No. 21-2425

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SIERRA CLUB, *et al.*,

Petitioners,

v.

STATE WATER CONTROL BOARD, *et al.*,

Respondents,

and

MOUNTAIN VALLEY PIPELINE, LLC,

Intervenor-Respondent.

On Petition for Review from the Virginia Department of Environmental Quality's VWP Individual Permit Number 21-0416 (December 20, 2021)

RESPONDENTS' FINAL FORM RESPONSE BRIEF

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TABLE OF ABBREVIATIONS

Abbreviation	Meaning
FERC	Federal Energy Regulatory Commission
EPA	Environmental Protection Agency
Corps	U.S. Army Corps of Engineers
CWA	Clean Water Act
MVP	Mountain Valley Pipeline
NEPA	National Environmental Policy Act
EIS	Environmental Impact Statement
DEIS	Draft Environmental Impact Statement
DEQ	Department of Environmental Quality
the Board	State Water Control Board
the Agencies	DEQ and the Board, collectively
LEDPA	Least Environmentally Damaging Practicable Alternative
VWP	Virginia Water Protection
NWP	Nationwide Permit
JPA	Joint Permit Application
GIS	Geographic Information System
NGA	Natural Gas Act

INTRODUCTION

Environmental review of interstate pipeline projects is a complex and coordinated process involving multiple agencies, including the Federal Energy Regulatory Commission (FERC), the Environmental Protection Agency (EPA), and the U.S. Army Corps of Engineers (Corps). Regulation of these projects is primarily federal. The role of state agencies is limited and discretionary: under the Clean Water Act (CWA), states may, if they choose, evaluate projects and impose additional conditions they find necessary to protect state water quality.

Virginia's environmental agencies far exceeded the requirements of federal or Virginia law in their rigorous review of the Mountain Valley Pipeline (MVP). They have spent thousands of hours of agency review time over the course of years, ultimately imposing the most stringent set of conditions Virginia has ever required for this type of project. In reviewing the application for a Virginia Water Protection (VWP) permit here, the Agencies conducted a comprehensive analysis of hundreds of waterbody crossings, even though Virginia law required them to analyze less than two dozen. They reviewed and responded to thousands of comments, and sent numerous inquiries to MVP. The resulting permit

includes nearly a hundred conditions to ensure that the pipeline will not harm Virginia's water quality, including strict requirements on construction practices, demanding standards for restoration of waterbodies, and extensive monitoring and enforcement mechanisms.

Petitioners contend that the Agencies should have gone still farther. They ask this Court to vacate the permit on the ground that the Virginia agencies misinterpreted the requirements of Virginia law. But these state-law claims are not even properly before this Court, and should have been brought in Virginia court instead. In addition, the Agencies correctly concluded that Virginia law prohibits them from altering FERC decisions on the siting of pipelines. Choosing the optimal pipeline siting implicates a host of complex environmental and geographic considerations, which FERC balances in a collaborative interagency process under the National Environmental Policy Act (NEPA). Virginia's environmental agencies reviewed the pipeline's siting during this process and submitted detailed comments, which FERC incorporated. The Court should not accept Petitioners' irrational interpretation, which would instead require the Agencies to engage in an isolated and piecemeal review of siting for individual crossings years later, after the pipeline had

largely been constructed. That interpretation would harm the environment and is contrary to the statute's text and purpose.

Furthermore, the Agencies' consideration of crossing methods was thorough and reasonable, going far beyond the requirements of Virginia law, and the Agencies reasonably concluded that the extensive conditions they placed upon the permit were adequate to satisfy Virginia's narrative water quality standards. Petitioners fail to show that the Agencies' findings were arbitrary and capricious, or lacking in substantial evidence.

JURISDICTIONAL STATEMENT

The challenged state agency action was finalized on December 14, 2021, and Petitioners filed a timely petition for review on December 22, 2021. Petitioners contend that this Court has jurisdiction under 15 U.S.C. § 717r(d)(1). See Opening Br. 3. Respondents dispute this Court's jurisdiction over Petitioners' claims. See *infra* Section I.

ISSUES PRESENTED

1. Whether this Court has jurisdiction over Petitioners' claims that state agencies failed to comply with state law.

2. Whether the Agencies' decision not to alter FERC's siting determinations was proper under Virginia law.

3. Whether the Agencies acted arbitrarily and capriciously in their review of crossing methods.

4. Whether the Agencies reasonably determined that the extensive construction, monitoring, and enforcement conditions placed upon the permit were adequate under Virginia's narrative water quality standards.

STATEMENT

I. Statutory and regulatory background

A. Federal law governing permitting of interstate pipelines

Under federal law, entities seeking to construct an interstate natural gas pipeline must obtain a certificate of public convenience and necessity from FERC, which has "exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce." *Schneidewin v. ANR Pipeline Co.*, 485 U.S. 293, 300-01 (1988); 15 U.S.C. § 717f(c)(1)(A)-(2). FERC therefore acts as the "lead agency" in "coordinating all applicable Federal authorizations" and "complying with the National Environmental Policy Act of 1969." 15 U.S.C. § 717n(b)(1).

An interstate pipeline project requires numerous federal authorizations. By way of examples, the Bureau of Land Management must issue right-of-way permits for natural gas pipelines through lands

held by the United States, including lands in the National Forest System. See 30 U.S.C. § 185(c)(2); 36 C.F.R. § 251.54(b)(3). The Fish and Wildlife Service must be consulted on projects potentially affecting certain fish, wildlife, or plants, and their habitats. See 16 U.S.C. § 1536(a)(2). The project must take into account the effect on any historic property. See 54 U.S.C. § 306108. And EPA, or a State with delegated authority, is responsible for issuing permits for pipeline-related activities under the Clean Air Act. See 42 U.S.C. § 7661b.

Further, NEPA requires FERC, among other things, to order an environmental impact statement (EIS) for "major" projects such as the MVP pipeline. 42 U.S.C. § 4332(C). The EIS process includes a comprehensive review of siting alternatives for the pipeline, in which all interested federal and state agencies may participate. 40 C.F.R. §§ 1502.1, 1502.14. This process considers which route will best protect the environment, balancing a range of concerns such as overall pipeline length, impacts on the habitat of endangered species, environmental and cultural resources such as national parks, national forests, and historic sites, proximity to population centers, and impacts on water and air quality. *Id.* § 1502.16.

Projects that will result in the discharge of dredged and fill materials into wetlands and waterways must also obtain approval from the Corps. See 33 U.S.C. § 1344(a) & (d); *AES Sparrows Point LNG, LLC v. Wilson*, 589 F.3d 721, 724 (4th Cir. 2009). This Corps process is referred to as Section 404 approval, after the provision of the CWA under which it occurs. See 33 U.S.C. § 1344.

The Corps has created several nationwide permits, which set standard conditions under the CWA for activities that "are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment." 33 U.S.C. § 1344(e)(1). Nationwide Permit (NWP) 12 sets conditions for "the construction, maintenance, repair, and removal of oil and natural gas pipelines and associated facilities in waters of the United States" under certain circumstances. USACE, *Nationwide Permit 12* (effective Mar. 15, 2021), https://tinyurl.com/6y434x3f. When pipeline construction activities do not meet the conditions for use of NWP 12, an applicant can seek an individual permit from the Corps. See 33 C.F.R. § 330.4(a); see also *Sierra Club v. U.S. Army Corps of Eng'rs*, 909 F.3d 635, 639-40 (4th Cir. 2018).

The Natural Gas Act (NGA) largely preempts state environmental regulation of pipelines. See, *e.g.*, *AES Sparrows Point LNG, LLC v. Smith*, 527 F.3d 120, 125-26 (4th Cir. 2008). Under the CWA, however, Congress left States a limited role. Section 401 of the CWA provides that entities seeking a "Federal license or permit" to conduct activities that "may result in any discharge into the navigable waters" of the United States must apply for a "certification from the State in which the discharge originates or will originate." 33 U.S.C. § 1341(a). This process is generally referred to as Section 401 certification. See *PUD No. 1 of Jefferson Cnty. v. Washington Dep't of Energy*, 511 U.S. 700, 710 (1994). Section 401 allows States to impose conditions on pipeline construction to protect state water quality. *Sierra Club v. State Water Control Bd.*, 898 F.3d 383, 388 (4th Cir. 2018).

Section 401 does not *require* States to take any action. Instead, States have four basic options after receiving a request for a Section 401 certification: (1) grant the certification outright; (2) grant the certification subject to certain conditions; (3) deny the certification; or (4) waive the right to provide or withhold the certification. See *ibid.* If a State issues a certification, it must contain a statement that "there is a reasonable

assurance that the [permitted] activity will be conducted in a manner which will not violate applicable water quality standards," 40 C.F.R. § 121.2(a)(3) (2019), including certain provisions of the CWA, *id.* § 121.1(n) (2019).[1]

B. Virginia law governing permitting of interstate pipelines

Under Virginia law, the Commonwealth's Department of Environmental Quality (DEQ) and the State Water Control Board (Board) (collectively, the Agencies) have authority over Section 401 certifications. During the relevant period, the Board had the ultimate authority to issue the permit, following consultation with DEQ.[2]

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[1] These regulations were revised in 2020, but the revisions were not in effect in December 2021, when the permit was issued. In any event, DEQ satisfied the requirements of both versions of the rule. JA0696-99; see also MVP Br. 7 n.4.

[2] In 2022, Governor Youngkin announced two new appointments to the Board, changing its composition. See Governor of Va., *Governor Glenn Youngkin Announces Administration Appointments* (May 13, 2022), https://tinyurl.com/y6y4ttnp. Further, effective July 2022, the permitting authority for projects such as the Pipeline is transferring to DEQ. See 2022 Virginia Laws Ch. 356 (S.B. 657) (enacted Apr. 11, 2022). Governor Youngkin installed Michael Rolband as the Director of Environment Quality in 2022. Governor of Va., *Governor-elect Youngkin Announces Selection of the Natural Resources Secretary and Director of Environmental Quality* (Jan. 5, 2022), https://tinyurl.com/4ahw9ujd.

When a project falls within the scope of a nationwide permit issued by the Corps, it is "deemed cover[ed] under a VWP general permit" as well. 9 Va. Admin. Code § 25-210-130(J). Where a project is not covered by a nationwide permit, applicants may apply for a Virginia Water Protection permit. Generally, such a permit must "address avoidance and minimization of wetland impacts to the maximum extent practicable." Va. Code § 62.1-44.15:21(A). Applicants must provide, among other things, "[a]n alternatives analysis for the proposed project," which must "demonstrate to the satisfaction of the board that avoidance and minimization opportunities have been identified and measures have been applied to the proposed activity such that the proposed activity in terms of impacts to state waters and fish and wildlife resources is the least environmentally damaging practicable alternative" (the LEDPA). 9 Va. Admin. Code § 25-210-80(B)(1)(g). "Practicable" is defined as "available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes." Va. Admin. Code § 25-210-10.

Several Virginia code provisions specifically govern the Agencies' review of FERC-regulated pipelines. First, Virginia law states that

"[e]ach wetland and stream crossing shall be considered as a single and complete project; however, only one individual Virginia Water Protection Permit addressing all such crossings shall be required for any such pipeline." Va. Code § 62.1-44.15:21(J)(1). "[I]ndividual review of each proposed water body crossing with an upstream drainage area of five square miles or greater shall be performed." *Ibid.* Second, pipelines greater than 36 inches in diameter "shall be constructed in a manner that minimizes temporary and permanent impacts to state waters and protects water quality to the maximum extent practicable." Va. Code § 62.1-44.15:21(J)(2). This provision does not state that "impacts to state waters" shall be "avoid[ed]." Compare *ibid.* with Va. Code § 62.1-44.15:21(A). Third, two Virginia code sections provide that "[n]o Board action on an individual or general permit for" facilities "of utilities and public service companies regulated by" FERC "shall alter the siting determination made through" FERC. Va. Code § 62.1-44.15:21(D)(2); Va. Code § 62.1-44.15:81(F).

In 2018, Virginia's General Assembly added a requirement that pipelines larger than 36 inches in diameter obtain a second permit covering potential impacts to water quality from activities occurring in

upland areas, effectively codifying the two-part certification process that the Agencies used in 2017, and this Court reviewed in *Sierra Club*, 898 F.3d at 408. Va. Code § 62.1-44.15:80. The VWP permit and the certification concerning upland activities "shall together constitute the certification required under § 401 of the [CWA] for natural gas transmission pipelines greater than 36 inches inside diameter." Va. Code § 62.1-44.15:80.

At the same time, the General Assembly amended Va. Code § 62.1-44.15:21. The section had previously provided that "[t]he Board shall develop general permits for" FERC-regulated facilities; the amendment added an exception for "any natural gas transmission pipeline that is greater than 36 inches inside diameter," requiring individual permits for such pipelines. Va. Code § 62.1-44.15:21(D)(2). And the amendments added Va. Code § 62.1-44.15:21(J), governing the individual permits for such pipelines. See 10, *supra*.

Virginia also has narrative water quality standards, which provide that "State waters" shall be "free from substances attributable to sewage, industrial waste, or other waste" in concentrations, amounts, or combinations which either "contravene established standards" or

"interfere directly or indirectly with designated uses of such water or which are inimical or harmful to human, animal, plant, or aquatic life." 9 Va. Admin. Code § 25-260-20(A). "Specific substances to be controlled" include those that produce "turbidity," which is a lack of water clarity. *Ibid.*

II. Factual background

Almost seven years ago, Mountain Valley Pipeline, LLC (MVP) filed an application with FERC to construct and operate the Mountain Valley Pipeline Project, a 303-mile pipeline that traverses West Virginia and Virginia. FERC, *Docket CP16-10* (last visited June 29, 2022), available at https://tinyurl.com/yc68t6ed; JA0689. That application commenced a complex regulatory review of the pipeline, including over thirty active authorizations and approvals by federal, interstate, state, and local agencies spanning such diverse areas as national forest rights-of-way, endangered species preservation, water and air quality, and historical site preservation. See, *e.g.*, JA0129-31; JA0300-03.

Among other things, FERC ordered an environmental impact statement under NEPA. As part of that process, FERC reviewed the environmental impacts of the pipeline on water resources, including

groundwater, surface water, and wetlands. FERC, Mountain Valley Project and Equitrans Expansion Project Final Environmental Impact Statement, 4-1 (June 2017), available at https://tinyurl.com/3xpab7vb (FERC EIS). FERC also considered project alternatives, including a "no action" alternative, alternative modes of natural gas transportation, and more than 25 alternatives to the proposed project route. FERC EIS § 3.

FERC issued a draft environmental impact statement for public comment in 2016. Numerous state and federal regulatory agencies submitted comments. DEQ submitted a 371-page letter, which coordinated comments from numerous Virginia agencies and localities, and included more than seventy recommendations to address potential environmental and water quality impacts.[3]

Among other things, DEQ proposed several route changes and variations, see *ibid.* at Attach. A pp. 8-10, which FERC incorporated into its final EIS. For instance, DEQ recommended changing the route to avoid the Canoe Cave Conservation Site, because it has extensive karst areas. *Id.* at 8. Karst areas are "geological formations of soluble limestone

[3] See generally Commonwealth Response to FERC MVP DEIS, FERC (Dec. 22, 2016), https://tinyurl.com/3dpvcuvs.

bedrock that creates underground water flow systems where the rocks have dissolved and created sinkholes, caves and underground springs and rivers." *Appalachian Voices v. State Water Control Bd.*, 912 F.3d 746, 758 (4th Cir. 2019). DEQ explained that avoiding the area "would minimize the effects of land disturbance on the karst areas." Commonwealth Response to FERC MVP DEIS, Attach. A, at 8. In response, the pipeline route was altered to avoid Canoe Cave. FERC EIS at 3-59.

Indeed, during the NEPA process, MVP incorporated hundreds of route modifications based on topographic considerations and to avoid or minimize impacts on roads, waterbodies, cultural resources, and landowner concerns. FERC EIS at 3-107. Among other things, the "route selection process considered pipeline length, avoidance of major population centers" and "sensitive areas," "avoidance of National Forests, National Parks, the Appalachian National Scenic Trial, and the Blue Ride Parkway," and opportunities to "collocate the pipeline with existing utility corridors." JA0087.

One significant route modification made during the EIS process was to the Blackwater River crossing. Initially, the application proposed

two crossings of the Blackwater River in Franklin County, Virginia upstream of the City of Rocky Mount's drinking water intake. FERC EIS at 3-87. DEQ's comments raised concerns about the proximity of the pipeline to the town's drinking water plants. Commonwealth Response to FERC MVP DEIS, Attach. A, at 11. MVP developed a route modification to avoid those crossings, which FERC concluded was appropriate. FERC EIS at 3-87.

DEQ also provided extensive comments on the proposed crossing methods during the FERC EIS process, which FERC incorporated. See, *e.g.*, Commonwealth Response to FERC MVP DEIS, Attach. A, at 18 ("Due to recent examples of frac-outs leading to bentonite mud spills resulting from the directional drill method, perform geotechnical analysis of all proposed sites for directional drills and closely review it to ensure that the sites are suited for such a crossing method. Depending on the sensitivity of any given stream, it may be preferable to trench crossings.").

FERC issued its certificate authorizing the pipeline's construction in October 2017. Mountain Valley Pipeline, LLC, 161 FERC ¶ 61,043 at 108, https://tinyurl.com/3wb9k27h (FERC Certificate). The certificate

contained a list of 40 separate "Environmental Conditions." *Id.*, App. C. These conditions incorporated comments from DEQ, see, *e.g.*, *id.*, App. C, at 8 (requiring a revised Karst Mitigation Plan before construction begins).

The Pipeline has undergone additional review from federal and state agencies regarding water quality. Initially, MVP submitted a Joint Permit Application (JPA) to the Corps, DEQ, and the Virginia Marine Resources Commission, seeking authorization to proceed under Corps Nationwide Permit 12. DEQ issued a Section 401 water quality certification, which included several conditions, and the Corps found that the project complied with Nationwide Permit 12. *Sierra Club*, 898 F.3d at 394-95; see also 9 Va. Admin. Code § 25-210-130(H).

At that point, DEQ was not required to conduct further review under then-existing Virginia law. DEQ, however, decided to conduct a supplemental proceeding to ensure that activities occurring in upland areas would not result in discharges into Virginia's waters, such as through run-off, that would harm water quality. *Sierra Club*, 898 F.3d at 390. Following an exhaustive review, the Board issued a water quality certification to MVP in December 2017, finding that the conditions it

imposed provided reasonable assurance that water quality standards would not be violated.[4] This Court upheld the upland Section 401 certification in 2018. *Sierra Club*, 898 F.3d at 408. Most of the upland portion of the pipeline in Virginia was then constructed. JA0080. MVP also constructed dozens of waterbody crossings in Virginia under Nationwide Permit 12. JA0730-31; see JA0027-34.

Later in 2018, this Court vacated the Corps' verification for the project to proceed under Nationwide Permit 12, finding the Project could not comply with conditions West Virginia had imposed on the use of Nationwide Permit 12 in that state. *Sierra Club*, 909 F.3d at 655. Accordingly, MVP applied for a Virginia Water Protection permit and sought an individual Section 404 permit from the Corps. See 9 Va. Admin. Code § 25-210-130(J).

Among other things, the joint application submitted to the Corps and DEQ included a site-specific analysis of the method of crossing each waterbody. Pipelines can cross waterbodies through either (1) trenchless methods or (2) open-cut methods, JA0126, each of which has advantages

[4] Virginia DEQ, Certification No. 17-001 401 Water Quality Certification Issued to Mountain Valley Pipeline LLC (Dec. 8, 2017), available at https://tinyurl.com/mwmsznpu.

and disadvantages depending upon the site conditions. Trenchless methods cross over or under the waterbody, with the significant advantage of not directly affecting the waterbody or disturbing aquatic wildlife or habitats there. JA0156, JA0173. Each type of trenchless crossing, however, has limitations and disadvantages that can make it unsuitable for particular sites.

Bridging can be used to cross over waterbodies, and can be appropriate, for instance, when a pipeline must cross deep gorges or geological faults. JA0174. Because they are "visible and easy to access," however, bridges are "vulnerable to threats of terrorism and vandalism," as well as damage during storms, natural disasters, or accidents. JA0174.

Horizontal directional drilling "allows for trenchless construction across an area by pre-drilling a pilot (or guide) hole below the depth of a conventional pipeline and then pulling the pipeline through the pre-drilled borehole." JA0175. Similarly, in the conventional bore method, "the pipe is installed beneath the waterbody or wetland," requiring "sloped or shored" bore-pit excavations of "launching and receiving pits located in workspace in uplands on each side of the feature being crossed." JA0176.

Although these boring methods can have significant environmental advantages, see 18, *supra*, they can also have environmental risks that make them unsuitable for certain types of sites. For instance, boring in karst areas can lead to "the loss of drilling fluid circulation and the resulting environmental impacts," as the lubricants needed to drill under the waterbody can leach into groundwater through the holes in the rock formations. JA0182. Boring through karst also presents "other potential hazards," such as the risk of the boreholes collapsing. *Ibid.* High groundwater can also make boring infeasible, as the groundwater could fill the borehole and be contaminated. *E.g.*, JA0175.

The surrounding terrain can present another limitation. Among other things, the terrain determines how deep the bore-pit needs to be. Trenchless crossings "present substantially greater challenges and logistical difficulties" when deeper bore-pits are required. JA0179. The depth of the bore-pit impacts, among other variables, the size of the "spoil pile," the dirt and rocks excavated from the bore-pit. See *Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, 43 (5th Cir. 1980); JA0175-81; AR000242. Particularly where the surrounding terrain is steep, it is difficult to contain large spoil piles, which can erode sedimentation and

lubricants into the waterbody. *E.g.*, JA0176-77, 0179-81. Steep slopes can also make trenchless crossings impracticable because of technical, logistical, and safety concerns, including the difficulties of operating the required machinery without damaging the environment or endangering the operators. JA0180-81.

The second category of crossing methods—open-cut crossings—include wet-ditch open-cut crossings and dry-ditch open-cut crossings. JA0173. A wet-ditch open-cut crossing "involves excavating a trench across the flowing river during times of seasonal normal or below-normal stream flow, lowering a pre-fabricated section of pipe into the trench, and backfilling to cover the pipe and restore the stream bed." JA0173. This method, however, "increases the potential for detrimental impacts to the aquatic environment," such as increasing turbidity and contaminating the flowing stream in the event of an accident. JA0173. Because of this method's environmental disadvantages, MVP did not propose, and the Agencies did not approve, any wet-ditch open-cut crossings. JA0173.

In a dry-ditch open-cut crossing, the operators "temporarily divert the water from the construction area and bury the pipeline two to four feet below the streambed." *Sierra Club*, 898 F.3d at 387; JA0174. The

purpose of dry-ditch crossings is "to keep the water flowing to maintain the downstream habitat." JA0719. The advantages of these crossings include that they typically can be completed quickly, in as little as twenty-four hours, which minimizes disruption to the waterbody. See JA0727-28. They also do not require bore-pits, JA0179, and involve much smaller spoil piles, which can be easily "excavated" and "moved … away from the stream" to avoid sedimentation. JA0719.

III. Procedural background

In early 2021, MVP submitted its renewed joint application, seeking an individual Virginia Water Protection permit from the Agencies and a Section 404 certification from the Corps. JA0117; JA0124, 0353-69; AR007031-217.

MVP's application had detailed information on the Pipeline, including an alternatives analysis, JA0134-55, a discussion of mitigation, minimization, and compensation, an analysis of proposed pipeline crossing methods for each waterbody, JA0172-91, and a mitigation framework, JA0758. Table 15 of the application listed each crossing, the methodology proposed ("boring versus no bore"), and an explanation why each crossing method was selected. JA0779. MVP also provided baseline

data of the pre-construction condition at each crossing, including "soils, hydrology, vegetation, [and] invasive species" for wetlands, and "longitudinal cross sections, pebble counts, vegetation, DO, pH, [and] benthic macroinvertebrates" for streams. JA0758-59.

Before accepting the application as complete, DEQ made three requests for additional information. JA0370-71, 0374-78, 0379-80; see generally JA372-73; AR007218-007618. Among other things, DEQ requested further information for any crossings where the analysis set forth in the application appeared incomplete or inconsistent, or where there appeared to be further opportunities to minimize impacts on the waterbodies. See, *e.g.*, JA0376 ("This crossing is located at the terminus of a temporary access road …. Can the road end just prior to the wetland and associated stream to avoid this impact?"); JA0374 ("Table 15 Crossing Method Determination Study … states that the proposed crossing method is a dry ditch, open cut. However, Table 15's Rationale Discussion … appear[s] to imply MVP will use a conventional bore … Please clarify …."); JA0377. MVP provided the requested information, and DEQ then deemed the application complete.

After providing notice to landowners and the public, DEQ held a 60-day comment period, receiving nearly 8,000 public comments. JA0746-48; see also AR007619-731, 027878-44171; JA0506-29, 0541-57. The majority of the comments favored the project. See JA1153. A number of commenters referenced a letter that the EPA sent to the Corps as part of its Section 404 proceeding, requesting that MVP add a discussion of changes to the proposal since the project was authorized under Nationwide Permit 12, and consideration of the costs of mitigation. Even though EPA did not submit this letter to DEQ, DEQ considered and responded to it. See JA0541-57.

The Board held two public hearings during which it heard oral comments from the public directly. JA0686, 746-47. At a third meeting, DEQ gave a presentation regarding the permit, and answered the Board's questions. JA0686-801. DEQ also provided a written response to comments, JA0506-29, and a Fact Sheet setting forth reasons for its recommendation to grant the permit with conditions. JA0079-109.

Regarding the sites for waterbody crossings, DEQ explained to the Board that Virginia Code sections 62.1-44.15:21 and 62.1-44.15:81 provide that the Agencies shall not alter the siting determination

approved by FERC. JA1133. DEQ explained that the project's siting "has been determined by the FERC to be the preferred alternative that could meet the project purpose," and the Virginia Code "specifically excludes DEQ from evaluating further alignment modifications." JA0084 (emphasis omitted). FERC "evaluated 27 route alternatives and compared their impacts to the proposed pipeline," finding none of the alternatives practicable except for one it approved. JA0088 (emphasis omitted). DEQ explained that it had "provided comments and recommendations to the FERC … for the Mountain Valley Project Draft Environmental Impact Statement," which "addressed pre-impact characterization of temporary impact locations, surface water resources, recommended mitigation, and alignment revisions based on a [Geographic Information System] evaluation of each pipeline crossing of a waterbody." JA0542.

Regarding crossing methods, DEQ noted that the Virginia Code required an individualized review of only those crossings "with an upstream drainage area of five square miles or greater." Va. Code § 62.1-44.15:21(J)(1); JA0524. Only approximately two dozen crossings met that threshold. JA0524. The Agencies, however, decided to exceed the

required review and individually review all "236 surface water crossings in Virginia." JA0090-91; JA0524.

In its presentation, DEQ explained the factors it considered to evaluate MVP's proposed crossing methodology, including "bore length, geotechnical considerations of how deep a bore pit would have to be," the "slopes and the available area to work in," the size of the "spoil pile," and the ability to "constrain" it within the work area. JA0779-80. A DEQ staffer further explained that while he was "not always in a position to question" the details of particular engineering determinations such as "whether a 39-foot" bore could "go another foot deeper or not," he conducted a site-by-site analysis to ensure the application applied a "consistent" and "logic[al]" approach to determining the proposed crossing method. JA0781-82. DEQ's Fact Sheet and response to comments likewise explained that the Agency considered "crossing length, bore-pit depth, stream depth, steep slopes, karst geology, cost, potential for bore failure and unique site-specific constraints" in determining that the application showed that the proposed crossing methods were the least environmentally damaging practicable alternatives. JA0090-91; JA0544.

The Agencies also considered the comments in EPA's letter regarding crossing methods. EPA recommended "updating the alternatives analysis with a narrative and table that identifies and compares the changes to the proposal since the project was authorized under the Nationwide Permit (NWP) 12," and DEQ noted in its response that MVP had accordingly provided such a table. JA0541-42. In response to EPA's comment that MVP should consider "the costs associated with site restoration, monitoring and management, as well as potential additional compensatory mitigation" in determining whether trenchless crossing methods were practicable, DEQ noted that MVP updated its application accordingly, but that the mitigation costs did not change the proposed crossing methods because they were "a small fraction of the crossing costs," JA0546 (emphasis omitted); see JA0785. Instead, the Agencies required enhancements to MVP's restoration plan, including additional "performance standards," and "monitoring, maintenance, and adaptive management." JA0753-54. EPA then sent a subsequent message, stating that if its technical "comments were followed, the project would be assured to be in compliance with the [CWA]." JA0750; see JA0784-85.

Finally, DEQ explained that while "commentators also allege that Virginia's narrative standard will be violated by the temporary construction activity" of installing a crossing, "[t]his is not consistent with how Virginia evaluates data and assesses water quality." JA0513. The Agency uses "a number of objective, data driven indicators to assess water quality," such as "dissolved oxygen, pH, temperature, water column and sediment toxics, toxicity tests, [and] bottom-dwelling macroinvertebrates." JA0514. Commenters' "short term, subjective accounts of the narrative standard" did not show any violation, and DEQ concluded that water quality would be adequately protected by the numerous conditions on the permit. *Id.*

The Board accepted DEQ's recommendation to approve the permit. See JA0795-801; JA0001-116. The permit includes nearly a hundred special and general conditions designed to protect water quality and minimize any environmental impact. JA0003-18. These conditions include requiring construction practices that "minimize[] bottom disturbance and turbidity," JA0004; requiring MVP to use the "[e]rosion and sedimentation controls" set forth in "the Virginia Erosion and Sediment Control Handbook," *ibid.*; requiring that "[a]ll temporarily

disturbed wetland [and stream] areas shall be restored to their original elevations and contours," JA0007; and requiring an "Environmental Auditor approved by DEQ to monitor stream and wetland crossing activities," JA0011; JA0003-18.

Further, the Agencies imposed additional monitoring and notification requirements, including a mandated monthly site inspection. JA0009-10. During this water quality assessment process, "monitoring results are analyzed to determine if the water quality meets set standards and is suitable enough for swimming, fishing[,] public water supply and other uses," through "a number of objective, data driven indicators to assess water quality." JA0514. DEQ also required an agency expert on site whenever MVP constructed stream crossings "to make sure there is no impact on any fish during the construction activities." JA0699-703, 762. Further, DEQ put in place post-construction monitoring for up to three years, adaptive management plans based on those monitoring observations, and additional mitigation for temporal loss of habitat. JA0764. The Agencies also included conditions allowing them to terminate the permit for cause, including for "[n]oncompliance by [MVP] with any condition of the VWP permit." JA0014.

Petitioners filed this action, requesting that this Court review the VWP permit. Dkt. No. 3. Petitioners contend that the Agencies misinterpreted Virginia law in concluding that they could not evaluate alternative sites; and that the Agencies' analysis of crossing methodology and the Virginia narrative water quality standards was arbitrary and capricious and inconsistent with Virginia law.

STANDARD OF REVIEW

Petitioners contend that this Court should apply the arbitrary and capricious standard of review under the federal Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq.* Opening Br. 27. The federal APA, however, does not apply to State agencies. *Delaware Riverkeeper Network v. Secretary of the Pa. Dep't of Env't Prot.*, 870 F.3d 171, 179 n.8 (3d Cir. 2017); 5 U.S.C. § 701(b)(1) (defining "agency" to include only federal entities). Indeed, this Court "has questioned whether State standards might be more appropriate for review of State agency actions." *Mountain Valley Pipeline, LLC v. North Carolina Dep't of Env't Quality*, 990 F.3d 818, 826 n.5 (4th Cir. 2021) (collecting cases). The standard of review under Virginia's APA applies to review of actions by Virginia state agencies.

Under Virginia law, state agencies' factual decisions are reviewed for "whether there was substantial evidence in the agency record to support the agency decision." Va. Code § 2.2-4027. Under this standard, "the reviewing court may reject an agency's factual findings only when, on consideration of the entire record, a reasonable mind would *necessarily* reach a different conclusion." *Alliance to Save the Mattaponi v. Commonwealth of Virginia*, 621 S.E.2d 78, 88 (Va. 2005). Reviewing courts must "take due account of … the experience and specialized competence of the agency, and the purposes of the basic law under which the agency has acted," and may not "seize upon questions, comments or incidences of an orderly administrative process to discredit agency action that is supported by the record, viewed in context and as a whole." *Environmental Def. Fund, Inc. v. Virginia State Water Control Bd.*, 422 S.E.2d 608, 611, 613 (Va. Ct. App. 1992).

Similarly, the scope of review under the federal arbitrary-and-capricious standard is "narrow and highly deferential," *Sierra Club*, 898 F.3d at 403, with a "presumption in favor of finding the agency action valid," *Ohio Valley Env't Coal v. Aracoma Coal Co.*, 556 F.3d 177, 192 (4th Cir. 2009); see *Friends of Buckingham v. State Air Pollution Control*

Bd., 947 F.3d 68, 81 (4th Cir. 2020) (applying the federal standard after concluding that "the result would be the same"). "Especially in matters involving not just simple findings of fact but complex predictions based on special expertise, a reviewing court must generally be at its most deferential." *Ohio Valley Env't Coal.*, 556 F.3d at 192 (cleaned up) (quoting *Baltimore Gas & Elec. Co. v. Nat'l Res. Def. Council*, 462 U.S. 87, 103 (1983)); see also *American Whitewater v. Tidwell*, 770 F.3d 1108, 1115 (4th Cir. 2014) ("Our review is particularly deferential when, as is the case here, 'resolution of th[e] dispute involves primarily issues of fact' that implicate 'substantial agency expertise.'" (quoting *Marsh v. Oregon Nat'l Res. Council*, 490 U.S. 360, 376-77 (1989))).

SUMMARY OF THE ARGUMENT

The petition should be denied. First, a federal court cannot review the actions of a state agency to ensure compliance with state law. Yet that is precisely what Petitioners request: their lead argument is that "[t]he Agencies misconstrued Virginia law" in declining to review the pipeline's siting, Opening Br. 19, and their remaining claims likewise rest on arguments that the Agencies failed to follow Virginia law. Petitioners rely on 15 U.S.C. § 717r(d)(1), but that section does not create

a cause of action, and reaches only questions of "federal law." Further, Virginia has not waived its sovereign immunity against suit in federal court on such claims.

Second, the Agencies correctly concluded that Virginia law does not allow them to second-guess FERC's siting determinations. Va. Code § 62.1-44.15:21(D)(2); Va. Code § 62.1-44.15:81(F). Instead, DEQ participates in the collaborative interagency NEPA proceeding led by FERC to determine the optimal siting. Petitioners construe Virginia law to create a carve-out, allowing the Agencies to second-guess FERC's siting for waterbody crossings by large pipelines. This reading, however, is not consistent with the statute's text, structure, legislative history, or purpose. A pipeline is a contiguous project; one crossing cannot be moved without altering the pipeline's siting elsewhere. Balancing all the environmental interests at stake to determine the optimal siting sweeps far beyond the limited scope of a Virginia Water Protection permit proceeding.

Third, Petitioners again misconstrue Virginia law in contending that the Agencies violated a purported duty to "independently verify" the information in the application. Opening Br. 24. Virginia law imposes no

such duty; Petitioners rely upon inapplicable Corps regulations. Indeed, the Agencies far exceeded the requirements of Virginia law by conducting an individual analysis of each of the hundreds of waterbody crossings, even though the statute only required analysis of less than two dozen crossings. The Agencies did not "blindly accept[] MVP's representations" or ignore inconsistencies, *id.*; to the contrary, they reviewed the application in great detail and repeatedly requested additional information. And the Agencies explained the factors on which they based their determination that the crossing methods constituted the LEDPA, including "crossing length, bore-pit depth, stream depth, steep slopes, karst geology, cost, potential for bore failure and unique site-specific constraints." JA0090. This analysis was not arbitrary or capricious.

Finally, Petitioners' assertion that the Agencies refused to apply Virginia's narrative water quality standards is incorrect. In fact, the Agencies imposed a host of conditions upon the permit to ensure that the project would not violate the standards, including stringent monitoring, inspection, and restoration requirements. The Agencies correctly explained that certain commenters' subjective accounts of transient

turbidity did not establish any violation. Again, this interpretation is reasonable and entitled to deference.

ARGUMENT

I. Petitioners' claims are not properly before this Court

A. Federal courts cannot order state agencies to comply with state law

First, Petitioners' claims that Virginia agencies violated Virginia law are not properly before this Court. As this Court recently explained, federal courts do not review alleged violations of *state* law by state agencies in issuing Section 401 certifications under the CWA. *North Carolina Dep't of Environ. Quality v. FERC*, 3 F. 4th 655, 666 (4th Cir. 2021).

Rather, "[t]he courts have consistently … rul[ed] that the proper forum to review the appropriateness of a state's certification is the state court, and that federal courts and agencies are without authority to review the validity of requirements imposed under state law or in a state's certification." *Ibid.* (quoting *Roosevelt Campobello Int'l Park Comm'n v. EPA*, 684 F.2d 1041, 1056 (1st Cir. 1982)); see *ibid.* ("Whether NCDEQ erred by accepting an application filed by a non-owner is a question of state law for the state courts."); *City of Tacoma v. FERC*, 460

F.3d 53, 67 (D.C. Cir. 2006) ("[I]f a party seeks to challenge a state certification issued pursuant to section 401, it must do so through the state courts[,]" unless the challenge involves claims that the state agency failed to comply with requirements of federal law.).

These rulings follow the bedrock principle that questions of how a state agency has interpreted its own state laws should be left to the state courts. See *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975) ("This Court … repeatedly has held that state courts are the ultimate expositors of state law[.]"); *Toghill v. Clarke*, 877 F.3d 547, 557 (4th Cir. 2017) ("[O]nly state courts can supply the requisite construction of a state statute." (cleaned up) (quoting *Gooding v. Wilson*, 405 U.S. 518, 520 (1972))). *Cf. Pennhurst State Sch. & Hosp v. Halderman*, 465 U.S. 89, 106 (1984).

Here, Petitioners claim that "[t]he Agencies misconstrued Virginia law," and "incorrectly" interpreted a Virginia statute. Opening Br. 19, 29. Petitioners do not argue that the Agencies violated the Clean Water Act; indeed, the Clean Water Act did not require the Agencies to conduct a proceeding at all. See 7-8, *supra*. This Court "ha[s] no authority to weigh in on the issue or invalidate [MVP's permit] on" the basis of these state-

law questions. *NCDEQ*, 3 F.4th at 666. Judicial review of MVP's permit should take place in state court. See Va. Code. § 62.1-44.29.

Petitioners assert that this suit can be brought in this Court under 15 U.S.C. § 717r(d)(1). But that statute provides this Court jurisdiction over state agency action only to the extent the Agency is "acting pursuant to *Federal law*," and thus does not apply to a claim that a state agency has misinterpreted state law. 15 U.S.C. § 717r(d)(1) (emphasis added). State certifications, for instance, must include findings that "any such discharge will comply with the applicable provisions of" the Clean Water Act, 33 U.S.C. § 1341(a)(1); such findings by a state agency concerning compliance with the federal act would fall within the scope of section 717r(d)(1). The Clean Water Act, however, also permits states to hold proceedings and impose conditions pursuant to *state* law, see 33 U.S.C. § 1341(b); that the Clean Water Act declines to preempt these state-law provisions does not somehow transform them into questions of federal law. Here, for instance, the Agencies were acting pursuant to Va. Code. § 62.1-44.15:21(D) and 81(F) in deciding to issue a Virginia Water Protection permit, and Petitioners' argument that the Agencies

misinterpreted these provisions plainly presents a question of Virginia state law.

And, in any event, 15 U.S.C. § 717r(d)(1) "does not *create* 'any civil action,'" and should not be construed to "give[] federal jurisdiction over state-law claims" against a state agency. *Shrimpers & Fishermen of RGV v. Texas Comm'n on Environ. Quality*, 968 F.3d 419, 426-27 (5th Cir. 2020) (Oldham, J., concurring). Indeed, such a construction would raise serious constitutional issues, as Article III grants federal courts authority to hear only claims that arise under federal law, or are between citizens of different states. *Id.*; U.S. CONST. art. III, § 2 (limiting the "judicial Power" to *inter alia* "all Cases, in Law and Equity, arising under this Constitution, the laws of the United States, and Treaties" and "to Controversies … between Citizens of different States").

Delaware Riverkeeper Network v. Secretary Pennsylvania Department of Environmental Protection is not to the contrary, because the Court there found that the claims did not "exclusively involv[e] issues of State law," but rather were intertwined with questions of "federal standards" under the CWA. 833 F.3d 360, 370-73 (3d Cir. 2016). Here, Petitioners' claims—particularly their first claim—raise questions that

are purely a matter of construing state law. And, to the extent that *Delaware Riverkeeper* can be read to cover Petitioners' claims here, it is wrongly decided and should not be followed by this Court. Petitioners lack any federal cause of action, and this Court should dismiss their petition.

B. State sovereign immunity bars Petitioners' action

For similar reasons, state sovereign immunity bars Petitioners from bringing this action in federal court. "[S]tate sovereign immunity bars all claims by private citizens against state governments and their agencies, except where Congress has validly abrogated that immunity or the state has waived it." *Passaro v. Virginia*, 935 F.3d 243, 247 (4th Cir. 2019). Neither exception applies here.

First, Congress did not validly abrogate the Agencies' sovereign immunity in Section 19(d) of the NGA. To abrogate a State's sovereign immunity, "Congress [must] unequivocally express its intent to abrogate and … act[] pursuant to a valid grant of constitutional authority." *Kimel v. Fla. Bd. of Regents,* 528 U.S. 62, 73 (2000). Section 19(d) is not the kind of "unequivocal" and "express" statement effective to abrogate state sovereign immunity. See, *e.g.*, *Constantine v. Rectors & Visitors of*

George Mason Univ., 411 F.3d 474, 484 (4th Cir. 2005) (holding that the Americans with Disabilities Act "clearly and unambiguously" abrogated state sovereign immunity given its explicit language that a "State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter" (quoting 42 U.S.C. § 12202)). In addition, the federal power to regulate interstate commerce in natural gas derives from the Commerce Clause. See, *e.g.*, *Exxon Corp. v. Eagerton*, 462 U.S. 176, 184 (1983). The Commerce Clause does not provide Congress authority to abrogate state sovereign immunity. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 66 (1996).

Second, the Agencies have not waived their immunity. "Under both federal and Virginia law, a clear statement is required to waive sovereign immunity." *Passaro*, 935 F.3d at 248. A state waives its immunity from suit in federal court only where that waiver is "stated by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction." *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (cleaned up) (quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 141, 171 (1909)); see also *College Savings Bank*

v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 682 (1999) ("Courts indulge every reasonable presumption against waiver[.]" (cleaned up) (quoting *Aetna Ins. Co. v. Kennedy ex rel. Bogash*, 301 U.S. 389 (1937))). No such clear waiver is present here. Rather, the General Assembly has waived the Agencies' sovereign immunity from suit in *state* court, but enacted no such waiver of the Agencies' sovereign immunity from suit in federal court, demonstrating the intent to preserve that immunity. See Va. Code. § 62.1-44.29; *Pense v. Md. Dep't of Pub. Safety and Corr. Servs.*, 926 F.3d 97, 101 (4th Cir. 2019); *cf. AES Sparrows Point*, 589 F.3d at 727 (express statement that suit could be brought in federal court waived immunity).

A state does not waive its sovereign immunity through its mere participation in a federal program. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 246-47 (1985), *superseded by statute*, 42 U.S.C. § 2000d-7. Rather, Congress must "manifest[] a clear intent" to condition the state's ability to participate in the program on its agreement to waive its immunity. *Id.*; see *Bell Atl. MD, Inc. v. MCI WorldCom, Inc.*, 240 F.3d 279, 292 (4th Cir. 2001) (emphasis added), *vacated on other grounds by Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635 (2002) ("If

Congress is not *unmistakably clear and unequivocal* in its intent to condition a gift or gratuity on a State's waiver of its sovereign immunity, [this Court] cannot presume that a State, by accepting Congress' proffer, knowingly and voluntarily assented to such a condition.").

Here, the NGA and CWA are far from clear that participation in the regulatory scheme constitutes a waiver of sovereign immunity. That is particularly true for the claims at issue here, that a state agency violated *state* law. Although two courts have held that participation in the NGA regulatory scheme constitutes a "gratuity waiver" because states would otherwise lack the power to add conditions to the federal permit, *Islander East Pipeline Co. v. Conn. Dep't of Envtl. Prot.*, 482 F.3d 79 (2d Cir. 2006); *Delaware Riverkeeper Network v. Secretary Pa. Dep't of Envtl. Prot.*, 833 F.3d 360, 377 (3d Cir. 2016), neither court considered waivers regarding purely state-law claims. The statutory language as to state-law claims is far from clear, see 35-36, *supra*.

Further, any "gratuity" would apply, if at all, only to the federal agency's incorporation of a state's conditions into the federal permit. That principle does not apply here, where Petitioners claim that state law alone required the state agency to conduct an *additional* analysis. See

Islander East, 482 F.3d at 91 (finding "gratuity" waiver applicable "where the state's decision continues to serve as a bar to proceeding with a federally approved natural gas project," and the state "elects not to abdicate its deputized authority back to the federal government"). Such claims that Virginia agencies "misconstrued Virginia law," Opening Br. 19, 29, must be brought in Virginia courts.

II. The Agencies reasonably determined that Virginia law does not allow them to second-guess FERC siting determinations

A. The Agencies correctly interpreted Virginia law

In any event, the Agencies correctly interpreted Virginia law, which bars them from second-guessing FERC's siting determinations.

Virginia Code sections 62.1-44.15:21 and 62.1-44.15:81 provide that no action by the Agencies shall alter the siting determination approved by FERC. JA1133. Petitioners challenge the Agencies' interpretation of these Virginia statutes, contending that it "contravenes the legislature's language and intent." Opening Br. 30-31. To the contrary, the Agencies' interpretation accords with the plain meaning of the statutes and carries out the legislative intent.

First, section 21(D)(2) provides:

> The Board shall develop general permits for … [f]acilities and activities of utilities and public service companies regulated by the Federal Energy Regulatory Commission or State Corporation Commission, except for construction of any natural gas transmission pipeline that is greater than 36 inches inside diameter pursuant to a certificate of public convenience and necessity under § 7c of the federal Natural Gas Act. *No Board action on an individual or general permit for such facilities shall alter the siting determination made through Federal Energy Regulatory Commission* or State Corporation Commission approval.

Va. Code § 62.1-44.15:21(D)(2) (emphasis added). Petitioners do not dispute that this provision expressly prohibits the Agencies from altering FERC siting determinations. They contend, however, that it does not apply to this proceeding, asserting that "the statute explicitly excludes large pipelines like MVP's from its restriction on altering FERC siting determinations," on the ground that the phrase "such facilities" incorporates the exception for large pipelines contained in the preceding sentence. Opening Br. 32.

This interpretation is erroneous. The "except" clause is a quintessential example of a proviso. See, *e.g.*, *United States v. Morrow*, 266 U.S. 531, 534 (1925) ("The general office of a proviso is to except something from the enacting clause."). A proviso "conditions the principal

matter that it qualifies—almost always the matter immediately preceding." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 154 (2012). Here, the proviso modifies the types of facilities for which "the Board shall develop general permits." Va. Code § 62.1-44.15:21(D)(2). In other words, the clause means that general permits may be used for pipelines smaller than 36 inches, while pipelines larger than 36 inches require individual permits. That reading accords with section 21(J), which confirms that individual permits are required for the larger pipelines. *Id.* § 62.1-44.15:21(J).

It does not follow that when the next sentence of section 21(D)(2) refers to "such facilities," the proviso clause *again* modifies which facilities are at issue. The statement that "[n]o Board action on an individual or general permit for such facilities shall alter the siting determination" does not include the same proviso as the previous sentence. *Id.* § 62.1-44.15:21(D), (D)(2). The previous sentence's exclusionary language—"except for construction of any natural gas transmission pipeline that is greater than 36 inches inside diameter," *id.* § 62.1-44.15:21(D)(2)—concerns only the Board's ability to develop

general permits, and is unrelated to the Board's inability to alter siting determinations.

Petitioners cite *Littlefield v. Mashpee Wampanoag Indian Tribe*, 951 F.3d 30, 37 (1st Cir. 2020), for the proposition that "[n]ormal usage in the English language would read the word 'such' as referring to the entire antecedent phrase," Opening Br. 33. The First Circuit, however, reached that conclusion in that case because "the antecedent phrase itself contains no natural breaks." *Littlefield*, 951 F.3d at 37. Here, by contrast, there is a "natural break" in the preceding sentence—the comma introducing the dependent proviso clause. As the Ninth Circuit has noted, the English language has "[n]o bright-line rule" governing which portion of a preceding sentence the word "such" refers to. *United States v. Kristic*, 558 F.3d 1010, 1013 (9th Cir. 2009). "'Such' can refer exclusively to preceding nouns and adjectives," or "surrounding verbs, adverbial phrases, or other clauses." *Ibid.* "Context," the court explained, "is typically determinative." *Ibid.*

And here, context makes clear that the "such facilities" language does not carve out pipelines exceeding 36 inches in diameter. The prohibition on altering siting applies to "an individual *or* general permit,"

demonstrating that the prohibition is broader than the scope of the general permit described in the preceding sentence. Va. Code § 62.1-44.15:21(D)(2) (emphasis added). In addition, section 21(J)(2) provides that all pipelines greater than 36 inches in diameter "shall be constructed in a manner that minimizes temporary and permanent impacts to state waters and protects water quality to the maximum extent practicable." Va. Code § 62.1-44.15:21(J)(2); see also S.B. 905, 2018 Reg. Sess. (Va. 2018). Notably missing from that provision is the requirement to "avoid" impacts to state waters that applies to other types of projects. See Va. Code § 62.1-44.15:21(A); 9 Va. Admin. Code § 25-210-80(B)(1)(g). As the Agencies explained, the alternatives analysis for FERC-approved pipelines need not consider "avoiding" impacts by using an alternate route (or an alternate type of project) because "the project's alignment as presented in the application … has been determined by the FERC to be 'the preferred alternative that could meet the project purpose.'" JA0084. Requiring such an analysis would be tantamount to adding in the word "avoid" when the General Assembly deliberately chose not to do so. *Tvardek v. Powhatan Vill. Homeowners Ass'n, Inc.*, 784 S.E.2d 280, 284 (Va. 2016).

Section 81(F) likewise provides that "[n]o action by either the Department or the Board on a certification pursuant to this article shall alter the siting determination made through [FERC]." Va. Code § 62.1-44.15:81(F). Petitioners interpret this section to apply only to "upland" construction, not stream or wetland crossings. Opening Br. 20. But their interpretation would lead to the anomalous result that the Agencies cannot alter siting for pipelines larger than 36 inches during the upland certification process, and cannot alter siting for pipelines smaller than 36 inches during the wetland certification process, but *can* alter siting for pipelines larger than 36 inches during the wetland certification process. Petitioners offer no explanation as to why the General Assembly would have designed the review process in this manner.

Indeed, Petitioners' interpretation is contrary to the purpose of the provisions. Pipelines are large, contiguous projects. Pipeline siting thus cannot be changed for one stream crossing alone without altering the pipeline's siting in other places. Many types of environmental interests must be balanced to select the optimal siting for an interstate pipeline, including protecting endangered species, national forests and trails, and historical sites, and minimizing impacts on landowners. See 5, *supra*.

And the decision to move crossings in one state could also change the pipeline's siting, and its corresponding environmental effects, in another state. To balance these interests, siting is determined in a collaborative, inter-agency process run at the federal level under NEPA. See 12-15, 23-24, *supra*.

The Virginia Water Protection permit is a much more limited proceeding, focusing solely on potential impacts to Virginia water quality from waterbody crossings in the state. Interpreting the statute to require the Agencies to consider the best site for Virginia water quality for each crossing in isolation would not protect the many other environmental interests at stake, and is not a plausible reading. Instead, DEQ participates in the siting determination prospectively, by providing comments in the NEPA proceeding. See 12-15, 23-24, *supra*; Va. Code § 62.1-44.15:21(D)(2) ("[C]onsultation on wetland impacts [shall] occur[] prior to siting determinations."). The NEPA process balances all of the environmental concerns raised by all of the federal, state, and local agencies involved to find the optimal route. See 5-6, *supra*. Indeed, here, DEQ provided several recommendations to FERC regarding the siting, and FERC adjusted the route accordingly. See 13-16, 23-24, *supra*.

For similar reasons, Petitioners are wrong that section 81(F) is "not at issue here." Opening Br. 31. Petitioners contend that section 81(F) is only relevant to upland certifications. See Opening Br. 31. But where a pipeline crosses a stream is dependent on where the pipeline connects to the upland portion of the project; it is impossible to move a stream crossing without simultaneously moving the upland portions of the pipeline. Therefore, section 81(F) and section 21(D) demonstrate the common intent to prohibit the Agencies from altering FERC siting determinations. Indeed, it would be particularly senseless here to consider the wetland impacts of siting in a vacuum, given that the upland sections of the pipeline *have already been constructed*. JA0084; see 17, *supra*. Altering the siting at this late stage would require disturbing the areas where the pipeline has already been constructed, and incurring the environmental costs of construction in new areas. This process would necessarily be considerably more harmful to the environment than using the route that the federal government has already determined to be environmentally optimal following the comprehensive NEPA process that incorporated DEQ's recommendations.

The legislative history also supports the Agencies' statutory construction. The proviso clause was added in 2018, as was section 81. See 2018 Virginia Laws Ch. 636 (S.B. 950) (showing proposed changes to the then-existent statute). The 2018 amendments did not change the pre-existing statutory provision in section 21(D) that prohibited altering FERC siting determinations. *Id.* Petitioners' interpretation requires concluding that, although the General Assembly left this sentence unaltered, it intended to change its meaning, requiring for the first time that the Agencies consider alternative siting for large pipelines. The legislative history for the amendments, however, contains no reference to any such intent. Instead, it explains that the intent of the amendments was to "require[] a detailed individual [VWP] permit to protect each wetland and stream proposed to be crossed by the pipeline," rather than allowing the use of a general permit, and to "require[] an evaluation of the pipeline activity in upland areas not involving wetlands or stream crossings that may result in discharge to state waters." Notes of Senate Debate, https://tinyurl.com/f4euwuwv.

In short, all of the tools of statutory construction demonstrate that the Agencies correctly interpreted Virginia law as prohibiting them from

altering the FERC siting determinations made through the collaborative NEPA process. At the very least, the Agencies' interpretation is certainly reasonable, and the Court should defer to it to the extent it finds the statute ambiguous. See, *e.g.*, *King v. Burwell*, 759 F.3d 358, 373 (4th Cir. 2014).

B. Petitioners' arguments to the contrary fail

Petitioners raise several arguments to the contrary, but none has merit. First, Petitioners contend that the Agencies cannot point to sections 21(D)(2) or 21(J)(2) because they "relied exclusively on Section 81(F)" during the permitting process. Opening Br. 38. But that is not the case. In its formal presentation to the Board, DEQ relied on both sections 81(F) and 21(D)(2) when explaining that "[n]o Board action on an individual or general permit for such facilities shall alter the siting determination." JA1133; see also JA0992. Within that same presentation to the Board, DEQ cited section 21 multiple times, including relying on section 21(J)(2). See, *e.g.*, JA1130-34.

In any event, even if the Agencies had relied solely on section 81(F), that would not have been unreasonable. Sections 21(D)(2) and 81(F) both prohibit the Agencies from altering FERC's siting determinations. This

overlap makes sense given the related nature of the provisions; the wetland and upland certification "shall together constitute the certification required under § 401 of the [CWA] for natural gas transmission pipelines greater than 36 inches inside diameter." Va. Code § 62.1-44.15:80. And, as discussed above, pipelines are long, contiguous projects such that altering the siting for waterbody crossings necessarily alters it in upland locations. Further, Petitioners themselves rely on section 81, and cannot simultaneously contend it is inapplicable. See Opening Br. 21 ("If there were any question about whether prohibitions [under section 21] on 'alter[ing]' siting determinations rescind the Agencies' obligation to deny certification of crossing locations that do not avoid and minimize impacts, it would be resolved by Va. Code § 62.1-44.15:81(H).").

Second, to circumvent sections 81(F) and 21(D)(2), Petitioners contend that even if the Agencies may not alter siting determinations, they may still deny permit applications on the basis that the siting is not the LEDPA. Opening Br. 21. In other words, under Petitioners' reading, the Agencies may not change the siting, but may deny the permit unless the applicant changes the siting. But this is a distinction without a

difference, and would render sections 81(F) and 21(D)(2) virtually meaningless. *City of Richmond v. Virginia Elec. & Power Co.*, 787 S.E.2d 161, 164 (Va. 2016) ("Every part of a statute is presumed to have some effect and no part will be considered meaningless unless absolutely necessary." (quoting *Lynchburg Div. of Soc. Servs. v. Cook*, 666 S.E.2d 361, 370 (Va. 2008))); see MVP Br. 27-28. It would also ignore the limitation that the Agencies are to consider only "practicable" alternatives, which are "available and capable of being done" considering the "overall project purposes." Va. Admin. Code § 25-210-10; JA0085. Alternate routes are not practicable where the Agencies are barred from altering siting determinations, and where FERC has already chosen the best route in light of the project purposes. And Petitioners' reading would conflict with the FERC certificate, which provides that "any state or local permits … must be consistent with the conditions of this certificate," and "state and local agencies … [cannot] prohibit or unreasonably delay the construction or operation of facilities approved by this Commission." FERC Certificate ¶ 309.

Finally, Petitioners make virtually no argument that the claimed error had any impact on the permit. See, *e.g.*, *NLRB v. Wyman-Gordon*

Co., 394 U.S. 759, 766 n.6 (1969) ("*Chenery* does not require that we convert judicial review of agency action into a ping-pong game" or an exercise in "useless formality."). Even if the Agencies' citations to section 81(F) were to be considered error, but see *supra* 47-53, they would be no more than a scrivener's error given that section 21(D)(2) prohibits the Agencies from altering the siting, see *supra* 42-44. And the route already incorporated the Agencies' LEDPA analysis concerning siting, because DEQ participated in the FERC siting process, and FERC incorporated DEQ's proposed route changes. See 13-16, *supra*.

Indeed, out of the hundreds of "surface water impact locations" that the Agencies considered, JA0080, Petitioners identify only one that they contend the Agencies should have altered, the Blackwater River crossing, see Opening Br. 41-43. And Petitioners fail to demonstrate any prejudice regarding that crossing as well. DEQ submitted comments regarding the Blackwater River crossing location during FERC's NEPA process, requesting that it be moved upstream of Rocky Mount's drinking water intake. See 14-15, *supra*; JA0522. FERC moved the crossing accordingly, and determined that the crossing location included in the final route was

the LEDPA.[5] Petitioners fail to explain why the Agencies would have come to a different conclusion.

III. The Agencies' approval of the crossing methods was not arbitrary or capricious

Petitioners' challenge to the Agencies' review of the crossing methods likewise fails. Opening Br. 44.

First, Petitioners' argument is based on the erroneous premise that Virginia law obligates agencies to independently "verify the information" submitted by applicants. See Opening Br. 44. Petitioners cite no Virginia law or regulation imposing such a requirement. The only case Petitioners cite is *Friends of the Earth v. Hintz*, a Ninth Circuit case which applied an Army Corps of Engineers regulation providing that the Corps "is responsible for independent verification" of data "prepared by the applicant." 800 F.2d 822, 835 (9th Cir. 1986) (quoting 33 C.F.R. Part 230, App. B § 8(b))). The Ninth Circuit applied that rule in reviewing the

[5] Petitioners incorrectly contend that DEQ later recommended *to MVP* that it "[r]eevaluate the location of the Blackwater River crossing and move it to a location that permits the trenchless crossing technique." Opening Br. 43 (quoting JA2025). In actuality, the Blue Ridge Regional Office submitted those comments to *FERC* in relation to FERC's final environmental assessment, and Petitioners make no showing that there is in fact a practicable environmentally preferable crossing location for the Blackwater River. See JA2010.

Corps' granting of a Section 404 permit. But this federal regulation is inapplicable to any federal agency other than the Corps, much less state agencies. And this Court has held that even the Corps has no obligation to "independently investigate" information provided by an applicant. *Crutchfield v. County of Hanover*, 325 F.3d 211, 223-24 (4th Cir. 2003).

Indeed, Virginia law did not require the Agencies to conduct any individualized review at all of the vast majority of the crossings. Va. Code § 62.1-44.15:21(J)(1) requires "individual review of each proposed water body crossing" only for crossings "with an upstream drainage area of five square miles or greater." Fewer than two dozen crossings met this threshold. JA0524. The Agencies' decision to review all of the hundreds of crossings far exceeded the requirements of Virginia law. JA0524, 1007. If the petition were granted, the Agencies would be under no obligation to conduct so extensive a review again.

Second, Petitioners criticize the Agencies for "fail[ing] to provide any explanation for their conclusion that MVP's proposed crossing methods were the LEDPA." Opening Br. 49. Virginia law does not require agencies to provide explanations at the level of detail that Petitioners apparently demand. Instead, the Board is merely required to "provide in

writing a clear *and concise* statement of the legal basis and justification for the" decision. Va. Code § 62.1-44.15:02(P) (emphasis added). The Agencies did exactly that in the Final Fact Sheet, as well as the written response to comments and DEQ's presentation. See JA0079-109; JA1099-1181. The Agencies explained that the appropriate crossing methods depended upon the features of the specific site, in particular the "crossing length, bore-pit depth, stream depth, steep slopes, karst geology, cost, potential for bore failure and unique site-specific constraints." JA0090-91; JA0544. Each of these features impacts which crossing method is practicable and least environmentally damaging for a particular site. See 17-21, *supra*. The Agencies' scientific judgment to rely upon these factors is plainly within its "experience and specialized competence," *Environmental Def. Fund*, 422 S.E.2d at 611 (quoting *Johnston-Willis, Ltd. v. Kenley*, 369 S.E.2d 1, 7 (Va. Ct. App. 1988)), and Petitioners make no showing that it was unreasonable.

Indeed, Petitioners do not point to *any* crossing where they contend that the Agencies made an erroneous, much less unreasonable, determination as to the crossing method. Instead, Petitioners' claim appears to be based on the assumption that trenchless crossings are

always environmentally superior to open-cut crossings, and that the Agencies should therefore have required more of them. Opening Br. 44. This assumption is incorrect.

To the contrary, there are "many common circumstances under which crossings cannot be practicably completed with trenchless methods," such as in areas with "difficult terrain, including on steep slopes and karst areas," JA0138; see 17-20, *supra*. In karst areas, for instance, trenchless crossings can cause "the loss of drilling fluid" which can contaminate groundwater, "as well as other potential hazards" such as the collapse of bore holes. See JA0182; see also 19, *supra*. Trenchless crossings can also "present substantially greater challenges and logistical difficulties" when deeper bore pits are required; among other things, deep bore-pits require large "spoil piles," which can erode sedimentation into streams. JA0179-80; see 19-20, *supra*. Likewise, steep slopes can make trenchless crossings impracticable because of technical, logistical, and safety issues. JA0180-81; see 19-20, *supra*.

At the same time, dry open-cut methods have environmental advantages for appropriate crossings, including that they can be completed much more quickly, in as little as twenty-four hours,

minimizing environmental disruption to the stream, see JA0727-28; 20-21, *supra*.[6] Thus, dry open-cut crossing methods can constitute the LEDPA, particularly under the stringent requirements that the Agencies imposed concerning construction and restoration of the waterbodies. See 27-28, *supra*.

Indeed, even Petitioners have previously recognized that trenchless crossings are not always environmentally superior. *E.g.*, Comments at 4, No. 20201231-5159 (Dec. 31, 2020) (NRDC), https://tinyurl.com/bdhhn6c3 (FERC "cannot simply take [MVP] at its word that conventional bores are, de facto the preferable alternative."); Joint NEPA Scoping Comments, Dkt. Nos. 21-57-000, 16-10-000, No. 20210415-5319 at 38 (Apr. 15, 2021), https://tinyurl.com/ynprexux (Sierra Club) ("Commenters do not necessarily agree that conventional bores or other trenchless methods will always be environmentally preferable …."). At least one Petitioner objected to an earlier MVP proposal that had additional trenchless crossings, contending that the proposed trenchless methods "would lead to adverse impacts on the environment that are

[6] Additionally, when evaluating the LEDPA, the Agencies may also consider costs. 9 Va. Admin. Code §§ 25-210-10 (defining "practicable" to include "cost"); 250-210-80(B)(1)(g).

distinct from the risks posed by the dry open-cut waterbody crossing method previously proposed and approved." *Id.* at 11.

Third, the record refutes Petitioners' contention that the Agencies "blind[ly] accepted" MVP's application without substantive review. Opening Br. 44, 48 (quoting *Hintz*, 800 F.2d at 836). In fact, DEQ made several requests that MVP provide additional information—including crossing-specific requests demonstrating the Agencies' close review of the application. See 22, *supra*; see, *e.g.*, JA0374 (DEQ requesting that MVP clarify crossing method analysis). Petitioners mischaracterize statements of a DEQ staffer in contending that the Agencies accepted MVP's application without analysis because the staffer "was not particularly qualified to assess it." Opening Br. 46 (quotation marks omitted) (quoting JA0780-82). In fact, the staffer gave an in-depth explanation of the site-specific factors he considered to evaluate MVP's proposed crossing methodology, including "bore length, geotechnical considerations of how deep a bore pit would have to be," the "slopes and the available area to work in," the size of the "spoil pile" and the ability to "constrain" it within the work area. JA0779-80. The staffer explained that he relied on the application for details of certain engineering

judgments, such as "whether a 39-foot" bore could "go another foot deeper or not." JA0781. At the same time, however, the staffer carefully reviewed the consistency and "logic" of the application's LEDPA analysis. JA0781-82.

The Agencies' review was fully compliant with Virginia law, which does not require the Agencies to conduct an independent re-analysis of the details of engineering questions. Indeed, the Agencies' review far exceeded what is typical or required under Virginia law. See 32-33, *supra*; *Crutchfield*, 325 F.3d at 223-24 (agencies can "reasonably rely[] on extensive studies given to them by applicants."). Further, just as for the Agencies' consideration of siting, the Agencies have been reviewing MVP's crossing method proposals for years; for instance, DEQ provided extensive comments on the proposed crossing methods as part of FERC's environmental review process, and MVP's application reflected those comments.[7] That the Agencies ultimately accepted the updated application thus does not show that their review was somehow superficial or undemanding.

[7] See Commonwealth Response to FERC MVP DEIS at 1, FERC, at 3 (Dec. 22, 2016), https://tinyurl.com/3dpvcuvs, at 18-19.

Finally, Petitioners err in contending that the Agencies' analysis was arbitrary and capricious because it failed to consider "substantial deficiencies raised by EPA" or inconsistent positions taken by MVP. Opening Br. 50-51. Far from ignoring EPA's letter, the Agencies carefully considered it and responded at length, despite the fact that EPA only sent the letter to the Corps. See 23, *supra*. EPA primarily requested that MVP add an analysis of "changes to the proposal since the project was authorized under the Nationwide Permit (NWP) 12," and consideration of the costs of mitigation. See 26, *supra*. MVP accordingly updated its application to address both points. *Id.*; JA0785. The addition of mitigation costs did not ultimately change the crossing-method analysis, because these costs are a relatively small proportion of the overall crossing costs. See 26, *supra*. The Agencies, however, required enhancements to MVP's restoration plan, including adding "performance standards to make sure [the restoration] was successful," and "monitoring, maintenance and adaptive management" conditions. JA0753-54. EPA then stated that if its technical "comments were followed, the project would be assured to be in compliance with the [CWA]." JA0750; see JA0784-85. There is nothing arbitrary or capricious

about the Agencies' decision to respond to EPA's comments by imposing more extensive restoration requirements, rather than requiring different crossing methods; to the contrary, such highly factual scientific judgments are entitled to substantial deference. See 30-31, *supra*.

Similarly, the Agencies reasonably did not consider changes in MVP's proposals to be a "red flag." Opening Br. 51. Again, the permitting process for the MVP pipeline has spanned several years. During that time, technology has improved, and MVP has also developed extensive real-world experience from constructing dozens of crossings, using both "directional drilling and the trenching" methods. JA0731; see 15, *supra*. In addition, multiple governmental agencies and other commenters have examined MVP's crossing proposals and provided feedback. Under these circumstances, it is neither surprising nor alarming that MVP's analysis would evolve.[8] Petitioners rely upon *Colorado Fire Sprinkler, Inc. v.*

[8] Petitioners point to a November 2020 FERC application which sought to build a portion of the pipeline without an individual permit by constructing only trenchless crossings, contending that it demonstrates that additional trenchless crossings were "practicable." Opening Br. 51. Petitioners, however, objected to this proposal, see 59-60 *supra*, and MVP withdrew it, instead "seek[ing] a comprehensive review of all outstanding

National Labor Relations Board, 891 F.3d 1031 (D.C. Cir. 2018), but that case is entirely inapposite. In *Colorado Fire*, "record evidence" demonstrated "[t]hat contract language" the agency relied upon "was objectively false." *Id.* at 1040-41. Here, Petitioners point to nothing "objectively false" in MVP's application, and the mere fact that the analysis has been updated does not demonstrate that it is unreliable. The Agencies' review of the crossing methods was not arbitrary or capricious, and is entitled to deference.

IV. The Agencies' consideration of Virginia's narrative water quality standards was not arbitrary or capricious

Finally, Petitioners argue that the Agencies erred in "refus[ing]" to "evaluate whether MVP's proposed crossings would cause violations of Virginia's narrative criteria prohibiting harmful levels of" sedimentation and turbidity. See Opening Br. 53-54. The Agencies, however, did not

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water body and wetland crossings by contemporaneously submitting new permit and certificate amendment applications." Letter from Todd Normane, Mountain Valley Pipeline, LLC, to U.S. Army Corps of Eng'rs, Fed. Energy Regul. Comm'n, W. Va. Dep't of Envtl. Prot., & Va. Dep't of Envtl. Quality, Re: Mountain Valley Pipeline Project at 2 (Jan. 26, 2021), https://tinyurl.com/yf8t2z6j. The site-by-site analysis that MVP submitted to the Agencies is more complete and informative than the withdrawn FERC application, which does not demonstrate that trenchless crossings are the LEDPA for the sites at issue.

refuse to evaluate the narrative standards. Rather, they reasonably concluded that the extensive conditions they placed on the permit would satisfy those standards.

Petitioners' contention that the Agencies "threw up their hands" *id.* at 54, and "ignor[ed] [the] narrative criteria altogether," *id.* at 26 (quoting *American Paper Inst., Inc. v. EPA*, 996 F.2d 346, 350 (D.C. Cir. 1993)), misreads the Agencies' analysis. The Agencies did apply the narrative standards, JA0507-14, and simply concluded that the demanding conditions that they placed on the permit were adequate to "control" any turbidity and prevent it from reaching harmful levels. 9 Va. Admin. Code § 25-260-20(A). Most significantly, the Agencies explained that the permits would protect against turbidity by requiring MVP to comply with DEQ-approved Annual Standards and Specifications and Erosion & Sediment Control Plans, the same requirements imposed under Virginia's Construction General Permit. JA0508. The Agencies imposed these same conditions to prevent turbidity and sedimentation in the upland permit. JA0508. This Court upheld that permit against a similar challenge by Petitioners, concluding that these standards are "tried and true," and that it was not "arbitrary for the State Agencies to assume that

those same methods used for years to prevent large construction projects from harming water quality would … continue to be effective." *Sierra Club*, 898 F.3d at 404. Furthermore, this Court recognized that, in reaching its decision, DEQ considered the combined effect of MVP's upland and instream activities. *Id.* at 407-08. The application of the same conditions here is not arbitrary or capricious for the same reasons—particularly considering the numerous *additional* conditions imposed in the Virginia Water Protection permit.

In addition, again like the upland permit, the Agencies imposed rigorous monitoring and enforcement requirements. Among other things, the Agencies required "written notice" prior to construction; monitoring of construction activities by DEQ-appointed experts; frequent inspections; and demanding restoration standards. See, 26-28, *supra*. Indeed, requisite water-quality monitoring is conducted *nearly daily* through field inspections by DEQ inspectors and a team of erosion and sediment control inspectors. JA0515-16; see 27-28, *supra*.

Moreover, one of the permit conditions also requires MVP to "notify DEQ within 24 hours of discovering impacts to surface waters including wetlands, stream channels, and open water that are not authorized by

[the] permit." JA0010. MVP must then remediate any excess sedimentation. JA0004, 0006-12; JA0003-18; see also JA0515-16; JA0024. The Agencies also imposed conditions providing that they could terminate the permit for cause, including for "[n]oncompliance by [MVP] with any condition of the VWP permit." JA0014. Again, as this Court previously concluded, the Agencies' "reliance on such monitoring" to ensure water quality is not "arbitrary or capricious." *Sierra Club*, 898 F.3d at 405.

Petitioners point to the Agencies' statement that "[t]here is no methodology to evaluate short term, subjective accounts of the narrative standard, such as an interference in recreational activity, as the commenters suggest" as demonstrating that the Agencies refused to apply the narrative standards. JA0514; see also Opening Br. 54 (criticizing DEQ for ignoring "citizen reports of high turbidity"). Petitioners misinterpret the statement. In fact, the Agencies concluded that "short-term, subjective accounts" of high turbidity from certain commenters did not show a *violation* of the narrative standards. As the Agencies explained, short-term impacts do not violate the standards

"even if degradation may be expected to temporarily occur provided that after a minimal period of time the waters are … restored." JA0513.

Likewise, subjective comments that water has become "too turbid" in the commenter's opinion does not establish a violation when the "objective, data driven indicators" do not show any decrease in water quality. JA0514-16 (concluding that there were no "ongoing, significant regular violations of erosion and sediment controls or water quality standards" based on "a consistent almost daily field presence of both DEQ inspectors and DEQ's third party compliance inspectors"). And again, the Agencies found that the stringent conditions they imposed as to construction methods, monitoring, and enforcement would prevent anything more than transient impacts on turbidity. See 27-28, *supra*.

Petitioners dispute these conclusions, but their factual disagreement with the Agencies regarding turbidity does not demonstrate a lack of substantial evidence to support the permit. Va. Code § 2.2-4027; see 30-31, *supra*. Nor are Petitioners entitled to demand that the Agencies measure turbidity using Petitioners' preferred method, rather than the Agencies' own objective criteria. See *Alliance to Save the Mattaponi*, 621 S.E.2d at 90; 30-31, *supra*; see also, *e.g.*, Opening Br. 56-

60 (discussing "benthic macroinvertebrate assessments"). The Agencies' conclusions are not arbitrary or capricious. *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658 (2007); *cf. Virginia Real Estate Com'n v. Bias*, 308 S.E.2d 123, 125 (Va. 1983) ("Under [the] standard, applicable here, the court may reject the agency's findings of fact 'only if, considering the record as a whole, a reasonable mind would *necessarily* come to a different conclusion.'" (quoting B. Mezines, *Administrative Law* § 51.01 (1981))).

CONCLUSION

For the foregoing reasons, this Court should dismiss the appeal, or alternatively deny the petition and uphold the Virginia Water Protection permit.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 12,973 words, excluding the parts of the brief exempted by Rule 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century typeface.

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CERTIFICATE OF SERVICE

I certify that on July 27, 2022, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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