, the determination of public convenience and necessity under the Act fails. Second, a conditional Certificate cannot support the use of eminent domain when, as here, the conditions include conditions precedent to a finding of public convenience and necessity such as obtaining permits from other governmental bodies. Separately, Mountain Valley could not properly exercise the takings power, as neither FERC nor the judiciary satisfied the Takings Clause's requirement of confirming Mountain Valley's ability to pay all just-compensation awards for the Project.

In addition to violating the Natural Gas Act and the Takings Clause, Mountain Valley's exercise of eminent domain also violates landowners' due process rights under the Fifth Amendment. FERC and the judiciary allowed Mountain Valley to enter landowners' property and deprive them of their property before giving them any hearing on their statutory and constitutional objections to the takings—and likewise failed to give landowners a prompt post-deprivation hearing where they could raise those arguments.

FERC also violated the due process rights of stakeholders seeking to participate in consultations under Section 106 of the NHPA by arbitrarily refusing to grant consulting party status to persons and organizations who intervened in the FERC proceeding, and unlawfully forced parties to choose between protecting their demonstrated interests through the Section 106 process and protecting their interests through intervening as a party in the FERC proceeding.

FERC's NEPA analysis in its EIS was deficient for several reasons. First, FERC failed to adequately assess the downstream greenhouse-gas effects of burning 2.0 billion cubic feet of gas per day. FERC's EIS estimated downstream emissions but devoted only one paragraph to the Project's massive emissions, and failed to engage in the required discussion of significance and cumulative impact. FERC incorrectly concluded that downstream effects were outside the scope of its NEPA analysis, and improperly excluded them from its public interest

determination under the Natural Gas Act. FERC also arbitrarily refused to use an available tool to evaluate downstream impacts, despite acknowledging it is an appropriate tool for informing federal agencies' decision-making.

FERC in the EIS also arbitrarily and capriciously concluded that the Project's impacts to aquatic resources from erosion and sedimentation would not be significant or long-term. FERC blindly relied on certain proposed mitigation measures to make that finding without meaningfully evaluating the likelihood of success of such measures and despite substantial record evidence establishing that such measures were unlikely to adequately control sedimentation, which predictions have been confirmed by numerous damaging sedimentation episodes during Project construction so far. FERC's conclusion was further undermined by its failure to account for permanently increased sedimentation that would result from conversion of mature forests to the herbaceous cover that will be maintained in the Project right-of-way.

FERC further violated NEPA by failing to adequately analyze the Project's impacts on groundwater recharge in karst terrain along the southern end of the pipeline route, where water flows down mountainsides to enter karst aquifers in low-lying areas with little to no filtration. FERC failed to evaluate the effectiveness of specific measures to mitigate impacts to groundwater quality caused by sedimentation or impacts to groundwater recharge and flow paths caused by

construction.

FERC's EIS is also inadequate because FERC failed to meaningfully analyze the Project's impacts on residents' cultural attachment to the landscape around Peters Mountain, an area where many families have owned the same farms since the 1700s and residents follow the same cultural traditions engendered by their ancestors' response to this unique environment, despite expert reports and other evidence that the Project would have significant adverse impacts on cultural attachment.

Lastly under NEPA, FERC's EIS was deficient because it failed to adequately analyze Hybrid Alternative 1A. Although NEPA regulations require the EIS to "[r]igorously explore and objectively evaluate all reasonable alternatives," FERC never meaningfully evaluated Hybrid Alternative 1A, which will avoid the non-mitigatable adverse effects that the proposed pipeline route will have on the Newport Petitioners' historic farm complexes.

FERC also violated the NHPA in several ways. First, FERC's issuance of the Certificate before completing the Section 106 process or even signing a Programmatic Agreement violated the plain language of Section 106 of the NHPA requiring completion of the Section 106 process "prior to" the issuance of a license or the approval of federal assistance. Neither the inclusion in the Certificate of a condition barring construction until completion of certain cultural resource reports

and receipt of "comments" from consulting parties, nor FERC's post-Certificate execution of a Programmatic Agreement establishing a process for future consultations, are sufficient to cure this fundamental violation of Section 106 or to adequately discharge FERC's Section 106's consultation requirements under the binding regulations.

Moreover, FERC's post-Certificate refusal to consider the objections raised by the Blue Ridge Petitioners concerning the impacts on traditional and cultural properties relating to the Sioux tribes' occupation of and interest in the project area illustrate the fundamental problems resulting from FERC's failure to complete these required Section 106 consultations prior to issuance of the Certificate. FERC's summary rejection of these objections in its Rehearing Order also violates FERC's obligations to consult with Rosebud and Cheyenne River Sioux Tribes under Section 101(d)(6)(B) of the NHPA, 54 U.S.C. § 302706(b), and implementing regulations.

Additionally, FERC violated the NHPA by denying the Newport Petitioners the right to participate as consulting parties. They have never been consulted on any Section 106 issues even after FERC's untimely grant of consulting party status on May 17, 2017. Consequently, the Newport Petitioners have been denied the right to participate in developing feasible alternative routes, such as Hybrid Alternative 1A.

FERC also violated the NHPA because its selection of the "area of potential effects" fails to address the foreseeable adverse effects for the two pipelines that Mountain Valley is seeking in contract offers to landowners to purchase easements, although the Certificate Order only grants Mountain Valley an easement to construct one pipeline.

Finally, FERC violated the Department of Transportation Act by failing to address Section 4(f) of that Act and evaluate the potential use of the Newport Petitioners' historic properties "as early as practicable" when studying proposed alternative routes.

STANDING

Petitioners are non-profit organizations with members who own property, reside, work, and recreate in areas that will be affected by the Project; representatives of tribal organizations with preservation interests in areas that will be affected by the Project; and private landowners whose property has been or will be taken by eminent domain or otherwise adversely affected by the Project.[6] *See, e.g.,* Petitioner and Member Declarations, Add. 66–125.[7] The construction,

[6] The individual Newport Petitioners are owners of historic farm complexes that have been have been owned and farmed continuously for generations and that the Virginia Department of Historic Resources has recognized as contributing resources to the Greater Newport Rural Historic District.

[7] Not all Petitioners submit standing declarations with this brief. Each Petitioner's standing, however, is apparent from the record and thus need not be supported by

maintenance and operation of the Project has caused and will continue to cause Petitioners concrete, particularized, and imminent harm, which this Court can redress by setting aside FERC's findings under the Natural Gas Act and the underlying NEPA and NHPA analysis, vacating the certificate based thereon, and remanding to the agency. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992); *WildEarth Guardians v. Jewell*, 738 F.3d 298, 306 (D.C. Cir. 2013).

ARGUMENT

I. STANDARD OF REVIEW

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

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additional declarations. *See Sierra Club v. EPA*, 292 F.3d 895, 900 (D.C. Cir. 2002) ("In many if not most cases the petitioner's standing to seek review of administrative action is self-evident; no evidence outside the administrative record is necessary…."); *see, e.g.,* Bold Petitioners' Motion to Intervene [JA-___] (describing that Bold's membership includes landowners in West Virginia and Virginia whose property is crossed by the pipeline and Bold's interest in protecting property rights from eminent domain); Exhibit D to Blue Ridge Petitioners' Stay Mot., Add. 162.

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, we 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: We 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).

Further, FERC must base its determinations under the Natural Gas Act on "substantial evidence." 15 U.S.C. § 717r(b). "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 pertinent facts in the record or the "refus[ed] to come to grips" with evidence in the record, its order "must crumble for want of substantial evidence." *Id.*

Appellate review of constitutional due process claims is *de novo*. *Avila v. U.S. Att'y Gen.*, 560 F.3d 1281, 1285 (11th Cir. 2009).

II. FERC FAILED TO SUPPORT WITH SUBSTANTIAL EVIDENCE ITS FINDINGS UNDER THE NATURAL GAS ACT

A. FERC Failed to Support with Substantial Evidence Its Finding that the Project is Required by the Public Convenience and Necessity

FERC's Certificate Order suffers from critical flaws that render it unlawful. Under Section 7 of the Natural Gas Act, a proponent of an interstate natural gas pipeline must obtain a "certificate of public convenience and necessity" from FERC. 15 U.S.C. § 717f(c)(1)(A). "[A] certificate shall be issued ... upon a finding that ... the proposed service ... is or will be required by the present or future public convenience and necessity." *Minisink Residents for Envtl. Preservation and Safety v. FERC*, 762 F.3d 97, 101 (D.C. Cir. 2014) (citing 15 U.S.C. § 717f(e)). This standard—not merely public use—must guide FERC's consideration of applications to construct new pipelines. If FERC cannot conclude that a pipeline is necessary based on substantial evidence, it may not authorize the taking of private property.

FERC implements the Act through its 1999 Certificate Policy Statement ("Policy Statement"), which establishes the framework the agency must follow to determine whether a proposed project meets the standard. *See* Certification of New Interstate Natural Gas Pipeline Facilities, 88 FERC ¶61,227, 61,747 (Sept. 15, 1999), *clarified*, 90 FERC ¶61,128 (Feb. 9, 2000), *further clarified*, 92 FERC ¶61,094, 61,373 (July 28, 2000). The Policy Statement establishes a balancing test that requires FERC to first measure any residual adverse impacts of the project after the proponent has, to the extent possible, minimized those impacts. *Id.* at ¶61,745. Those impacts include effects on "landowners and communities." *Id.* The Policy Statement then requires FERC to balance the residual adverse impacts against "evidence of public benefits to be achieved." *Id.* Pipelines that impose adverse impacts will only be approved "where the public benefits to be achieved … outweigh the adverse impacts. *Id.* at ¶61,747.

Though FERC professes to apply its Policy Statement, the agency disregards that policy in a systematic manner, ensuring approval of any project with signed precedent agreements, *i.e.*, contracts for pipeline capacity. Consistent with that practice, FERC based its finding of public benefit of the pipeline solely on Mountain Valley's capacity contracts with its own corporate affiliates. In doing so, FERC ignored its own policy and refused to consider substantial evidence in the record showing that the precedent agreements between Mountain Valley and its

affiliates are not reliable indicia of market demand. Moreover, FERC authorized Mountain Valley's exercise of eminent domain without meaningful consideration of the harm that will result to landowners, again in contradiction of its own policy.

1. FERC Lacked Substantial Evidence of Market Demand to Support Its Assessment of the Project's Public Benefits

FERC lacked substantial evidence to support its finding of public convenience and necessity, which rests entirely on the existence of contracts for pipeline capacity between Mountain Valley and its own corporate affiliates. Further, FERC failed to meaningfully consider substantial record evidence showing that those contracts are not reliable indicators of public demand. Because FERC lacked a rational basis for its conclusion that the Project is required by the public convenience and necessity, its issuance of the Certificate Order was unlawful.

FERC's Policy Statement make clear that narrow reliance on capacity contracts between corporate affiliates to support a finding of public need is improper. Prior to 1999, FERC required applicants to show market support for a project through contractual commitments for pipeline capacity. Policy Statement ¶61,743. Such contracts are often referred to as "precedent agreements." FERC acknowledged that its prior sole reliance on the existence of precedent agreements was inadequate because, in part, "[t]he amount of capacity under contract ... is *not*

a sufficient indicator by itself of the need for a project." *Id.* at ¶61,744 (emphasis added).

The Policy Statement included a list of relevant factors for assessment of market benefit, one of the indicators of public demand for a proposed project. *Id.* at ¶61,747. Those include, but are not limited to, "precedent agreements, demand projections, potential cost savings to consumers, or a comparison of projected demand with the amount of capacity currently serving the market." *Id.* In clarifying its policy, FERC explicitly stated that "as the natural gas marketplace has changed, the Commission's traditional factors for establishing the need for a project, such as contracts and precedent agreements, may no longer be a sufficient indicator that a project is in the public convenience and necessity." 90 FERC ¶61,128, 61,390 (Feb. 9, 2000).

In practice, however, FERC rarely, if ever, considers any factor other than precedent agreements. *See, e.g.*, Certificate Order [JA-___] (LaFleur, Comm'r, dissenting) (FERC's "implementation of the Certificate Policy Statement has focused more narrowly on the existence of precedent agreements."). Former Commissioner Norman Bay also recently criticized overreliance on precedent agreements: while the Policy Statement "lists a litany of factors for the Commission to consider in evaluating need ... in practice, the Commission has largely relied on the extent to which potential shippers have signed precedent

agreements for capacity on the proposed pipeline," thus ignoring "a variety of other considerations." *Nat'l Fuel Gas Supply Corp.*, 158 FERC ¶61,145 (2017) (Bay, Comm'r, Separate Statement). *See also* Rehearing Order (Glick, Comm'r, dissenting) (hereinafter "Glick Dissent") at 3-4 [JA-___–___] ("The developer of a potential pipeline, especially of a pipeline that is not clearly needed, still has a powerful incentive to secure precedent agreements with one of its affiliates. The Commission consistently relies on those agreements, by themselves, to conclude that a proposed pipeline is needed.").

FERC's policy explicitly recognizes that reliance on precedent agreements to establish "necessity" is even more problematic when the agreements are between corporate affiliates, *i.e.*, "affiliate agreements." FERC's Policy Statement acknowledges that "[u]sing contracts as the primary indicator of market support for the proposed pipeline project also raises additional questions when the contracts are held by pipeline affiliates." Policy Statement ¶61,744. In other words, the insufficiency of precedent agreements to establish public need is exacerbated when, as in the instant action, the contracts are between affiliated entities and thus are not the result of arms-length negotiations. Glick Dissent at 2-3 [JA-___–___] ("[W]here entities are part of the same corporate structure, precedent agreements among those entities will not necessarily be negotiated through an arms-length

process and considerations other than market demand will bear on the negotiations underlying the agreement.").

In direct contradiction of its Policy Statement, FERC states in the Certificate Order that "absent evidence of anticompetitive or other inappropriate behavior, [FERC] views [precedent] agreements with affiliates like those with any other shipper for purposes of assessing the demand for capacity." Certificate Order ¶45 [JA-___]. FERC's Policy Statement, however, recognizes that agreements between affiliated companies are, at best, weak indicators of market demand. That is because precedent agreements between affiliates invite self-dealing to create the appearance of market demand for capacity on a pipeline despite the lack of identified end users for the gas. As FERC's Policy Statement observed, "[a] project that has precedent agreements with multiple new customers may present a greater indication of need than a project with only a precedent agreement with an affiliate." Policy Statement ¶61,748.

Despite the fact that the stated purpose of its Policy Statement was to reduce FERC's reliance on precedent agreements—especially affiliate agreements—the agency has unjustifiably adhered to its old approach. Here, FERC relied on the existence of precedent agreements with Mountain Valley's affiliated shippers to demonstrate market need for the Project. Certificate Order ¶41 [JA-___]. Furthermore, FERC failed to consider the affiliate nature of the precedent

agreements when relying on them to establish the need for the Project. *Id.* at ¶45 [JA-___].

Commissioner LaFleur, compelled by similar concerns as former Commissioner Bay, critiqued FERC's reliance on precedent agreements for the Project, observing that "evidence of the specific end use of the delivered gas within the context of regional needs is relevant evidence that should be considered as part of our overall needs determination." Certificate Order (LaFleur, Comm'r, dissenting) at 4 [JA-___]; *id.* at 3-4 [JA-___] ("While Mountain Valley has entered into precedent agreements with two end users … for approximately 13% of the MVP project capacity, the ultimate destination for the remaining gas" is unknown.) [JA-___–___]. Noting that the end use of 87 percent of the gas to be carried on the Project is unknown, Commissioner LaFleur urged "careful consideration of a fuller record" so that FERC could "better balance environmental issues ... with the project need and its benefits." *Id.* Likewise, in his dissent to the Rehearing Order, Commissioner Glick explained that "[t]his situation requires that the Commission rely on more than the mere existence of precedent agreements when concluding that these Projects are needed. That is particularly so where, as here, all of the precedent agreements are among affiliates of the Projects' developer." Glick Dissent at 2 [JA-___].

FERC's narrow reliance on affiliate precedent agreements to support its

finding of public convenience and necessity is undermined by overwhelming evidence in the record showing that there is no true market need for the Project's additional capacity. The record shows that the demand for natural gas in the regions that Mountain Valley purports to serve is leveling off at the same time that overall pipeline capacity is rapidly expanding, leading to a likelihood of significant unused capacity, continued use of natural gas despite the existence of cheaper, cleaner alternatives (at the expense of ratepayers), or primary use of the Project for export purposes. *See* Sierra Petitioners' Rehearing Request at 16-19 [JA-___–___]; Comments of Thomas Hadwin [JA-___].

A study by Synapse Energy Economics found that "given existing pipeline capacity, existing natural gas storage, the expected reversal of the direction of flow on the existing Transco pipeline,[8] and the expected upgrade of an existing Columbia pipeline, the supply capacity of the Virginia-Carolinas region's existing natural gas infrastructure is more than sufficient to meet expected future peak demand." [JA-___].

Given the risk that the project shippers will be unable to find a market for the vast majority of the Project's subscribed capacity, FERC was obligated to

[8] Since the release of that study, FERC approved the Transco reversal as part of the Atlantic Sunrise Project. Order Issuing a Certificate, *In re Transcon. Gas Pipe Line Co.*, LLC 158 FERC ¶61,125 (February 3, 2017).

assess other indicators of market demand. It failed to do so. FERC's failure to meaningfully consider the substantial evidence showing a lack of any long-term market demand for the Project's capacity—which FERC's Policy Statement specifically identifies as an important factor in its analysis—renders its Orders arbitrary and capricious and violates the Act's mandate that all approved projects be *required* by the public convenience and necessity. *See Nat. Res. Def. Council v. Rauch*, 244 F. Supp. 3d 66, 97 (D.D.C. 2017) (finding that an agency "failed to consider an important aspect of the problem" when it neglected to consider a factor that its own guidance stated should be relevant to its decision).

Moreover, by refusing to scrutinize the affiliate nature of the precedent agreements, FERC "failed to consider an important aspect of the problem," rendering its decision arbitrary and capricious. *Id*. The entities that have contracted to ship gas on the Project are all corporate affiliates of Mountain Valley's owners. Two of those entities—Roanoke Gas and Con Edison—are utilities that have signed 20-year agreements for service on the pipeline. The costs of these agreements will be passed through to retail customers. Attachment A to Sierra Petitioners' Rehearing Request [JA-___]. At the same time that these captive customers would cover the cost of the pipeline investment, the affiliated pipeline developers (RGC Midstream LLC and Con Edison Gas Midstream LLC) would enjoy high rates of return in excess of business and financial risk, as discussed in

Section II.B, *infra*. As a study by Institute for Energy Economics and Financial Analysis (IEEFA) submitted to FERC explained, "[t]he high returns on equity that pipelines are authorized to earn by FERC … mean that the pipeline business is an attractive place to invest capital. And because ... there is no planning process for natural gas pipeline infrastructure, there is a high likelihood that more capital will be attracted into pipeline construction than is actually needed." [JA-___].

FERC's decision "not to second guess the business decisions of end users," Certificate Order ¶53 [JA-___], thus rendered its finding of public convenience and necessity arbitrary and capricious and in violation of the Natural Gas Act. *See AT&T Corp. v. F.C.C.*, 236 F.3d 729, 736–37 (D.C. Cir. 2001) (finding decision to be arbitrary and capricious where agency relied on a single factor despite previously explaining that multiple other factors were relevant to such decisions).

2. FERC Superficially Considered Adverse Impacts to Landowners

In determining whether to issue a Certificate, FERC must assess the adverse impacts of the project—including effects on landowners and communities—and balance those impacts against evidence of public benefits. Policy Statement ¶61,745. Here, FERC's finding that the public benefits of the Project outweigh the adverse impacts is not supported by substantial evidence, and its balancing analysis runs counter to the Policy Statement. FERC relied on Mountain Valley's purported minimization of impacts to landowners and communities from the use of eminent

domain to find that the Project's benefits outweigh its adverse impacts. In so doing, FERC failed to actually assess and balance the residual adverse impacts from the use of eminent domain against the Project's supposed public benefits.

FERC's Policy Statement recognizes that landowners and communities along a pipeline's route have an interest in avoiding unnecessary construction and any adverse impacts to property that result from the use of eminent domain. *Id.* at ¶61,748. The Policy Statement thus encourages applicants to minimize adverse impacts to those interests at the outset. *Id.* at ¶61,745. FERC's review of an applicant's minimization efforts, however, "is not intended to be a decisional step in the process for the Commission." *Id.* Though FERC may suggest further minimization, "the choice of how to structure the project at this stage is left to the applicant's discretion." *Id.* The meaningful analysis comes *after* such minimization efforts: "If residual adverse effects … are identified, after efforts have been made to minimize them, then the Commission will proceed to evaluate the project by balancing the evidence of public benefits to be achieved against the residual adverse effects." *Id.*; *see also id.* at ¶61,749 ("[T]he more adverse impact a project would have on a particular interest, the greater the showing of public benefits from the project required to balance the adverse impact.").

Here, FERC relied entirely on Mountain Valley's purported minimization efforts to find that the Project's public benefits outweigh its adverse impacts.

FERC merely discussed measures Mountain Valley took to co-locate a portion of its pipeline with existing rights-of-way and to incorporate certain route variations. Certificate Order ¶57 [JA-___]. FERC then found that "while we are mindful that Mountain Valley has been unable to reach easement agreements with many landowners, for purposes of our consideration under the Certificate Policy Statement, we find that Mountain Valley has generally taken sufficient steps to minimize adverse impacts on landowners and surrounding communities." *Id.* Based on this conclusory determination, FERC resolved that "the benefits that [the Project] will provide to the market outweigh any adverse effects on … landowners or surrounding communities." *Id.* at ¶70 [JA-___]. *See also* Rehearing Order ¶¶49, 98 [JA-___, -___].

FERC's evaluation of the considerable adverse impacts of Mountain Valley's use of eminent domain lacked any serious analysis. FERC did not address the number of landowners that would be affected or identify the amount, character, or categories of property to be taken, nor the impact that taking would have on surrounding communities. Its boilerplate conclusion provides no rational assessment of how or why any of the ostensible benefits outweigh the adverse impacts to landowners, which are substantial.[9] *See* Rehearing Order (LaFleur,

[9] Mountain Valley was forced to sue to acquire easements over more than 480 properties owned by more than 650 individuals, business associations, trusts, and

Comm'r, dissenting) at 2 [JA-___] ("The impacts to landowners and communities are also significant ….").

Whether Mountain Valley has "generally taken sufficient steps to minimize adverse impacts," Certificate Order ¶57 [JA-___], does not answer the relevant question: whether the residual impacts are outweighed by the public benefits. Accordingly, FERC's application of its balancing test was arbitrary and capricious because it did not "examine the relevant data and articulate a satisfactory explanation for its action." *State Farm*, 463 U.S. at 43. FERC's subsequent conclusion that the public benefits of the Project outweigh the adverse impacts lacks the support of substantial evidence and renders FERC's finding that the Project is "required" by the public convenience and necessity arbitrary and capricious.

B. FERC Failed to Support with Substantial Evidence Its Approval of Mountain Valley's Requested Fourteen Percent Return on Equity

Relying solely on citations to past decisions, FERC granted Mountain Valley's requested fourteen percent return on equity, claiming that such a high

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groups of intestate heirs who refused to sell their property to Mountain Valley before FERC's grant of eminent domain. *Mountain Valley Pipeline, LLC v. An Easement to Construct, Operate and Maintain a 42-Inch Gas Transmission Line*, Civ. No. 2:17-cv-4214, ECF # 1 (S.D.W.Va. Oct. 24, 2017); *Mountain Valley Pipeline, LLC v. Easements to Construct, Operate and Maintain a Natural Gas Pipeline*, Civ. No. 7:17-cv-492-EKD, ECF # 1 (W.D.Va. Oct. 24, 2017).

return is necessary because of "the risk Mountain Valley faces as a new market entrant, constructing a new greenfield pipeline system." Certificate Order ¶82 [JA-___]. Return on equity has a substantial impact on the recourse rates that FERC allows Mountain Valley to charge it customers and, consequently, the affiliated owner/shippers' 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. *Sierra Club v. FERC*, 867 F.3d 1357, 1377 (D.C. Cir. 2017). Given the potential for high rates of return to skew incentives towards building new, unnecessary pipelines, it was incumbent on FERC to give closer scrutiny to Mountain Valley's requested return on equity. Instead, FERC's dismissal of that danger in its Certificate and Rehearing Orders relies entirely on past decisions and conclusory statements, without meaningfully assessing the appropriate return on equity according to the specific circumstances of this project

FERC's high return on equity for greenfield pipelines incentivizes overbuilding by offering returns in excess of what can be achieved 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. Sierra Petitioners' Rehearing Request at 22-23 [JA-___–___]. The abnormally high returns on equity authorized by FERC, in the absence of any

coordinated planning process for pipeline infrastructure, attracts more capital to pipeline building than is needed to serve market demand and results in overbuilding. IEEFA Study at 9 [JA-___]. The Certificate Order does not show FERC accounted for those market-skewing incentives when it approved Mountain Valley's requested return on equity.

FERC's blind reliance on precedent to justify its decision, without any consideration of the actual risk faced by Mountain Valley aside from its status as "a new market entrant, constructing a new greenfield pipeline system," Rehearing Order ¶¶53-56 [JA-___–___], does not satisfy the substantial evidence standard. The North Carolina Utilities Commission (NCUC), in comments on a similar proceeding in which FERC approved an identical fourteen percent return on equity, explained that although "in the past the Commission has merely accepted recourse rates based on cases citing previous cases, application of that policy would appear to conflict with the unambiguous statutory requirement that a filing entity demonstrate that its filing, including the recourse rates, comports with the public convenience and necessity." Sierra Petitioners' Rehearing Request at 22-23 [JA-___–___]. Indeed, the precedent that FERC relies on to justify the fourteen percent return on equity does not itself include substantial evidence on which FERC could base a finding that the fourteen percent return is reasonable even in those specific cases. *Id.* (citing NCUC, Comments in Support of Project and

Protest of Proposed Recourse Rates, Docket No. CP15-554 (Accession No. 20151023-5301) at 5–6).

Here, FERC's only justification for its excessive return on equity is blanket citations to precedent and unsupported statements regarding "the risk Mountain Valley faces as a new market entrant, constructing a new greenfield pipeline system." Certificate Order ¶82 [JA-___].FERC does not provide any market information to establish Mountain Valley's true risk nor does it assess how Mountain Valley's risk may be lower than that found in previous proceedings given the current low cost of capital. Comments of Thomas Hadwin at 17 [JA-___] (explaining that Mountain Valley's return is "exorbitantly high in an era of low single digit interest rates and distorts investment decisions").

FERC's failure is not remedied by its claim that Mountain Valley's rates may potentially be reassessed in the future, Certificate Order ¶83 [JA-___], because once an unnecessary pipeline is approved and constructed based on the incentives provided by the unjustified return, the harm to Petitioners' interests will have largely already occurred. Regardless of any potential future adjustments, FERC's approval of the fourteen percent return in the absence of substantial evidence provides a perverse incentive to build an unnecessary greenfield pipeline 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'"); *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").

III. MOUNTAIN VALLEY CANNOT EXERCISE EMINENT DOMAIN BASED ON THIS CERTIFICATE

To satisfy the Fifth Amendment, a taking must both serve a "public purpose" and be a "public necessity."[10] In the Act, Congress declares that interstate pipelines may serve a public purpose, but Congress has tapped FERC to determine (1) whether a pipeline is a "public necessity" and (2) whether a pipeline company is "able and willing properly to do" everything needed for the proposed project. 15 U.S.C. § 717f(e). Here, Mountain Valley has not maintained the permits on which

[10] While courts generally cannot second-guess legislative determinations of necessity, *Adirondack Ry. Co. v. New York*, 176 U.S. 335, 349 (1900), the judiciary must hold the taker to the conditions and limitations contained in the document purporting to grant the taking power. *See, e.g., Monarch Chem. Works, Inv. v. City of Omaha*, 277 N.W.2d 423, 426-28 (Neb. 1979) (holding that taking of plaintiff's land for state penal complex was a public use but was not a public necessity because the taking did not conform to the redevelopment plan contained in the city's own plan document); *Public Serv. Co. v. B. Willis, C.P.A., Inc.,* 941 P.2d 995, 997-98 (Okla. 1997) (finding no necessity because condemnor failed to establish prima facie case of necessity when it failed to produce and follow document containing resolutions of necessity).

FERC's determination of public necessity relied, and FERC failed to confirm whether Mountain Valley had adequate assets to satisfy the Just Compensation Clause. Certificate Order, App. C at 5 [JA-___]. On such facts, the Act and the Constitution bar Mountain Valley from continuing to exercise eminent domain under its conditional certificate from FERC.

A. Mountain Valley's Use of Eminent Domain Under The Certificate Order Violates the Natural Gas Act

Section 717f(e) of the Act states that a certificate of convenience and public necessity ("certificate") shall be issued to a qualified applicant if (1) the project "is or will be required by the present or future public convenience and necessity" and (2) "the applicant is able and willing properly to do the acts and to perform the service proposed." 15 U.S.C. § 717f(e). In turn, section 717f(h) provides that "any holder of a certificate of public convenience and necessity ... may acquire [necessary property rights for the project] by the exercise of eminent domain." 15 U.S.C. § 717f(h). Under any constitutionally permissible reading of those provisions, this project does not satisfy the requirements of the Act.

1. *For Two Reasons, Mountain Valley's Conditional Certificate Does Not Allow It to Exercise Eminent Domain*

First, FERC's determination of public necessity hinges on Mountain Valley's obtaining and keeping certain federal and state permits, which Mountain Valley has lost. Certificate Order ¶308 [JA-___]. The Certificate Order states that

the Project will be "in the public convenience and necessity" and "environmentally acceptable"—but only if Mountain Valley acquires all necessary permits and properly builds the pipeline. *Id.* Today, at least two of Mountain Valley's required permits have been yanked—one from the U.S. Forest Service and another from the Bureau of Land Management. *Sierra Club v. U.S. Forest Serv.*, 897 F.3d 582 (4th Cir. 2018). Because Mountain Valley no longer holds those permits, the Certificate (by its terms) does not supply the requisite "public necessity" for the Project. *See* Certificate Order ¶¶61, 64 [JA-___, ___]. The Court should send Mountain Valley back to FERC for the regulator to determine whether the pipeline is still a "public necessity" when Mountain Valley has failed to maintain the required permits.

Second, this Certificate never supported the use of eminent domain, as Congress never intended for certificates with conditions precedent—such as not-yet-obtained permits and authorizations from other governmental bodies—to justify the exercise of the takings power. The Act grants eminent-domain power to "any holder of a certificate of public convenience and necessity" that is unable to contract for the property needed for pipeline right-of-way. 15 U.S.C. § 717f(h). And section 717f(e) provides that "the Commission shall have the power to attach to the issuance of the certificate ... such reasonable ... conditions as the public convenience and necessity may require." 15 U.S.C. § 717f(e). The Court has not addressed whether a conditional certificate would be legitimate if it allowed the

certificate holder to exercise eminent domain and begin construction, as Mountain Valley has done here, before obtaining all necessary permits. *Gunpowder Riverkeeper v. FERC*, 807 F.3d 267, 281 (D.C. Cir. 2015) (Rogers, J., concurring in judgment). To avoid unconstitutional takings, including cases where "public necessity" has not been finally determined, the proper reading of those sections is that (1) the "holder" must have a "certificate of public convenience and necessity" that is not dependent on conditions precedent and (2) the "conditions" in section 717f(e) refer to conditions as "limitations" rather than to conditions as "prerequisites."

The distinction is important. A parent may tell a child that she can use the car tonight if she keeps the speed limit (condition as limitation), or the parent may tell her that she can use the car tonight if she washes it first (condition as prerequisite). FERC may impose conditions as limitations: for example, specifying limits on the pipeline's route, rates charged to consumers, pipeline diameter, and easement widths. But neither Congress nor the Constitution gives FERC power to let Mountain Valley drive the vehicle of eminent domain, so to speak, before obtaining permits required by law.

The Supreme Court and this Court have consistently honored that distinction, viewing the Act's conditioning power as referring to conditions as limitations, not as prerequisites. *See Atl. Ref. Co. v. Pub. Serv. Comm'n of N.Y.*,

360 U.S. 378, 389, 392 (1959) (holding that "conditions" in the Act refer to "conditions *under which gas may be initially dedicated to interstate use*" to protect consumers while a reasonable and just price "is being determined under other sections of the Act" (emphasis added)); *N. Nat. Gas Co., Div. of InterNorth, Inc. v. FERC*, 827 F.2d 779, 782 (D.C. Cir. 1987) (describing the conditioning power as "conditions on the terms of the proposed service itself"); *Panhandle E. Pipe Line Co. v. FERC*, 613 F.2d 1120, 1131-32 (D.C. Cir. 1979) (confining the "conditioning power" to "rates and contractual provisions," not whether companies can acquire property before obtaining necessary permits). While some decisions seemingly bless conditional certificates in the prerequisite sense,[11] the concern driving the analysis in those cases was whether district courts had any jurisdiction at all to review FERC certificates.[12] Here, the Court clearly has jurisdiction to decide whether the Certificate allowed Mountain Valley to start taking property in February 2018, before it obtained the necessary permits. 15 U.S.C. § 717r(b). Because FERC cannot use its "conditioning power to do indirectly ... things that it

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[11] *See, e.g.*, *Transcontinental Gas Pipe Line Co. v. 2.14 Acres*, No. 17-1725, 2017 WL 3624250, at *6 (E.D. Pa. Aug. 23, 2017); *Constitution Pipeline Co v. 0.42 Acres*, No. 114-CV-2057, 2015 WL 12556145, at *2 (N.D.N.Y. Apr. 17, 2015).

[12] *See Transcontinental*, 2017 WL 3624250 at *3 ("District Courts ... are limited to jurisdiction to order condemnation of property in accord with a facially valid certificate. Questions of the propriety or validity of the certificate must first be brought to FERC upon an application for rehearing and the Commissioner's action thereafter may be reviewed by a United States Court of Appeals.").

cannot do at all,"[13] the Court should avoid unconstitutional interpretations of the Act and instead construe the Certificate and the Act as not supporting Mountain Valley's premature use of the takings power.

2. Mountain Valley Is Not Able "Properly to Do" the Project

FERC did not properly find that Mountain Valley was "able and willing properly to do the acts and to perform the services proposed and to conform" to the Act. 15 U.S.C. § 717f(e). On this record, FERC cannot reasonably conclude that Mountain Valley is able property to exercise eminent domain, *see* Part III.B, *infra*, or to build a pipeline when Mountain Valley lacks the necessary permits.

B. Mountain Valley's Use of Eminent Domain Under This Certificate Violates the Takings Clause

1. FERC Failed to Determine Whether Mountain Valley Would Be Able to Pay Just Compensation for the Takings

The Fifth Amendment requires payment of just compensation whenever private property is taken for public use. U.S. CONST. AMEND. V; *Sweet v. Rechel*, 159 U.S. 380, 400-01 (1895). Any act granting the power to take must guarantee—with absolute certainty—the power to pay for those takings "before [the landowner's] occupancy is disturbed." *Id.* at 403. A statute that "attempts to authorize the appropriation ... without making adequate provision for

[13] *Am. Gas Ass'n v. FERC*, 912 F.2d 1496, 1510 (D.C. Cir. 1990).

compensation, is unconstitutional and void and does not justify an entry on the land of the owner." *Id.*

The Fifth Amendment imposes heightened proof of a private taker's ability to pay for project takings. When the taker is the government, the ability to pay is presumed. The backing of the public treasury and the full faith and credit of the sovereign are a sufficient guarantee. But when the taker is a private company, the taker "has neither sovereign authority nor the backing of the U.S. Treasury to assure adequate provision of payment." *Transwestern Pipeline Co. v. 17.19 Acres*, 550 F.3d 770, 775 (9th Cir. 2008). When not backed by the public fisc, the taker must prove (1) its amenability to suit and (2) such "substantial assets" that "just compensation is, to a virtual certainty, guaranteed." *Wash. Metro. Area Transit Auth. v. One Parcel of Land*, 706 F.2d 1312, 1321 (4th Cir. 1983).

Mountain Valley has not met the Fifth Amendment's test—and neither FERC nor the judiciary has insisted on it. Mountain Valley's owner-operator admitted in a U.S. Securities and Exchange Commission filing that it "has insufficient equity to finance its activities during the construction stage of the project." Attachment D to Sierra Petitioners' Rehearing Request [JA-___]. FERC itself detailed serious financial risks about the Project: Mountain Valley "does not currently own or operate any interstate pipeline facilities," it has "no existing customers," and "greenfield pipelines" like this Project "face higher business risks

than existing pipelines proposing incremental expansion projects." Certificate Order ¶¶4, 32, 82 [JA-___, -___, -___]. Yet FERC made no effort to analyze whether Mountain Valley had such "substantial assets" to guarantee just compensation. *Wash. Metro.*, 706 F.2d at 1321 The district courts—not wanting to second-guess FERC—likewise refused discovery on Mountain Valley's assets and instead set bonds based on the company's estimates. *See, e.g.*, *Mountain Valley Pipeline, LLC v. Easements et al.*, Civil Action No. 7:17-cv-00492, 2018 WL 648376, at *6 (W.D. Va. Jan. 31, 2018); *Mountain Valley Pipeline, LLC v. Easement et al.*, Civil Action No. 2:17-cv-04214, 2018 WL 1004745, at *12 (S.D. W.Va. Feb. 21, 2018).

Someone, somewhere must ensure "adequate provision for compensation" under the Takings Clause. Because FERC and the district courts failed to do so, it falls to the Court to ensure compliance with the Constitution's standards—and to revoke Mountain Valley's power to exercise eminent domain.

2. Mountain Valley's Exercise of Eminent Domain Under This Certificate Also Violates the Public Use Clause

Mountain Valley lacks two of the permits that were conditions for FERC's determination of public necessity. Bold Petitioners thus ask the Court to apply the Certificate and the Act to avoid the constitutional problem of allowing takings that lack a public necessity. *See* Section III.A, *supra*. That is the prudent approach, as

courts avoid statutory interpretations that create constitutional problems. *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009). The alternative—allowing takings lacking a public necessity—would violate the Constitution.

IV. MOUNTAIN VALLEY'S USE OF EMINENT DOMAIN VIOLATES PETITIONERS' DUE-PROCESS RIGHTS

The Fifth Amendment guarantees that no person shall be "deprived of life, liberty, or property, without due process of law." U.S. CONST. AMEND. V. Mountain Valley's takings violated due process because neither FERC nor the district courts were willing to consider Bold Petitioners' statutory and constitutional arguments before granting Mountain Valley early entry onto the landowners' properties. FERC claimed it lacked authority to consider such arguments. Certificate Order ¶63 [JA-___]. The district courts likewise refused to consider many of those arguments, explaining that the Act strips them of jurisdiction to second-guess FERC. 15 U.S.C. § 717r(b). The Constitution requires more: at the very least, a hearing of landowners' statutory and constitutional arguments prior to the deprivation of their property rights. *See United States v. James Daniel Good Real Property*, 510 U.S. 43, 53 (1993).

In rare circumstances not present here, the government may take property consistent with due process as long as it grants a prompt post-taking hearing. *See Barry v. Barchi*, 443 U.S. 55 (1979). But landowners have not enjoyed even that

low level of protection. Mountain Valley started taking their properties in February 2018, more than seven months ago, and has since cleared the majority of the right-of-way of trees and commenced full construction on a significant portion. This is the first court to consider landowners' panoply of statutory and constitutional arguments.

Such after-the-fact review does not erase the due-process violations when landowners challenge the right to take the property in the first place. *See Brody v. Village of Port Chester*, 345 F.3d 103, 112 (1st Cir. 2003). Denied the opportunity to raise statutory and constitutional challenges before Mountain Valley took and irreversibly altered their lands, and likewise denied a prompt post-deprivation hearing to raise such claims, landowners have been denied due process.

V. FERC FAILED TO ADEQUATELY ASSESS THE IMPACTS OF THE PROJECT UNDER NEPA

The Certificate Order adopts the findings in the final EIS that the environmental impacts of the Project will be insignificant, with the exception of impacts to forested lands. Certificate Order ¶131 [JA-___].

NEPA was designed to "prevent or eliminate damage to the environment." *Envtl. 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)) .

The purpose of NEPA's requirement that federal agencies 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 Envtl. 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, Inc.*, 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, Inc. v. Hodel*, 865 F.2d 288, 299 (D.C. Cir. 1988).

The record shows that FERC's conclusions regarding greenhouse-gas downstream effects and Project impacts to aquatic resources, groundwater, and

cultural attachment, and its consideration of alternative routes, were based on summary discussion and incomplete, untested, or undisclosed data. The errors and omissions in the analysis violated NEPA, and subverted FERC's balancing of the public interest under the Natural Gas Act.

A. FERC Failed to Adequately Analyze Downstream Greenhouse-Gas Effects

Each year, the Project's downstream greenhouse-gas emissions would be equivalent to the annual emissions of 9.9 coal-fired power plants.[14] Yet FERC's EIS devotes only one paragraph to downstream emissions. FERC's failure to take a hard look at downstream effects violates NEPA, and its refusal to consider them in its public interest balancing is directly contrary to this Court's holding in *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017).

1. FERC Arbitrarily Concluded that Downstream Effects Are Not Indirect Effects

Indirect effects "are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. § 1508.8(b). Reasonably foreseeable effects are "sufficiently likely to occur that a person of ordinary prudence would take [them] into account in reaching a decision." *EarthReports, Inc. v. FERC*, 828 F.3d 949, 955 (D.C. Cir. 2016) (citation omitted). Here, FERC approved a gas pipeline

[14] *See* EPA, Greenhouse Gas Equivalencies Calculator, *available at* https://www.epa.gov/energy/greenhouse-gas-equivalencies-calculator

"designed to transport about … 2.0 billion cubic feet per day," and estimated "total [greenhouse-gas] emissions from end use" at 40,000,000 tons of carbon-dioxide equivalent per year. EIS at ES-2, CO105-54, 4-620 [JA-___, -___, -___].

FERC nonetheless contends these emissions are "not reasonably foreseeable" and do not "fall within the definition of indirect impacts or cumulative impacts." Rehearing Order ¶¶270-71 [JA-___–___]. *But see Sierra Club*, 867 F.3d at 1371–74 (downstream greenhouse-gas emissions are indirect effect of authorizing gas pipeline); *City of Davis v. Coleman*, 521 F.2d 661, 677 (9th Cir. 1975) ("The argument that the principal object of a federal project does not result from federal action contains its own refutation."); Glick Dissent at 5 [JA-___] (record indicates combustion of the transported gas is "entirely foreseeable"); Rehearing Order (LaFleur, Comm'r, dissenting) at 3-4 n.10 [JA-___–___].

FERC's position that the downstream estimate "was provided outside the scope of [its] NEPA analysis" was not just harmless error. Rehearing Order ¶271, n.740 [JA-___] (citing *Dominion Transmission*, 163 FERC ¶61,128, at PP41-44 (2018)). Rather, it fatally undermines FERC's certificate decision because the agency does not "consider environmental effects that are outside of [its] NEPA analysis … in [its] determination of whether a project is in the public convenience and necessity…." *Dominion Transmission*, 163 FERC ¶61,128, at P43. *But see Sierra Club*, 867 F.3d at 1373 ("FERC will balance 'the public benefits against the

adverse effects of the project,'" including downstream greenhouse-gas effects) (internal citations omitted).

2. FERC Failed to Take a Hard Look at Downstream Effects

FERC was required to "quantify *and consider*" downstream emissions. *Sierra Club*, 867 F.3d at 1375 (emphasis added). *See also Montana Envtl. Info. Ctr. v. U.S. Office of Surface Mining*, 274 F. Supp. 3d 1074, 1093, 1098 (D. Mont. 2017) (quantifying downstream greenhouse-gas emissions did not constitute the requisite "'hard look' that ensured both the agency and the public were well-informed"). FERC's "EIS accordingly needed to include a discussion of the 'significance' of this indirect effect…, as well as [the cumulative impact]." *Id.* at 1374 (*citing* 40 C.F.R. § 1502.16(b), 40 C.F.R. § 1508.7). Instead, the EIS provides a downstream emissions estimate, asserts (without support) that coal displacement could "potentially" offset "some" emissions, and concludes:

> [downstream] emissions would increase the atmospheric concentration of GHGs, in combination with past and future emissions from all other sources, and contribute incrementally to climate change that produces the impacts previously described. Because we cannot determine the projects' incremental physical impacts on the environment caused by climate change, we cannot determine whether the projects' contribution to cumulative impacts on climate change would be significant.

EIS at 4-620 [JA-___]. This cursory statement, which constitutes the EIS's entire assessment of the significance and cumulative impact of the Project's massive

downstream emissions, hardly constitutes a "full and fair discussion." 40 C.F.R. § 1502.1.[15] FERC's "EIS is deficient, and the agency action it undergirds is arbitrary and capricious, [because] the EIS does not contain 'sufficient discussion of the relevant issues…'" *Sierra Club*, 867 F.3d at 1368 (citation omitted). *See also Am. Rivers v. FERC*, 895 F.3d 32, 49 (D.C. Cir. 2018) (agencies must "take a hard and honest look at the environmental consequences of their decisions"); *Del. Riverkeeper*, 753 F.3d at 1310 ("an agency must fulfill its duties to 'the fullest extent possible'"). Moreover, FERC later contradicts the sole reason provided for its alleged inability to assess significance. *See* Rehearing Order ¶290 [JA-___] (Social Cost of Carbon "constitute[s] a tool that can be used to estimate incremental physical climate change impacts.").[16]

FERC's refusal to assess significance means the Project's downstream

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[15] *See also WildEarth Guardians v. U.S. BLM*, 870 F.3d 1222, 1228, 1237 (10th Cir. 2017) (agency's approval of coal leases was arbitrary and capricious even though it quantified downstream emissions because, although agency "has not completely ignored the effects of increased coal consumption, … it has analyzed them irrationally"); *Ctr. For Biological Diversity v. Nat'l Hwy. Traffic Safety Admin*., 538 F.3d 1172, 1216 (9th Cir. 2008) (analysis inadequate where agency "quantifie[d] the expected amount of [carbon dioxide]" but failed to "evaluate the 'incremental impact' that these emissions will have on climate change or on the environment more generally in light of other past, present, and reasonably foreseeable actions").

[16] FERC's later excuses for failing to evaluate significance also fail. *See* Glick Dissent at 9-10 [JA-___-___]; *see generally Fla. Se. Connection, LLC*, 164 FERC ¶61099, *17-20 (Aug. 10, 2018) (LaFleur, Comm'r, *dissenting*); *id*. at *24 (Glick, Comm'r, *dissenting*).

effects are treated as insignificant, despite the magnitude of emissions. *See* EIS at ES-16 [JA-___] (Project "would result in limited adverse environmental impacts, with the exception of impacts on forest"); Certificate Order ¶286 [JA-___] (the Project "will not result in significant adverse cumulative impacts"); *id*. at ¶130 [JA-___] (except for forest impacts, "impacts will be reduced to less-than-significant levels").[17] Consequently, under FERC's approach, downstream greenhouse-gas impacts will never render a pipeline "environmentally unacceptable," and thus do not "factor into the Commission's approval of a proposed pipeline—a result that directly contradicts the D.C. Circuit's holding in *Sierra Club*. *Fla. Se. Connection, LLC*, 164 FERC ¶61099, *23 (Aug. 10, 2018) (Glick, Comm'r, *dissenting*).[18]

3. FERC's Substitution Argument is Illogical and Fatally Undermines its Analysis of the No-Action Alternative

[17] FERC also failed to discuss possible mitigation. *Compare Sierra Club*, 867 F.3d at 1374 (FERC "has legal authority to mitigate" downstream emissions) to Rehearing Order ¶308 [JA-___].

[18] FERC contends its Certificate Order put downstream emissions "in context" by comparing them to the national emissions inventory and an inflated "regional" inventory (comprised of unspecified states equal to approximately half the national inventory). Certificate Order ¶294 [JA-___]. *But see* 40 C.F.R. § 1508.27 (when evaluating significance, "NEPA requires considerations of both context and intensity"). FERC does not attempt to explain how the calculated percentages bear on significance or impact—including why the impact of a single project with annual combustion emissions equivalent to 1 percent of emissions for the *entire country* (and 43.5 percent of West Virginia's 2015 emissions) is not significant. *See* https://www.eia.gov/environment/emissions/state/analysis/pdf/stateanalysis.pdf.

FERC claims the Project might "displace gas that otherwise would be transported via different means, resulting in no change in GHG emissions." Certificate Order ¶293 [JA-___].[19] This "lacks support in the record[, which] is enough for [the Court] to conclude that the analysis which rests on this assumption is arbitrary and capricious,"—and, moreover, "the assumption itself is irrational (i.e., contrary to basic supply and demand principles)." *WildEarth Guardians*, 870 F.3d at 1235-36. *See also Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 549 (8th Cir. 2004); *Mont. Envtl. Info. Ctr. v. U.S. Office of Surface Mining*, 274 F. Supp. 3d 1074, 1098 (D. Mont. 2017) (rejecting notion that coal mine expansion would merely displace other coal in the marketplace as "illogical").

FERC also claims, without support, that "considering [greenhouse-gas] emissions would have no effect on [its] alternatives analysis," Rehearing Order ¶293 [JA-___], because the no-action alternative "would not decrease the ultimate consumption of fossil fuel … or reduce GHG emissions." Rehearing Order ¶300 [JA-___]. *But see WildEarth Guardians*, 870 F.3d at 1235-36, 1238 (rejecting "irrational and unsupported" assumption that if agency rejected proposed coal

[19] *See also Sierra Club*, 867 F.3d at 1375 (where decisionmaker and public are left in the dark as to degree of net change in emissions, the EIS "fails to fulfill its primary purpose").

lease, the same amount of coal would be mined elsewhere, such that greenhouse-gas emissions would be the same under the no-action alternative); *Nat. Res. Def. Council v. U.S. Forest Serv.*, 421 F.3d 797, 813 (9th Cir. 2005) (NEPA requires federal agencies to "present complete and accurate information to decision makers and to the public to allow an informed comparison of the alternatives"); 40 C.F.R. § 1502.14 (alternatives section is "the heart of the [EIS]" and must "provid[e] a clear basis for choice among options," including the no-action option). FERC's "fail[ure] to adequately distinguish between [the preferred and no-action] alternatives defeated NEPA's purpose" of informed decisionmaking and informed public comment. *WildEarth Guardians*, 870 F.3d at 1237.

4. FERC Arbitrarily Refused to Use the Social Cost of Carbon

FERC admits the Social Cost of Carbon is an "appropriate[]" tool for federal agencies to use "to inform their decisions," and that agencies have been rightly "faulted for failing to use it." Rehearing Order ¶281 [JA-___]. But FERC attempts to distinguish itself from these agencies by downplaying the causal connection between pipeline approval and combustion emissions. *Id.*; *but see* Glick Dissent at 7 n.2 [JA-___] ("To transport natural gas … is not less tied to its consumption than to produce it, and the case law reflects this accord."). FERC's refusal to use the Social Cost of Carbon is thus not due to any alleged deficiency in the tool, but rather to FERC's rejection of this Court's determination that it is a "legally

relevant cause" of downstream effects. *Sierra Club*, 867 F.3d at 1373. Accordingly, FERC's rationale for ignoring an admittedly useful tool for evaluating downstream impacts was arbitrary and capricious.

5. FERC Ignored this Court's Directive to Weigh Downstream Effects in its Public Interest Determination

FERC failed to "engage in 'informed decision making' with respect to the greenhouse-gas effects of this project." *Sierra Club*, 867 F.3d at 1374. The Project would cause massive downstream emissions and attendant climate impacts. FERC was required to take a hard look at these effects precisely because it has "statutory authority to act on that information." *Id*. at 1372. But FERC explicitly rejects this Court's unambiguous holding in *Sierra Club* that the agency can deny a pipeline because of downstream impacts: "[W]ere we to deny a pipeline certificate on the basis of impacts stemming from the end use of the gas transported, that decision would rest on a finding not 'that the *pipeline* would be too harmful to the environment,' but rather that the *end use* of the gas would be too harmful to the environment." Rehearing Order ¶309 [JA-___] (emphasis in original) (quoting *Sierra Club*, 867 F.3d at 1357); *see also id*. at n.831 (disavowing authority to deny a pipeline due to downstream effects). This intransigence renders FERC's action arbitrary and capricious. Because the Project's downstream effects "are critical to determining whether [it is] in the public interest…, the Commission's failure to

adequately address them is a sufficient basis for vacating this certificate." Glick Dissent at 2 [JA-___].

B. FERC Failed to Adequately Analyze Impacts to Aquatic Resources from Erosion and Sedimentation

FERC's EIS failed to take a "hard look" at the direct and indirect effects of the Project on waterbodies and wetlands. *See Robertson*, 490 U.S. at 350. Construction authorized by the Certificate Order would cross 1,146 waterbodies and disturb over 5,000 acres of soils with potential for severe water erosion. EIS at 4-118, 5-2 [JA-___-___]. Moreover, much of the pipeline route follows very steep slopes, which are particularly susceptible to erosion. *Id.* at 2-49 [JA-___].

Mountain Valley has begun and will continue to clear a 150-foot wide corridor along the pipeline route, "remov[ing] the protective cover and expos[ing] the soil to the effects of wind and rain, which increases the potential for soil erosion and sedimentation." *Id.* at 4-81 [JA-___]. In addition to erosion from right-of-way clearing, soil compaction from construction could "increase[] runoff into surface waters in the immediate vicinity of the proposed construction right-of-way ... resulting in increased turbidity levels and increased sedimentation rates in the receiving waterbod[ies]." *Id.* at 4-137 [JA-___]. Impacts on waterbodies include "local modifications of aquatic habitat involving sedimentation, increased turbidity, and decreased dissolved oxygen concentrations." *Id.* at 4-136 [JA-___].

In their comments on the Draft EIS, Sierra Petitioners cited expert reviews concluding that erosion and sediment control measures were inadequate, that sedimentation would increase by up to 1,500 percent during construction even with an unrealistically high assumption of 75 percent effectiveness of controls, [JA-___], and that conversion of forested areas in the right-of-way to cleared grassland would permanently increase sedimentation by up to 15 percent [JA-___].

Despite generally acknowledging the impacts associated with construction, FERC in the EIS concluded that "[n]o long-term or significant impacts on surface waters are anticipated" and that "[t]emporary impacts would be avoided or minimized" by adherence to certain mitigation measures. *Id.* 4-143, 4-149 [JA-___, -___]; *see also* Certificate Order ¶176 [JA-___]; Rehearing Order ¶¶176, 187 [JA-___, -___]. The EIS does not include analysis of permanently increased sedimentation from conversion of forested areas to herbaceous cover, *i.e.,* grass and small shrubs, contrary to FERC's discussion in its Rehearing Order. Rehearing Order ¶¶200-01 [JA-___]. FERC's conclusion that impacts would not be significant was not supported by the record and is belied by the significant sedimentation impacts that have already occurred during Project construction and a recent decision of the Fourth Circuit rejecting part of the EIS's sedimentation analysis.

1. FERC Failed to Support Its Conclusion that Mountain Valley's Erosion and Sedimentation Mitigation Measures Will Protect Aquatic Resources

FERC concluded that impacts to aquatic resources would not be significant because Mountain Valley would adhere to its Erosion and Sedimentation Plans and other related mitigation plans. *See, e.g.*, EIS at 5-2 [JA-___]; Certificate Order ¶185 [JA-___]; Rehearing Order ¶¶173, 176, 187-88 [JA-___, -___, -___]. Those plans, however, are not included in the EIS, and the EIS neither evaluates the effectiveness of nor discusses in detail the measures in those plans. In its Rehearing Order, FERC merely states that its conclusion regarding the effectiveness of the measures is based on "Commission staff's field experience gained from pipeline construction and compliance inspections conducted over the last 25 years." Rehearing Order ¶187 [JA-___]. But Petitioners in their comments to FERC presented contrary expert analysis to which FERC failed to respond, and identified numerous examples of the inadequacy of such measures on past pipeline projects that resulted in significant impacts to water quality. [JA-___]. Insufficient mitigation measures, even if longstanding in their use, are still insufficient. *See Summit Petroleum Corp. v. EPA*, 690 F.3d 733, 746 (6th Cir. 2012) (rejecting agency argument that its interpretation is entitled to deference merely because it is longstanding).

FERC's failure to support its conclusion that those measures 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").

Petitioners' predictions of severe sedimentation impacts have, unfortunately, been validated. Notices of Violation from both Virginia and West Virginia regulators reveal that Project construction has resulted in numerous significant sedimentation events. *See* Exhibits G-L, Y to Petitioners Appalachian Voices, *et al.*'s Stay Mot., Doc. No. 1741782.[20] These records document numerous instances

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[20] Although not part of the record before the agency at the time of its decision, such "events indicating the truth or falsity of agency predictions should not be ignored." *Am. Petroleum Inst. v. EPA*, 540 F.2d 1023, 1034 (10th Cir. 1976) (citing *Amoco Oil Co. v. EPA*, 501 F.2d 722, 729 n.10 (D.C. Cir. 1974)).

Evidence of those events is contained in official government documents and newspapers of wide circulation. These constitute "adjudicative facts" that can be "accurately and readily determined from sources whose accuracy cannot

of failing sedimentation control devices resulting in substantial impacts to aquatic resources. *See, e.g.*, Ex. H to Stay Mot. (noting that sediment controls at a stream crossing "failed and were breached allowing sediment laden water to enter stream," violating West Virginia's water quality standards); Ex. K to Stay Mot. (describing one incident of "overwhelmed and damaged erosion and sediment controls" that led to approximately 2,800 linear feet of stream channel filled with up to eleven inches of sediment, and another resulting in 6,009 linear feet of impacts with sediment depositions up to seven inches).

Contrary to FERC's argument in its Rehearing Order, such failures are not simply a result of faulty implementation, but in many cases inadequacy of the chosen measures to handle sedimentation loads in the steep, highly erodible terrain crossed by the Project. 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." Laurence Hammack, *Construction Halted at Mountain Valley Pipeline Work Site Following Severe*

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reasonably be questioned" and are thus properly the subject of judicial notice in accordance with Federal Rule of Evidence 201. *See Detroit Int'l Bridge Co. v. Gov't of Canada*, 133 F. Supp. 3d 70, 85 (D.D.C. 2015); *Agee v. Muskie,* 629 F.2d 80, 81 n.1, 90 (D.C. Cir. 1980). Judicial notice of such facts is appropriate "at any stage of the proceeding." Fed. R. Evid. 201(d). Courts have specifically taken judicial notice of "developments since the taking of [an] appeal." *Bryant v. Carlson*, 444 F.2d 353, 357-58 (9th Cir. 1971).

Erosion in Franklin County, The Roanoke Times, May 20, 2018.[21] The fact that FERC has not taken a single enforcement action or issued a stop work order in response to these incidents further demonstrates that the mitigation measures themselves, not just Mountain Valley's implementation, are inadequate. *See* Rehearing Order ¶¶189-90 [JA-___–___]; *see also* Ex. I to Stay Mot. (noting that Mountain Valley's Stormwater Pollution Prevention Plan was inadequate). In the face of such widespread impacts and Commission inaction, FERC cannot seriously maintain that Mountain Valley's mitigation measures are both "sufficient" and "adequately policed." Rehearing Order ¶188 [JA-___].

Indeed, the Fourth Circuit recently held that the analysis of sedimentation in FERC's EIS was inadequate to satisfy the U.S. Forest Service's NEPA obligations in connection with that agency's authorization of the Project across National Forest lands. *Sierra Club*, 897 F.3d at 591-96. The court criticized the Service for accepting Mountain Valley's estimate of 79 percent effectiveness for sedimentation controls on the National Forest despite the agency earlier identifying 48 percent as a best-case estimate. *Id.* The Court showed particular concern that the Forest Service may have acquiesced because "using the 48% figure would" have

[21] *Available at* https://www.roanoke.com/business/construction-halted-at-mountain-valley-pipeline-work-site-following-severe/article_2eeebd3a-5007-56b0-9469-3e381b09b668.html.

"*ramifications for the entire project analysis*." *Id.* at 592, 595 (emphasis in original). The court held that the Forest Service's decision "runs counter to the evidence before the agency," and directed the Service on remand to "explain how [FERC's] EIS took a 'hard look' at the sedimentation issues … considering its reliance on a superseded [Hydrologic Analysis of Sedimentation] report with which the Forest Service had grave concerns."[22] *Id*. at 596.

The analysis that the Fourth Circuit found inadequate to assess impacts on National Forest lands was in fact far more robust than the analysis for the rest of the Project, which did not provide *any* numeric estimate of the effectiveness of Mountain Valley's mitigation measures or quantify the extent to which sedimentation would increase. *See* Rehearing Order, ¶¶175-76 [JA-___]. In light of the EIS's flaws identified by the Fourth Circuit, and its paucity of analysis for non-National Forest lands, FERC's conclusion that Mountain Valley's mitigation measures would prevent significant impacts to aquatic resources was arbitrary and capricious. *See Nat'l Parks Conservation Ass'n*, 241 F.3d at 734.

2. FERC Failed to Consider Increased Sedimentation from Land Cover Change

FERC's EIS entirely fails to account for the increase in sedimentation that

[22] The EIS's analysis of sedimentation impacts to National Forest lands was based on the second draft of a hydrological report even though "the third and final draft was issued the previous day." *Id.*

would result from the conversion of upland forest to herbaceous cover within vulnerable segments of the Project right-of-way. In comments on the Draft EIS, Sierra Petitioners cited scientific literature demonstrating that pipelines are "known to increase fine sedimentation due to reduced vegetation," [JA-___], and submitted an expert report that used computer models to predict the change in annual sedimentation post-construction that would result from conversion of mature forest to the herbaceous cover that would be maintained in the permanent right-of-way. The study found that in "high risk" areas, *i.e.*, those with steep slopes and highly erodible soils, which characterize a significant portion of the route, sedimentation would increase by 15 percent due to the permanent land cover change. [JA-___]. FERC in its EIS did not acknowledge this report or otherwise assess the permanent increase in sedimentation that would result from land cover change, rendering its conclusion that the Project would have no long-term impacts arbitrary and capricious.

In its Rehearing Order, FERC claims that it did consider those impacts by considering "the potential for sedimentation from steep slopes in [the] analysis of landslide risk," and by requiring compliance with plans "designed to mitigate aquatic impacts from upland construction," and to "ensure stability and revegetate steep slopes." Rehearing Order ¶201 [JA-___]. But permanent sedimentation increases from land cover change have nothing to do with landslides, and will

occur even with perfect success of revegetation measures. FERC thus "entirely failed to consider an important aspect of the problem." *Del. Riverkeeper*, 753 F.3d at 1313.

C. FERC Failed to Support Its Conclusion that Mountain Valley's Mitigation Measures Will Protect Karst Groundwater and Groundwater Users

The southern portion of the Project crosses "some of the most prolific regions of karst in the United States." Comment of Virginia Sierra Club on Karst Hazards at 8 [JA-___]. Karst is a landscape made up by limestone and other soluble rocks that creates a network of underground drainage systems and caves. *Id.* at 11 [JA-___]. Surface-groundwater interaction in karst is unique from other geologic settings. *Id.*

Within Monroe, Giles, Craig, Montgomery, and Roanoke Counties, water originating on slopes underlain by relatively impermeable bedrock flows downhill until it enters a karstic aquifer, typically through a sinkhole. *Id.* at 21 [JA-___]. This is termed "allogenic recharge" – "the influx of surface water derived from a mountainside into an aquifer at a lower elevation." *Id.* at 32 [JA-___]. Changes to the upland drainage network can impact the quality and quantity of groundwater in the aquifer. *Id.*

Once in the karst aquifer, "water freely courses through enlarged conduits, including caves, and eventually emerges at springs and seeps or is pumped to the

surface by wells." *Id.* at 25 [JA-___]. "There is little or no filtration" of water flowing through karst conduits and contaminants, like sediment, "may quickly enter existing water supplies." *Id*. Many residents in this area of the Project rely exclusively on groundwater from springs and wells.

The EIS found that, "[t]emporary, minor, and localized impacts [on groundwater] could result … during construction through areas with developed karst." EIS at 4-114 [JA-___]. However, it concluded that Mountain Valley's mitigation measures "would adequately avoid or minimize potential impacts on groundwater resources." *Id.* at 4-115 [JA-___]. The Certificate Order restated this conclusion. Certificate Order ¶177 [JA-___]. As described below, the EIS did not support this conclusion.

The EIS's finding of insignificant impact was based in part on Mountain Valley's *Karst-specific Erosion and Sediment Control Plan* (*Karst Erosion Plan*). EIS at 4-105 [JA-___]. That plan states Mountain Valley will minimize impacts on karst groundwater by implementing industry-standard erosion and sediment control practices supplemented with "enhanced" best management practices to achieve several objectives, including "minimiz[ation of] construction-related surface water run-off"; "minimiz[ation of] the permanent alteration of surface runoff patterns"; "[p]revent[ion of] uncontrolled release of surface water and sediment to a water body or karst feature"; and "[p]revent[ion of] blockage or filling of karst

features….” Mountain Valley Response to Data Request at 1-2 [JA-___–___]. However, the *Karst Erosion Plan* does not describe the “enhanced” best management practices that would achieve these objectives.

The EIS did not describe the “enhanced” measures either. Instead it mis-identified the *Karst Erosion Plan’s* “objectives” as the best management practices. *See* EIS at 4-106 [JA-___]. Thus, FERC accepted Mountain Valley’s representations that it would prevent sediment from entering sinkholes or otherwise reaching karst groundwater without Mountain Valley explaining *how* it would do this. Again, FERC could not evaluate the effectiveness of mitigation measures that were not actually described.[23] *Nat’l Parks Conservation Ass’n*, 241 F.3d at 734.

The EIS did not show that FERC specifically evaluated whether the industry-standard practices contained in Mountain Valley’s *Erosion and Sediment Control Plans* for Virginia and West Virginia[24] would be sufficient on their own to

[23] The *Revised Karst Mitigation Plan* does not describe the “enhanced” best management practices, rather it states “additional [best management practices] will be implemented as specified by the [karst specialist].” Mountain Valley Implementation Plan Supplement at 13 [JA-___].

[24] The *Erosion and Sediment Control Plan for Virginia* briefly addresses “karst areas.” Mountain Valley December 2017 Supplemental Materials at Appendix C-2, § 5.3.5 [JA-___]; *see also id.* at Appendix C-1, p. 9 [JA-___]. It states: “[Mountain Valley] prepared a Karst Hazards Assessment that described construction methods to mitigate or eliminate potential impacts … for karst features that cannot be avoided through minor variations within the construction easement.” *Id.* However,

achieve the objectives identified in the *Karst Erosion Plan*. As described above, the record does not support FERC's finding that those plans would be effective in generally controlling project-related erosion and sedimentation on the steep, newly deforested slopes that, by nature's design, drain directly into the karst aquifers in these counties.

The EIS's finding of insignificant impact is also based in part on Mountain Valley's *General Blasting Plan.* EIS at 4-114 [JA-___]. That plan states, "[b]lasting will be conducted in a manner that will not compromise the structural integrity of the karst hydrology of known karst structures." Mountain Valley June 2017 Supplemental Materials at 16 [JA-___]. It proposes use of low-force charges, pre-blasting inspections, and agency consultation regarding post-blasting remediation measures (*i.e.*, what to do when blasting damages karst features). *Id.* While it describes inspections, it does not provide any detail regarding the use of low-force charges or potential remediation measures. The EIS did not explain how FERC evaluated the effectiveness of these measures to mitigate the impacts on

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the assessment's recommendations are limited to adjusting the alignment to avoid direct encounter with sinkholes, ensuring that unspecified erosion and control measures prevent runoff to karst features, and consulting with a "karst specialist" to determine whether additional, unspecified measures are needed to stabilize karst features. Mountain Valley October 2016 Supplemental Materials at Table 2 [JA-___]. In short, the specific measures for mitigating erosion and sedimentation impacts on karst groundwater are not disclosed in the assessment either.

groundwater quality, recharge and flow paths absent that information.

The EIS finding of insignificant impact also relied on Mountain Valley's plan to re-establish ground surface contours and surface runoff patterns after construction. EIS at 4-106 [JA-___]. However, Mountain Valley does *not* plan to fully re-establish surface runoff patterns post-construction. Rather, it plans to permanently install drains, water bars, and trench breakers to intercept and redirect water from slopes that provide allogenic recharge. *See, e.g.*, Mountain Valley December 2017 Supplemental Materials at 6-19 [JA-___].[25] The Forest Service and Petitioners commented that this could have significant, long-term impacts on groundwater recharge and users.[26] However, the EIS did not evaluate these impacts or whether they could be avoided.

Under NEPA, agencies must take a "hard and honest look at the environmental consequences of their decisions," *see Am. Rivers*, 895 F.3d at 49, which hard look must consider of mitigation measures. *See Envtl. Def.*, 515 F.Supp. 2d at 84. "[B]road generalizations and vague references to mitigation

[25] This is intended to mitigate other impacts of construction, including increased risk of landslides. *Id.* at 2 [JA-___].

[26] *See* Craig Petitioners' Rehearing Request at 26-27 [JA-___] (*citing* expert reports prepared by Dr. Pamela Dodds (R.4526 at Enclosure 1 [JA-___]) and Paul Rubin (R.4487 at Attachment 1 [JA-___])). *See also* R.4253 at 4 [JA-___] ("the need to have trench breakers with discharge, will likely affect the quality and quantity of these surficial aquifers for the life of the project.…").

measures … do not constitute the detail as to mitigation measures that would be undertaken, and their effectiveness, that the [agency] is required to provide." *Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1381 (9th Cir. 1998); *see also Okanogan Highlands All. v. Williams*, 236 F.3d 468, 473 (9th Cir. 2000) ("'mere listing' of mitigation measures, without supporting analytical data," is insufficient). FERC's failure to take a hard look at significant project impacts on allogenic recharge or assess the effectiveness of specific measures to mitigate impacts to karst groundwater violated NEPA.

D. FERC Failed to Adequately Assess Project Effects on Cultural Attachment to Land

The Project crosses Peters Mountain, an area of the Appalachian Mountains that holds unique historical and cultural significance. The residents' deep feeling of connection to this landscape has been termed "cultural attachment to land."[27]

Cultural attachment represents "the cumulative effect over time of a collection of traditions, attitudes, practices, and stories that tie a person to the land, to physical place, and to kinship patterns." Mountain Valley January 2016 Response to Data Request at 20 [JA-___]. It has been described as "the result of having lived in an area and having had your ancestors live in the area." *Id.* at 21

[27] The Forest Service cited potential impacts to cultural attachment in its 2002 record of decision as reason to reject alternatives that would have routed a powerline project through Peters Mountain. R.2692 at 11 [JA-___].

[JA-___]. Indeed, many residents trace their ancestral habitation in the area to the 1700s or 1800s, and continue to own and operate the small-scale farms established in the 1700s that form the backbone of the local economy. *Id.* at 8, 33 [JA-___, -___].

FERC directed Mountain Valley to study cultural attachment in the Peters Mountain area. EIS at 4-472 [JA-___]; Mountain Valley January 2016 Response to Data Request at 1 [JA-___].

Mountain Valley commissioned, "The Proposed Mountain Valley Pipeline Jefferson National Forest Segment Cultural Attachment Report." [JA-___]. The report provided "an investigation of the concept of cultural attachment," but did *not* analyze Project effects on cultural attachment. *Id.* at 2, 44 [JA-___, -___].

The report found that residents' cultural attachment was "similar to other indigenous peoples' attachment to place":

> "poems and stories [have] established [Peters Mountain] hero," parallel "descriptions of cultural property which [are] often used in discussing Native American's cultural and spiritual relationship to land and place [e.g.], active rituals on the land, burials of family members, family history rooted in stories about the land, and intimate understanding of the resources which the land provides for sustenance."

Id. at 21-22 [JA-___-___] (internal citations omitted).

The report concluded that residents of the "Peters Mountain area have a cultural attachment to the Study Area" that was unique from other areas in the

United States. *Id*. at 47 [JA-___]. It concluded this was a "major concern with regard to" the proposed Project. *Id.* at 48 [JA-___]. It also concluded that Peters Mountain could be considered a rural historic landscape, defined by the National Park Service as "a geographical area that historically has been used by people, or shaped or modified by human activity … and that possesses a significant … continuity of areas of land use, vegetation, buildings and structures, roads and waterways, and natural features. *Id.* at 32-33 [JA-___]. It recommended further analysis based in part on the Service's guidance for protecting cultural landscapes "as a means of documenting the material aspects of cultural attachment within NEPA and the [National Historic Preservation Act]." *Id.* at 17, 33, 47 [JA-___, -___, -___].

FERC purported to undertake an effects analysis in the EIS. EIS at 4-474 [JA-___]. However, FERC did not use the National Park Service's methods for ethnographic assessment and protecting cultural landscapes or articulate its own methods. *Cf.* 40 C.F.R. § 1502.24 (requiring agencies to identify methodology). Instead, it summarily concluded that mitigation plans would minimize resource impacts in this area and residents would be compensated for property damage. EIS at 4-475 – 4-476 [JA-___–___].

For example, the EIS found the Project would not impact cultural attachment, in part, because "wells and springs … affected by construction would

be repaired or replaced." *Id.* at 4-475 [JA-___]. In addition to failing to show wells and springs effectively could be repaired,[28] this discussion did not address the cultural significance of these water sources to residents whose families have relied on the same wells and springs for generations and prize the water's taste and purity. Mountain Valley January 2016 Response to Data Request at 36-38 [JA-___–___]. Their ancestors built the spring boxes and pipes that still deliver water to their homes and farms. *Id.* at 41 [JA-___]. One resident explained that water from a spring on his property "that originates in the [Jefferson National Forest] has provided the water supply to the farm on which my family lives for more than 100 years." *Id.* at 31 [JA-___]. Another stated: "[w]ater is our life. We have the best water in the world." *Id.* The EIS did not show a "hard look" at how damage to wells and springs would impact residents' cultural attachment or whether such impacts could be mitigated by replacement water supply or economic compensation. *Id.* at 13, 31 [JA-___, -___].

FERC restated these conclusions on rehearing, including that "an assessment of cultural attachment is not required by any federal laws or regulations relating to historic preservation and cultural resources management." Rehearing Order ¶267 [JA-___].

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[28] In comments on the Draft EIS, the Forest Service noted that "[i]f disturbed by construction, wells in near surface aquifers will not likely re-establish." [JA-___].

NEPA section 101 directs federal agencies "to use all practicable means, consistent with other essential considerations of national policy, to … preserve important historic, cultural, and natural aspects of our national heritage …." 42 U.S.C. § 4331(b)(4). An EIS must include a discussion of the environmental consequences of a proposed project on cultural resources." 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1502.16.[29] The report Mountain Valley commissioned at FERC's direction found that residents of Peters Mountain have a cultural attachment to land, Peters Mountain can also be considered a rural historic landscape, and that cultural attachment to land "is a major concern" with regard to the Project that should be analyzed further in accordance with National Park Service guidance. FERC's failure to take a "hard and honest look" at the environmental consequences of the Project on cultural attachment given these facts violated NEPA, *Am. Rivers*, 895 F.3d at 49, and its argument that such analysis was not required is contrary to the law.

E. FERC Failed to Adequately Consider Hybrid Alternative 1A

In spite of widespread and unrefuted evidence that Hybrid Alternative 1A is

[29] *See, e.g.*, National Park Service, "Planning-Cultural Landscapes" https://www.nps.gov/subjects/culturallandscapes/planning.htm ("In order to comply with National Historic Preservation Act (NHPA) Section 106 and National Environmental Policy Act (NEPA), particular attention is given to identifying and evaluating cultural landscapes and their significant landscape characteristics.").

substantially less impacting and has significant environmental, recreational, historic and cultural resource advantages over the proposed route, FERC never adequately evaluated this route, but instead based its conclusions that that this route is less preferable on a misleading and inaccurate record. NEPA regulations require an EIS to "[r]igorously explore and objectively evaluate all reasonable alternatives." 40 C.F.R. § 1502.14(a); Newport Petitioners' Rehearing Request at 27-38 [JA-___–___]. The non-mitigatable harm to the Newport Petitioners' historic properties and the Greater Newport Rural Historic District as a whole can be avoided by use of Hybrid Alternative 1A. Collocation also favors Hybrid Alternative 1A and this route avoids four High Consequence Areas that are currently in the blast effects zone, including a preschool and church. *Id.* This route also affects fewer residences, historic sites, conservation and archaeological sites, forests, endangered species, and wetlands. *Id.* Hybrid Alternative 1A also avoids significant impacts on Virginia's water resources, including direct adverse effects on historic springs and water resources in the District.

VI. FERC FAILED TO SATISFY THE REQUIREMENTS OF THE NHPA

The Project will cross areas of cultural and historical significance, including sites of significance to Indian tribes, seven rural historic districts, individual historic properties, the Blue Ridge National Parkway, and Appalachian National

Scenic Trail. *See* Programmatic Agreement [JA-___]. Accordingly, under the National Historic Preservation Act ("NHPA"), FERC was required to consider project effects on historic resources prior to making a final decision on the Project. 54 U.S.C. § 306108. Here, FERC delegated its responsibilities for identifying properties, considering the Project's effects, and evaluating avoidance and mitigation measures to Mountain Valley. Although procedures for implementing the NHPA call for early consultation with local governments, Indian Tribes, and other knowledgeable stakeholders, the record shows that Mountain Valley undertook bilateral consultation with the State Historic Preservation Officers ("State Officers"), and relied on FERC's general "paper hearing" procedures for communication with other consulting parties. *See, e.g.,* Criteria of Effects Report, Appendix A [JA-___] (documenting bilateral consultation). FERC's hands-off approach contributed to unlawful exclusion of interested stakeholders from the consultation process, resulting in errors in the identification of historic resources, and FERC's failure to fully evaluate effects on historic resources, prior to approval of the Project

A. FERC's Conditional Certificate Approving the Project Violates the Plain Language of Section 106 of the NHPA and Implementing Regulations

4. FERC Unlawfully Issued the Certificate Order Without Complying with Section 106

Section 106 of the NHPA prohibits federal agencies from approving any federally licensed undertaking unless the agency (1) takes into account the effects of the undertaking on historic properties; (2) affords the Advisory Council on Historic Preservation ("Advisory Council") a reasonable opportunity to comment on the undertaking; and (3) considers the advice of the Advisory Council, "prior to" the issuance of a license or the approval of federal assistance.[30] 54 U.S.C. § 306108; 36 C.F.R. Part 800. Completion of Section 106 "prior to" the issuance of a requested license is critical to accomplishing the "action-forcing" purposes of Section 106, similar to other federal statutory schemes, such as NEPA. *Robertson*, 487 U.S. at 348. "While Section 106 may seem to be no more than a 'command to consider,' ... the language is mandatory and the scope is broad." *United States v. 162.20 Acres of Land, More or Less, Etc.,* 639 F.2d 299, 302 (5th Cir.), *cert. denied,* 454 U.S. 828 (1981).

The Advisory Council has promulgated regulations implementing the requirements of Section 106. 36 C.F.R. Part 800. These regulations, which are binding on all federal agencies, establish a consultation process that agencies must complete before approving any undertaking. Among other things, the federal

[30] The Advisory Council is an independent federal agency responsible for the implementation and enforcement of Section 106 in its entirety. 54 U.S.C. §§ 304101, 304108(a).

agency, in consultation with the State Officer, any Tribal Historic Preservation Officers ("Tribal Officer"), and other recognized stakeholders, must identify historic properties, assess the effects of the project, and seek ways to avoid, minimize, or mitigate any adverse effects. 36 C.F.R. §§ 800.1(a), 800.4, 800.5, 800.6(a).

The Section 106 process may only be completed by obtaining the formal comments of the Advisory Council or entering into a Memorandum of Agreement between the consulting parties resolving adverse effects. The Memorandum then becomes a binding obligation and operates to "govern the undertaking and all of its parts." 54 U.S.C. § 306114; 36 C.F.R. § 800.6(c).

The Certificate Order acknowledges that at the time of issuance, the "process of compliance with section 106 of the National Historic Preservation Act ha[d] not been completed" for the Project, including "consultations with [State Officers]." Certificate Order, ¶269 [JA-___]. The Certificate Order indicated that FERC intended in the future to "consult with appropriate consulting parties regarding the production of an agreement document to resolve adverse effects [on historic properties] in accordance with 36 C.F.R. § 800.6." *Id.* The Order therefore included Environmental Condition No. 15, which purports to "restrict[] construction until after all additional required surveys and evaluations are completed, survey and evaluation reports and treatment plans have been reviewed

by the appropriate consulting parties, the [Advisory Council] has had an opportunity to comment, and the Commission has provided a written notice to proceed." *Id.*

Notwithstanding that condition, FERC's issuance of the Order prior to the completion of the Section 106 process – indeed, *long* before completing the Section 106 review – violates the plain language of Section 106 by depriving the Advisory Council of an opportunity to comment, and FERC's consideration of those comments, "prior to" the issuance of any license. 54 U.S.C. § 306108. Again, these procedures are intended to be action-forcing, to ensure that FERC is fully-informed *at the time of decision* as to the potential effects on historic properties and availability of measures to avoid or reduce those effects so as to prevent unnecessary destruction of historic properties.

As one court explained,

> [T]he [Advisory Council']s regulations, ... require that NHPA issues be resolved by the time that the license is issued... . In this case, the Board's final decision contains a condition requiring [the permit applicant] to comply with whatever future mitigation requirements the Board finally arrives at. *We do not think that this is the type of measure contemplated by the [Advisory Council] when it directed agencies to develop measures to "avoid, minimize, or mitigate" adverse effects.*

Mid States Coal., 345 F.3d at 554 (emphasis added). As is the case here, the court specifically noted that, although the agency had, prior to issuance of the license, "identified some potentially affected sites," it had "not made a final evaluation or

adopted specific measures to avoid or mitigate any adverse effects, *see* 36 C.F.R. § 800.2(d)(3).” *Id.* While the Court noted that the Advisory Council’s regulations offer the possibility of a “Programmatic Agreement” for completing the Section 106 reviews and consultations, “the programmatic agreement itself must be in place before the issuance of a license.” *Id.*

Here, of course, no Section 106 agreement was executed prior to the issuance of the Certificate Order. [JA-___]. Numerous issues concerning the impact of the Project on historic properties were unresolved at the time the Programmatic Agreement was executed, and, as discussed in more detail below, many issues remained unresolved, even after FERC issued a Right to Proceed with construction. [JA-___]. As discussed below, post-Certificate efforts to assess effects on historic properties cannot cure this fundamental violation of Section 106.

5. FERC’s Post-Certificate Execution of a Programmatic Agreement Did Not Cure this Violation

More than two months after FERC issued the Certificate Order, FERC Staff, Mountain Valley, the Advisory Council, and State Officers executed a Programmatic Agreement governing post-Certificate completion of the Section 106 process. [JA ___]. However, this Programmatic Agreement does not cure FERC’s fundamental violation of Section 106. “[M]erely entering into a programmatic agreement does not satisfy Section 106’s consultation

requirements." *Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dept. of Interior*, 755 F. Supp. 2d 1104, 1109 (S.D. Cal. 2010). Instead, the Section 106 process is completed upon actual "*compliance* with the procedures established in an approved programmatic agreement." *Id.* (citing 36 C.F.R. § 800.14(b)(2)(iii)) (emphasis added).

Under the regulations, programmatic agreements may be used as an alternate procedure in situations "[w]hen effects on historic properties cannot be fully determined prior to approval of an undertaking," such as where the "identification of historic properties," or the assessment of adverse effects, cannot be completed until "specific aspects or locations of an alternative are refined or access is gained." 36 C.F.R. § 800.4(b)(2); *see id. §* 800.14(b)(1)(ii), 800.16(t). However, even under "an appropriately-negotiated programmatic agreement," the required consultation must occur "as it becomes feasible." *Quechan Tribe*, 755 F. Supp. 2d at 1109. *See also Southern Utah Wilderness Alliance v. Burke,* 981 F. Supp. 2d 1099, 1109 (D. Utah 2013) (execution of a national Programmatic Agreement with the Advisory Council was insufficient to demonstrate compliance with Section 106 where consultations with the State Officer concerning the specific undertaking had not been adequate).

Here, FERC's post-Certificate actions make clear that the signing of the Certificate Order foreclosed the ability of FERC and consulting parties to perform

a key aspect of the statutorily mandated review set forth in the binding Section 106 regulations – to consider whether there are "alternatives or modifications to the undertaking that could avoid, minimize or mitigate adverse effects on historic properties," in consultation with the State Officer and other consulting parties. 36 C.F.R. § 800.6(a)(1). Following issuance of the Certificate Order, FERC did not engage in "consultation" to resolve adverse effects.[31] Instead, the "treatment plans" proposed by Mountain Valley and approved by FERC merely document previously identified resources that will be destroyed or damaged by the Project. [JA-___]. Requests from consulting parties for mitigation were ignored. [JA-___]. The *pro forma* circulation of "document-and-destroy" treatment plans does *not* satisfy FERC's obligation under the Section 106 regulations to resolve adverse effects by considering measures to "avoid, minimize, or mitigate" prior to issuing a final decision on the undertaking. *See Muckleshoot Indian Tribe v. U.S. Forest Serv.,* 177 F.3d 800, 809 (9th Cir. 1999) ("*[D]ocumenting* the [historic] trail did not satisfy the Forest Service's obligations to minimize the adverse effect of transferring the intact portions of the trail.") (emphasis added). These and other

[31] "*Consultation* means the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the section 106 process." 36 C.F.R. § 800.16(f). Merely soliciting general comments from the public cannot substitute for the consultations required by Section 106.

post-Certificate actions make clear that FERC has foreclosed meaningful opportunities to avoid or mitigate project impacts on historic properties. Accordingly, the issuance of the Certificate violates Section 106 of the NHPA.

3. *FERC's Conditional Certificate Foreclosed Any Meaningful Ability of FERC and the Advisory Council to Consider Alternatives to Avoid or Mitigate Harm to Historic Properties*

FERC's post-Certificate actions demonstrate that the Certificate's Condition 15 was manifestly inadequate to protect historic properties and procedural rights under the NHPA prior to completion of the Section 106 process. Decisions by this Court, which have upheld in some contexts the "conditional" approval of a license prior to completion of the Section 106 process, are therefore distinguishable from this case.

For example, in *City of Grapevine v. FAA,* 17 F.3d 1502 (D.C. Cir.), *cert. denied,* 513 U.S. 1043 (1994), the Court held that the conditional approval of a Federal Aviation Administration (FAA) certificate did not violate Section 106 so long as the FAA conditioned its approval on a requirement that the applicant refrain from construction until completion of the Section 106 process.

However, the proposed action in *City of Grapevine* involved the construction of two new runways: "Runway 16/34 East, scheduled to be operational in 1992, and proposed new Runway 16/34 West, scheduled to be operational in 1997." *Id.* at 1504. Only the West Runway — the runway whose construction would not take

place for five years — was subject to the FAA's conditional approval due to its potential impacts on historic properties, and the FAA specifically "conditioned final approval of the West Runway upon its subsequent *reevaluation*." *Id.* at 1508 (emphasis added).

As a result, the FAA's conditional approval did not foreclose its ability to consider measures to avoid and minimize adverse impacts prior to construction of the West Runway — a key component of Section 106 — since the FAA explicitly required a full reevaluation, and retained the authority to deny the airport the right to actually use the runway based on the results of the Section 106 process. As the Court explained, the only consequence of this conditional approval was the applicant's "risk of losing its investment should the § 106 process later turn up a significant adverse effect and the FAA withdraw its approval." *Id.* at 1509.[32]

The limited circumstances of the FAA's approval in *Grapevine* are not present in this case. To the contrary, this case represents precisely the context in which the fundamental purpose of mandatory language in Section 106, which is also emphasized in the binding Section 106 regulations, will be undermined by

[32] *See also Gunpowder Riverkeeper,* 807 F.3d at 280 (FERC's conditional certificate of a pipeline project did not violate Clean Water Act where "no activities [were] authorized by the conditional certificate itself that may result in such discharge prior to the state approval and the Commission's issuance of a Notice to Proceed.").

allowing the applicant to move forward with project construction prior to the completion of Section 106. In this case, construction of the pipeline itself is the action that will result in irreparable injury to the hundreds of acres of rural historic districts, including contributing natural features such as trees, viewsheds, and historic roadways, that will be clear-cut and bulldozed by Mountain Valley to construct the pipeline, irrevocably damaging these historic areas.

Moreover, here, unlike *Grapevine,* FERC continued to authorize piecemeal construction without any comprehensive reevaluation upon completion of the required Section 106 reviews and consultations. Thus, even though construction through these historic districts was temporarily deferred while "treatment plans" were prepared, it is impossible for the plans to meaningfully consider "alternatives" or "modifications" to the Project that would actually avoid adverse effects. "The completed segments would stand like 'gun barrels pointing into the heartland' of the [historic districts] .... presenting the responsible federal agency with a *fait accompli*." *Maryland Conservation Council v. Gilchrist,* 808 F.2d 1039, 1042 (4th Cir. 1986) (quoting *Named Individual Members of San Antonio Conservation Soc'y v. Texas Hwy. Dep't*, 400 U.S. 968, 971 (1970) (Black, J., dissenting from denial of certiorari)) (cited by this Court in *Karst Environmental Educ. & Protection, Inc. v. E.P.A.*, 475 F.3d 1291 (D.C. Cir. 2007)). It is precisely this sort of piecemeal decision-making that the NHPA's clear statutory language is

designed to prevent.

B. FERC's Refusal to Consult with the Tribal Officers Violates Section 101(d)(6)(B) of the NHPA, and the Implementing Regulations

The problems with FERC jumping the gun and prematurely issuing the Certificate prior to the completion of the Section 106 process are well illustrated in its handling of the requests for consultation made by the Cheyenne River and Rosebud Sioux Tribes under Section 101(d)(6)(B) of the NHPA, 54 U.S.C. § 302706(b). This provision of the NHPA and the implementing regulations require FERC to undertake a "reasonable and good faith effort" to identify and consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties that may be affected by an undertaking. 36 C.F.R. § 800.2(c)(2)(ii). "This requirement applies regardless of the location of the historic property. Such Indian tribe or Native Hawaiian organization *shall* be a consulting party." *Id.* (emphasis added).

The Section 106 regulations further require that agencies grant Tribal Officers "a reasonable opportunity to identify [their] concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects." 36 C.F.R. *§* 800.2(c)(2)(ii)(A). FERC failed to comply with any

of these requirements. The traditional and cultural connections of the Siouan tribes to the site were never identified by FERC, and the Sioux Tribes were never notified of the undertaking or offered an opportunity to consult prior to the issuance of the Certificate Order.

The Sioux Tribes became aware of the undertaking after FERC issued the Certificate Order. They notified FERC of their interest in being consulted in January 2018, while the Section 106 reviews under the Programmatic Agreement were still ongoing, and well before Condition 15 of the Certificate had been discharged. After deflecting the government-to-government requests of the Sioux Tribes for some months, on April 6, 2018, FERC advised the tribes that FERC had no obligation to consult with the tribes, claiming that "FERC staff found no documentation that your tribe ever occupied the project area or that your tribe had historical interest in West Virginia or Virginia." [JA-___].

However, the very reference that FERC cited in this letter — the "Handbook of North American Indians" — irrefutably shows that the Tutelos — the forebears of the Sioux tribes — formerly resided in the project area. A modest amount of additional research efforts would have further confirmed that the Tutelo groups were indisputably Siouan in origin. [JA-___]. The Advisory Council's guidance makes clear that "[t]he circumstances of history may have resulted in an Indian tribe now being located a great distance from its ancestral homelands and places of

importance." http://www.achp.gov/regs-tribes.html. As one court noted, "the [Section 106] regulations clearly contemplate participation by Indian tribes *regarding properties beyond their own reservations*." *Attakai v. United States,* 746 F. Supp. 1395, 1408 (D. Ariz. 1990) (emphasis added).

Simply put, FERC cannot properly identify traditional and cultural properties of the Sioux peoples in the absence of consultation with the Sioux Tribal Officers, and the Officers have no ability to identify these properties unless and until FERC formally notifies them about the undertaking and provides them with a meaningful opportunity to consult as part of the Section 106 process. Accordingly, it is clear that FERC failed to make a reasonable and good faith effort to identify the Sioux tribes for consultation on the Project's possible effects on properties of religious or traditional cultural significance to the Sioux.[33]

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[33] FERC's violation of this provision of the NHPA is not altered by the fact that FERC reached out to certain tribes (notably, *not* the Sioux) as part of the NEPA process. [JA-___]. It is well-established that NEPA and the NHPA are separate statutory responsibilities, and FERC's completion of the required NEPA review is insufficient to demonstrate compliance with NHPA. *Preservation Coalition, Inc. v. Pierce*, 667 F.2d 851, 859 (9th Cir. 1982) ("[C]ompliance with the NHPA, even when it exists, does not assure compliance with NEPA."). In the case of historic buildings, each statute "mandates separate and distinct procedures, both of which must be complied with ...." *Adler v. Lewis*, 675 F.2d 1085, 1096 (9th Cir. 1982). Likewise, the Advisory Council's view that FERC was not obligated to "re-start the Section 106 process" based on the failure to consult with the Tribal Officers does not alter this result. [JA-___]. The Advisory Council staff did not address FERC's responsibilities under Section 101(d)(6)(B) of the NHPA to consult with the Tribal Officers, much less assess or affirm the reasonableness of FERC's

In response to FERC's refusal to consult with them, the Siouan tribes endeavored to undertake their own cultural resource studies, despite the fact that the initial responsibility for doing such studies rests with FERC, albeit in consultation with the tribes. 36 C.F.R. § 800.2(a). The Tribal Officers ascertained that the project area includes an extensive, known, formerly recorded occupation site along the bottoms near the confluence of the Blackwater River and Little Creek, and that this stone circle is a type of feature considered significant to the Siouan Tribes as a place of supplication to a higher power where an individual sought spiritual guidance. *See* Exhibit D to Blue Ridge Petitioners' Stay Mot., Add. 162. These preliminary efforts provided unassailable information that their tribes have a demonstrable connection to the region of Virginia traversed by the Project.

FERC's consultation failures are compounded by its denial of the Tribal Officers' motion to intervene as being untimely and without good cause, thereby doubling the prejudice resulting from its own failure to consult with the Siouan tribes.[34] FERC cannot shift the burden onto the Tribal Officers to initiate this

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outreach to Native American tribes. The Advisory Council's authority is limited exclusively to interpretation of Section 106 and does not extend to other provisions of the NHPA, the interpretation of which is vested in the Secretary of the Interior. 54 U.S.C. §§ 304108(a), 306101(b).

[34] FERC's claim in the Rehearing Order, [JA-___], that the Tribal Officers' motions to intervene were untimely reveals a disturbing ignorance about its

consultation. As one Court explained, "[t]he [Section 106] regulations contemplate a far more formal procedure, which includes, at minimum, written notification to the relevant State Officer accompanied by documentation supporting the agency's finding ..." *Committee to Save Cleveland's Huletts v. U.S. Army Corps of Engineers*, 163 F. Supp. 2d 776, 790-91 (N.D. Ohio. 2001). Accordingly, FERC violated Section 101(d)(6)(B) of the NHPA and the implementing regulations by failing to initiate consultation with the Tribal Officers or provide them with a reasonable opportunity to comment on the undertaking.

C. FERC Unlawfully Forced Stakeholders to Choose Between Protecting Their Interests as Consulting Parties to the Section 106 Process or Securing Judicial Review of FERC's NHPA Compliance, In Violation of the NHPA and the Due Process Clause

1. FERC Wrongfully Denied Blue Ridge Petitioners the Right to Participate as Consulting Parties or Intervenors

In addition to the special consultative role accorded to Native American

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statutory responsibilities under the NHPA. Under the Section 106 regulations, FERC is obligated to identify the appropriate tribal historic preservation officers and invite them to consult, not vice versa. In effect, it is FERC's position that a Tribal Officer must anticipate FERC's future final refusal to accord them their statutory consultation role and formally intervene as a private party in order to invoke their statutory rights *not* to be treated as a consulting party in the NHPA proceeding. As this Court recently noted, "such a policy puts the Tribe in a classic Catch-22." *Oglala Sioux Tribe v. U.S. Nuclear Regulatory Comm'n*, 896 F.3d 520, 533 (D.C. Cir. 2018).

Tribes noted above, the Section 106 regulations require agencies to provide the public and specified "consulting parties" with an opportunity to comment throughout the Section 106 process. *See* 36 C.F.R. §§ 800.4(a)-(c), 800.5(a), 800.6(a). "Consulting party" status gives stakeholders heightened rights to review documents and participate in the Section 106 process. *Id. §* 800.4(c)(5).

However, in this case, FERC arbitrarily refused to grant consulting party status to persons and organizations such as Blue Ridge Environmental Defense League who intervened in the FERC proceeding, unlawfully forcing parties to choose between protecting their demonstrated interests through the Section 106 process and protecting their interests through intervening as a party in the FERC proceeding. [JA ___]. These limitations are not authorized by either the Section 106 regulations or FERC's own regulations.

This practice is also unlawful with respect to persons and organizations who chose to protect their demonstrated interests in the undertaking by becoming consulting parties to the Section 106 process, even though FERC Staff informed them that it meant refraining from intervening in the FERC proceeding. Intervention as a party is necessary in order to seek rehearing, and ultimately, judicial review of FERC's compliance with the NHPA. *See* 15 U.S.C. § 717r. FERC's refusal to allow affected stakeholders to become intervenors if they are consulting parties has deprived them of their statutory rights to judicial review in

violation of the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. *See Logan v. Zimmerman Brush Co.,* 455 U.S. 422 (1982).

2. FERC Wrongfully Denied the Newport Petitioners the Right to Participate as Consulting Parties

The Newport Petitioners' historic properties will suffer substantial, non-mitigatable adverse effects if Mountain Valley is permitted to proceed with construction of the Project, which will result in physical destruction of or damage to these historic properties and change the character of the use and physical features that contribute to the properties' historic significance. The pipeline route will bisect the historic farm complexes, sever open farmland and water connections, and cause significant damage to pastures, rendering impossible the continued care for and grazing by livestock, destroy historic springs and water distribution sources, and impede agricultural production and the ability to timber forested areas. Virginia's Department of Historic Resources has opined that five historic districts, including the Greater Newport Rural Historic District, "will be adversely affected by the [Project] bisecting them and leaving a permanent fifty-foot wide imprint on their landscapes." Exhibit A to Newport Petitioners Rehearing Request at 20-21 [JA-___–___].

Although the Newport Petitioners, from as early as November 2014, qualified as consulting parties under Section 106 of the NHPA, FERC denied their

request for consulting party status. 36 C.F.R. § 800.2(c). Over a year later, FERC, in response to a request by the Advisory Council, reconsidered its denial and granted five of the Newport Petitioners consulting party status on May 17, 2017.

Despite Section 106's mandate that FERC "shall involve the consulting parties … in findings and determinations made during the Section 106 process" and "seek information … from consulting parties … likely to have knowledge of, or concerns with, historic properties in the area," the Newport Petitioners have *never* been consulted on any Section 106 issues – even after being granted consulting party status. 36 C.F.R. §§ 800.2(a)(4), 800.4(a)(3). They have been excluded from NHPA-required consultations relating to: (1) numerous Mountain Valley submissions addressing the pipeline route and impacts on historic-cultural resources, (2) filings relating to Hybrid Alternative 1A, (3) the Draft EIS, (3) meetings held by the State Officer and Mountain Valley in which the impacts on the District were discussed, (4) the Criteria of Effects Report, filed on May 11, 2017, which erroneously concludes that the Project will not have an adverse effect on the historic properties owned by the Newport Petitioners, and (5) the Final EIS. Newport Petitioners' Rehearing Request at 38-45 [JA-___-___].

The draft Programmatic Agreement was not even sent to the Newport Petitioners until six days *after* the FERC issued the Certificate to Mountain Valley. *Southern Utah Wilderness Alliance*, 981 F. Supp. at 1109 (recognizing

programmatic agreement with the Advisory Council was insufficient to demonstrate Section 106 compliance where consultations had not been adequate). As a result of their exclusion from the Section 106 process, the Newport Petitioners have been denied the right to participate in the development of feasible alternative routes, such as Hybrid Alternative 1A, that would avoid adverse effects on their historic properties and the District. *Quechan Tribe*, 755 F. Supp. 2d at 1108 (granting injunctive relief because the agency failed to engage in the consultation required by Section 106 before approving the project).

D. The Area of Potential Effect is Deficient Because FERC Failed to Address the Adverse Effects of Two Pipelines

The NHPA requires FERC to address the adverse effects of "reasonably foreseeable effects … that may occur later in time … or be cumulative." 36 C.F.R. § 800.5(a)(1). Here, any cumulative effect is not hypothetical. Although the Certificate Order grants Mountain Valley an easement to construct one pipeline, Mountain Valley has stipulated in contract offers to landowners to purchase an easement that the contract is to purchase rights of way for *two pipelines*. Comment and Objection of Matt Fellerhoff [JA-___]. These foreseeable adverse effects for two pipelines are not addressed in the "area of potential effect" for the Project and, consequently, render the area of potential effect inadequate for analysis under the NHPA and NEPA.

VII. FERC FAILED TO ADDRESS THE REQUIREMENTS OF SECTION 4(F) OF THE DEPARTMENT OF TRANSPORTATION ACT

Because the pipeline is a "transportation activity" controlled by the Department of Transportation, FERC also violated Section 4(f) of the Department of Transportation Act by failing to evaluate the potential use of these historic properties "as early as practicable." 49 U.S.C. § 303; 23 C.F.R. §§ 774.3, 774.9, 774.17. Section 4(f) prohibits the Secretary of Transportation from approving a transportation project that requires the use of a historic site unless: (1) there is no prudent and feasible alternative; and (2) the project includes all possible planning to minimize harm to the historic site. *Id.* FERC completely ignored these requirements by refusing to objectively evaluate whether there are feasible and prudent alternatives, such as Hybrid Alternative 1A, which has substantial advantages and avoids all eight Virginia historic districts.

CONCLUSION AND RELIEF REQUESTED

For the reasons set forth above, FERC's findings under the Natural Gas Act, analysis under NEPA and the NHPA, 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).

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation in this Court's order of August 30, 2018 because this brief contains 21,470 words, excluding the parts of the brief exempted by FRAP 32(a)(7)(B) and D.C. Cir. Rule 32(e)(1). Microsoft Word 2016 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 2016 Times New Roman) in 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2018, I electronically filed the foregoing Petitioners' Joint 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 EM/ECF system on all ECF-registered counsel.

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