

**UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION**

)	
Mountain Valley Pipeline, LLC)	
)	CP16-10-000
Mountain Valley Pipeline Project)	
)	

**ROANOKE, GILES, AND CRAIG COUNTIES’ REQUEST FOR REHEARING AND
STAY OF ORDER ISSUING CERTIFICATES AND
GRANTING ABANDONMENT AUTHORITY**

Pursuant to 15 U.S.C. § 717r(a) and 18 C.F.R. § 385.713, Roanoke, Giles, and Craig Counties, Virginia hereby request rehearing of the Commission’s “Order Issuing Certificates and Granting Abandonment Authority,”¹ for Mountain Valley Pipeline, LLC’s (Mountain Valley) Mountain Valley Pipeline Project (MVP Project or project), and a stay of the effectiveness of that order. As described below, the administrative record does not demonstrate compliance with the Commission’s regulations and policies for issuing certificates under Section 7 of the Natural Gas Act, or the National Environmental Policy Act (NEPA). The Counties request that the Commission vacate the Certificate Order and remand the matter to Office of Energy Projects (OEP) Staff with instructions to undertake further procedures consistent with its rules and policies.

This rehearing request is organized as follows: Section I describes the Counties, Section II describes the Background of the proceeding; Section III contains the Statement of Issues; Section IV states Standards of Review that are applicable to rehearing; Section V contains the Counties’ Argument in favor of rehearing; Section VI contains the Counties’ concurrent Request for a Stay, Section VII contains the Counties’ Request for Relief. The Counties also incorporate by reference as if stated fully herein, the issues statement and argument in “Rehearing Request by The Nature Conservancy.”

**I.
PETITIONERS**

The Counties are located in a rural and agrarian setting celebrated for its natural resources – rivers and streams, forested lands, rugged mountains, and pastoral vistas. All three will be crossed by the MVP Project. The project will cross Giles County from MP 195.4 to MP 215.4, Craig County from MP 215.4 to MP 217.1, and Roanoke County from MP 236.1 to MP 244.4.²

¹ eLibrary no. 20171013-4002 (Oct. 13, 2017).

² Mountain Valley, Resource Report 1, eLibrary no. 20151023-5035, Table 1.2-1.

The Counties are parties to this proceeding, having filed timely, unopposed motions to intervene.³ Giles and Roanoke Counties are also consulting parties for purposes of the National Historic Preservation Act (NHPA) section 106 process. They submitted comments, including expert testimony, in response to the draft and final Environmental Impact Statements (EIS) and additional information requests.⁴ The Certificate Order and final EIS anticipate that the Counties, as local governments, will play a role in the implementation of the MVP Project.⁵

Giles County has a population of approximately 17,000, with a total area of 360 square miles. The MVP Project traverses Giles County for approximately twenty (20) miles and affects one hundred fifty (150) parcels of real property within the County. The project will impact natural and historic resources as well as infrastructure within the County.⁶ It will potentially impact several historic properties located within the County, including those located within the proposed Big Stony Creek Rural Historic District and Greater Newport Rural Historic District.⁷ Segments of the Jefferson National Forest and Appalachian Trail are located within Giles County, and are significant sources of tourism and related economic development for the

³ Roanoke County, “Motion to Intervene and Identification of Issues,” eLibrary no. 20151125-5074 (Nov. 24, 2015); Giles County, “Motion to Intervene of Giles County Board of Supervisors under CP16-10,” eLibrary no. 20151123-5257 (Nov. 23, 2015).; Craig County, “Motion of the County of Craig, Virginia for Leave to Intervene under CP16-10,” eLibrary no. 20151124-5029 (Nov. 24, 2015).

⁴ See, e.g., “Motion for Leave to File an Answer and Limited Answer of Roanoke County, Virginia,” eLibrary no. 20160311-5190 (March 11, 2016); Letter Re: Cultural Resources Survey Reports for the Mountain Valley Pipeline Project (CP16-10-000), eLibrary no. 20160323-5194 (March 23, 2016); Comment and Objection, eLibrary no. 20160411-5323 (April 11, 2016); Letter Re: Response Letter to the Advisory Council on Historic Preservation (ACHP), eLibrary no. 20160520-5042 (May 20, 2016); Roanoke, Giles, and Craig Counties’ Requests for Reconsideration of the Schedule for Environmental Review and Coordination of the Record of Information, eLibrary no. 20160810-5194 (Aug. 10, 2016); Letter Re: Notice of Availability of the Draft Environmental Impact Statement for the Proposed Mountain Valley Project (CP16-10-000), eLibrary no. 20161011-5308 (October 11, 2016); Roanoke County, Virginia’s Comments on the Mountain Valley Project and Equitrans Expansion Project Draft Environmental Impact Statement, eLibrary no. 20161222-5459 (Dec. 22, 2016) (Roanoke County’s Draft EIS Comments); Giles County, “Giles County, Virginia’s Comments on the Mountain Valley Project and Equitrans Expansion Project Draft Environmental Impact Statement,” eLibrary no. 20161222-5458 (December 22, 2016); Craig County, “Resolution of the Board of Supervisors of the County of Craig, Virginia Providing Comment Regarding the FERC Draft Environmental Impact Statement (DEIS) Regarding the Mountain Valley Pipeline Project,” eLibrary no. 20161228-0124 (December 27, 2016); Giles and Roanoke Counties’ Supplemental Comments regarding the Potential Impacts of Construction and Operation of the Mountain Valley Pipeline Project in Karst Terrain, eLibrary no. 20170602-5147 (June 2, 2017) (Counties’ Supplemental Karst Comments); Giles and Roanoke Counties’ Comments regarding Final Environmental Impact Statement, eLibrary no. 20170918-5180 (Sept. 18, 2017) (Giles and Roanoke Counties’ Final EIS Comments); Giles and Roanoke Counties, “Giles and Roanoke Counties’ Request to be Consulted Under Section 106 of the National Historic Preservation Act,” eLibrary no. 20170802-5115 (August 2, 2017).

⁵ See, e.g., Final EIS, p. 4-568 (describing coordination with local emergency responders).

⁶ See Giles County, “Motion to Intervene of Giles County Board of Supervisors under CP16-10,” eLibrary no. 20151123-5257 (Nov. 23, 2015).

⁷ See Giles County, “Request to Become a Consulting Party for the National Historic Preservation Act Section 106 Process,” eLibrary no. 20160218-5210 (Feb. 18, 2016).

County. In the course of the proceeding, Giles County stated concerns regarding potential project impacts on environmental resources, health and public safety, and the region's economy.⁸

Roanoke County covers approximately 251 square miles and has a population of approximately 91,000. It is located at the southern end of the famous Shenandoah Valley of Virginia with the Blue Ridge Mountains to the southeast and the Appalachian range to the northwest. Roanoke County is located adjacent to the Counties of Craig, Botetourt, Bedford, Franklin, Floyd, and Montgomery. It also surrounds the independent Cities of Salem and Roanoke. Significant attractions include the Blue Ridge Parkway and the Appalachian Trail. The MVP Project route will enter and exit the county in two locations, and intersect 31 parcels.⁹ The project will potentially impact several historic properties located within the County, including those located within the Bent Mountain Rural Historic District, Coles-Terry Historic District, and Bent Mountain Apple Orchard Rural Historic District.¹⁰ Roanoke County raised concerns regarding potential project impacts on environmental resources, health and public safety, and the region's economy in the course of the proceeding.¹¹

Craig County consists of 333 square miles, and has a population of 5,210. Its concerns about the MVP Project include impacts to the local economy, water supplies, karst geologic features, and residents' cultural attachment to the land.¹² The U.S. Forest Service (Forest Service) owns approximately 54% of acreage in Craig County, and the County relies heavily on ecotourism and the Jefferson National Forest for economic development opportunities.¹³ Craig County raised concerns regarding project impacts to forested lands, water resources, karst, and residents' cultural attachment to the land during the proceeding.¹⁴

⁸ See Giles County, "Letter to USFS," eLibrary no. 20160909-5383 (Sep. 9, 2016).

⁹ See Roanoke County, "Roanoke County's Motion to Intervene and Identification of Issues under CP16-10," eLibrary no. 20151125-5074 (Nov. 25, 2015).

¹⁰ Roanoke County's Draft EIS Comments, p. 31.

¹¹ See Roanoke County, "Roanoke County's Motion to Intervene and Identification of Issues under CP16-10," eLibrary no. 20151125-5074 (Nov. 25, 2015).

¹² See Craig County, "Motion of the County of Craig, Virginia for Leave to Intervene under CP16-10," eLibrary no. 20151124-5029 (Nov. 24, 2015).

¹³ See Craig County, "Craig County Resolution R16-83," eLibrary no. 20161219-5327 (Dec. 19, 2016).

¹⁴ See eLibrary no. 20151124-5029.

II. **BACKGROUND**

On October 23, 2015, Mountain Valley filed an application for a Certificate of Public Convenience and Necessity under NGA section 7(c).¹⁵ It filed resource reports¹⁶ on December 1, 2014,¹⁷ and revised reports on October 23, 2015.¹⁸ On November 13, 2015, the Commission issued the Notice of Applications and solicited Motions to Intervene.

OEP Staff issued the draft EIS on September 16, 2016. Comments were due on December 22, 2016. Mountain Valley continued to file new or revised information regarding the proposed project, alternatives, and potential impacts during the draft EIS comment period. Many parties, including the Counties, objected to the Commission's publication of the draft EIS based on incomplete information. OEP Staff issued two Post-DEIS Information Requests in January and March of 2017.¹⁹ OEP Staff issued the final EIS on June 23, 2017.²⁰ It did not provide a formal comment period for the final EIS; however, many parties, including the Counties, did file comments. OEP Staff did not respond to comments filed on the final EIS. Mountain Valley continued to file environmental information following publication of the final EIS. OEP Staff did not supplement the final EIS in response to the additional information filed.

On October 13, 2017, the Commission issued the Certificate Order. The Certificate Order approves Mountain Valley's construction of a 303.5-mile-long, 42-inch-diameter natural gas pipeline from Wetzel County, West Virginia (milepost (MP) 0.0) to an interconnection with Columbia Gas Transmission, LLC's WB System in Braxton County, West Virginia, at MP 77.6, and then to an interconnection with Transco's mainline system at MP 303.5 in Pittsylvania County, Virginia.²¹

The Certificate Order includes many environmental conditions, some of which include additional survey work to identify potential project impacts. There are several permits required

¹⁵ See Mountain Valley, "Application for Certificate of Public Convenience and Necessity and Related Authorizations," eLibrary no. 20151023-5035 (Oct. 23, 2015). Prior to filing its application, Mountain Valley received permission to use the Commission's pre-filing procedures (*see* 18 C.F.R. section 157.21). See FERC, "Letter responding to Mountain Valley Pipeline LLC's letter filed 10/27/14 re Approval of Pre-Filing Request for the planned Mountain Valley Pipeline Project under PF15-3," eLibrary no. 20141031-3001 (Oct. 31, 2014).

¹⁶ See 18 C.F.R. section 380.12.

¹⁷ See Mountain Valley, "Report of Mountain Valley Pipeline LLC Draft Resource Report #1 and Summary of Alternatives under PF15-3," eLibrary no. 20141201-5054 (Dec. 1, 2014).

¹⁸ See eLibrary no. 20151023-5035.

¹⁹ See FERC, "Post-DEIS Environmental Information Request," eLibrary no. 20170127-3018 (Jan. 27, 2017); FERC, "Post-DEIS Environmental Information Request #2," eLibrary no. 20170320-3003 (Mar. 20, 2017).

²⁰ See FERC, "Final Environmental Impact Statement," eLibrary no. 20170623-4000 (Jun. 23, 2017).

²¹ *Id.* at ¶ 7.

under state and federal law that are still outstanding, specifically: the Bureau of Land Management's grant of a right-of-way, the U.S. Army Corps' issuance of a Clean Water Act (CWA) section 404 permit, the Virginia Marine Resources Commission's Subaqueous Bottoms Habitat Permit, and Virginia Department of Environmental Quality's issuance of a CWA section 401 permit. Also, the Commission has not yet completed consultation with the U.S. Fish and Wildlife Service under Endangered Species Act section 7, or the National Historic Preservation Act section 106 process.

The Certificate Order states that Mountain Valley may not begin construction until it satisfies certain environmental conditions, including those that require it to obtain necessary permits. However, Mountain Valley has relied on the Certificate Order as authority for seeking to use eminent domain to condemn private property. On October 24, 2017, Mountain Valley sued over 300 landowners in U.S. District Court for the Western District of Virginia, Roanoke Division to acquire easements and access through eminent domain.²²

III. **STATEMENT OF ISSUES**

Issue 1. Whether the Final EIS demonstrates a “hard look” at the environmental impacts of the MVP Project as Required by NEPA.

Cases

Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc., 462 U.S. 87, 103 S. Ct. 2246, 76 L. Ed. 2d 437 (1983)

Bissell v. Penrose, 49 U.S. 317, 12 L. Ed. 1095 (1850)

Colorado Env'tl. Coal. v. Dombeck, 185 F.3d 1162 (10th Cir. 1999)

Delaware Riverkeeper Network v. F.E.R.C., 753 F.3d 1304 (D.C. Cir. 2014)

Hughes River Watershed Conservancy v. Glickman, 81 F.3d 437 (4th Cir. 1996)

Marsh v. Oregon Nat. Res. Council, 490 U.S. 360, 109 S. Ct. 1851, 104 L. Ed. 2d 377 (1989)

Nat. Res. Def. Council, Inc. v. Hodel, 865 F.2d 288 (D.C. Cir. 1988)

Nat. Res. Def. Council, Inc. v. Morton, 458 F.2d 827 (D.C. Cir. 1972)

Nat'l Audubon Soc'y v. Dep't of Navy, 422 F.3d 174 (4th Cir. 2005)

²² Duncan Adams, *Mountain Valley Sues Landowners to Gain Pipeline Easements and Access through Eminent Domain*, Roanoke Times (Oct. 27, 2017), available at: http://www.roanoke.com/business/news/mountain-valley-sues-landowners-to-gain-pipeline-easements-and-access/article_abff5d87-1aee-5a50-b3c2-b3ee0c812e44.html (last checked Nov. 13, 2017).

Roanoke, Giles, and Craig Counties' Request for Rehearing Mountain Valley Pipeline Project (CP16-10-000)

Natural Resources Defense Council v. U.S. Forest Service, 421 F.3d 797 (9th Cir. 2005)

Neighbors of Cuddy Mountain v. U.S. Forest Service, 137 F.3d 1372 (9th Cir.1998)

Nevada v. Dep't of Energy, 457 F.3d 78 (D.C. Cir. 2006)

Okanogan Highlands Alliance v. Williams, 236 F.3d 468 (9th Cir.2000)

Pac. Coast Fed'n of Fishermen's Associations v. Blank, 693 F.3d 1084 (9th Cir. 2012)

Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 109 S. Ct. 1835, 104 L. Ed. 2d 351 (1989)

S. Fork Band Council Of W. Shoshone Of Nevada v. U.S. Dep't of Interior, 588 F.3d 718 (9th Cir. 2009)

Sierra Club v. Fed. Energy Regulatory Comm'n, 867 F.3d 1357 (D.C. Cir. 2017)

Small Refiner Lead Phase-Down Task Force v. U.S.E.P.A., 705 F.2d 506 (D.C.Cir.1983)

The Fund for Animals v. Norton, 294 F. Supp. 2d 92 (D.D.C. 2003)

U.S. Army Corps of Engineers, 515 F. Supp. 2d 69 (D.D.C. 2007)

Utahns for Better Transp. v. U.S. Dep't of Transp., 305 F.3d 1152 (10th Cir. 2002)

Statutes

42 U.S.C. § 4321

42 U.S.C. § 4332(2)(C)

42 U.S.C. § 4332(2)(C)(ii)

42 U.S.C. § 4332(c)

42 U.S.C. § 4332(C)(ii)

Regulations

18 C.F.R. § 380.1

40 C.F.R. § 1500.1

40 C.F.R. § 1502.1

40 C.F.R. § 1502.14(f)

***Roanoke, Giles, and Craig Counties' Request for Rehearing
Mountain Valley Pipeline Project (CP16-10-000)***

40 C.F.R. § 1502.16

40 C.F.R. § 1502.22

40 C.F.R. § 1502.24

40 C.F.R. § 1505.2(c)

40 C.F.R. § 1506.5(a)

40 C.F.R. § 1508.20

Other

Executive Order 11988

Issue. 2. Whether the Commission Erred in Not Thoroughly Considering Reasonable Alternatives as Required by the NGA and NEPA sections 102(2)(C)(iii) and 102(2)(E).

Cases

American Gas Ass'n v. F.E.R.C., 593 F.3d 14 (D.C. Cir. 2010)

Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190 (D.C. Cir. 1991)

City of Grapevine, Tex. v. Dep't of Transp., 17 F.3d 1502 (D.C. Cir. 1994)

Env'tl. Def. Fund, Inc. v. Corps of Engineers of U.S. Army, 492 F.2d 1123 (5th Cir. 1974)

Izaak Walton League of Am. v. Marsh, 655 F.2d 346 (D.C. Cir. 1981)

Laclede Gas Co. v. F.E.R.C., 873 F.2d 1494 (D.C. Cir. 1989)

Missouri Pub. Serv. Comm'n v. F.E.R.C., 234 F.3d 36 (D.C. Cir. 2000)

National Fuel Gas Supply Corp., 158 FERC ¶ 61,145 (2017)

Natural Resources Defense Council v. U.S. Forest Service, 421 F.3d 797 (9th Cir. 2005)

Sierra Club v. Morton, 510 F.2d 813 (5th Cir. 1975)

Sierra Club v. Watkins, 808 F. Supp. 852 (D.D.C. 1991)

State of California v. Block, 690 F.2d 753 (9th Cir. 1982)

Tongass Conservation Soc. v. Cheney, 924 F.2d 1137 (D.C. Cir. 1991)

Roanoke, Giles, and Craig Counties' Request for Rehearing Mountain Valley Pipeline Project (CP16-10-000)

Statutes

42 U.S.C. § 4332(2)(C)(iii)

42 U.S.C. § 4332(2)(E)

Regulations

18 C.F.R. § 380.15(a)

40 C.F.R. § 1502.13

40 C.F.R. § 1502.14

40 C.F.R. § 1502.24

40 C.F.R. § 1508.25(b)(2)

Other

Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, " 46 Fed. Reg. 18026-01 (Mar. 23, 1981)

Issue 3. Whether the Record Supports a Finding that the Project As Approved Avoids or Minimizes Impacts to Scenic, Historic, Wildlife, and Recreational Values as Required by the NGA.

Cases

Star Central Gas Pipeline, Inc., 124 FERC ¶ 61,042

Statutes

15 U.S.C. § 717f

Policy

FERC, "Statement of Policy: Certification of New Interstate Natural Gas Pipelines" (1999), Docket No. PL99-3-000

Issue 4. Whether the Record Shows the Commission Has Complied with the National Historic Preservation Act.

Cases

CTIA-Wireless Ass'n v. F.C.C., 466 F.3d 105 (D.C. Cir. 2006)

Roanoke, Giles, and Craig Counties' Request for Rehearing Mountain Valley Pipeline Project (CP16-10-000)

Mid States Coal. for Progress v. Surface Transp. Bd., 345 F.3d 520 (8th Cir. 2003)

Statutes

54 U.S.C. § 306108

Regulations

36 C.F.R. § 800.1

36 C.F.R. § 800.1(c)

36 C.F.R. § 800.14(b)

36 C.F.R. § 800.14(b)(2)(iii)

36 C.F.R. § 800.16(f)

36 C.F.R. § 800.2(a)(4)

36 C.F.R. § 800.2(c)(3)

36 C.F.R. § 800.4(a)(3)

36 C.F.R. § 800.4(b)

36 C.F.R. § 800.4(b)(2)

36 C.F.R. § 800.4(d)

36 C.F.R. § 800.4(d)(2)

36 C.F.R. § 800.5(a)

36 C.F.R. § 800.5(a)(1)

36 C.F.R. § 800.5(a)(2)

36 C.F.R. § 800.9

36 C.F.R., §800.6(a)

36 CFR § 800.6(c)

***Roanoke, Giles, and Craig Counties' Request for Rehearing
Mountain Valley Pipeline Project (CP16-10-000)***

Other

The Secretary of the Interior's Standards and Guidelines for Federal Agency Historic Preservation Programs Pursuant to the National Historic Preservation Act, " 63 Fed. Reg. 20496-01 (April 24, 1998)

IV. STANDARD FOR REHEARING

This section sets out standards, which apply in judicial review and are the basis for the Counties' argument that the Certificate Order erred in the specific ways alleged in the Argument in the following section. The authorities cited herein apply to all of the issues identified for rehearing by the Commission.

This certificate proceeding under the NGA is an adjudication as defined by the Administrative Procedures Act (APA) section 554.²³

The APA's "arbitrary and capricious standard" applies to Commission orders issued under the NGA.²⁴ It also applies to judicial review of claims brought under NEPA.²⁵ Under APA section 706(2), 5 U.S.C. § 706(2), a court "... shall hold unlawful and set aside agency action, findings, and conclusions found to be ... (A) arbitrary, capricious, abuse of discretion, or otherwise not in accordance with the law; (D) without observance of procedure required by law; or (E) unsupported by substantial evidence"

Under this standard, the Court can uphold the Commission's decisions if it "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational

²³ 5 U.S.C. § 554. Under APA section 556, the Commission is required to conduct a hearing for a certificate proceeding. 5 U.S.C. § 556. In any hearing required under APA section 556,

parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions – (1) proposed findings and conclusions; or (2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and (3) supporting reasons for the exceptions or proposed findings or conclusions. 5 U.S.C. § 557(c).

An agency must make, and the record must show, a "ruling on each [proposed] finding, conclusion, or exception presented [by a Party]." *Id.* Its final decision must include "...findings and conclusions, and the reasons or basis therefore, on all material issues of fact, law, or discretion presented on the record...." *Id.* "The purposes of the APA provision requiring specific findings and conclusions are to prevent arbitrary agency decisions, provide parties with a reasoned explanation for those decisions, settle the law for future cases, and furnish a basis for effective judicial review." *Armstrong v. Commodity Futures Trading Comm'n*, 12 F.3d 401, 403 (3d Cir. 1993); *see also Ne. Broad., Inc. v. F.C.C.*, 400 F.2d 749, 758–759 (D.C. Cir. 1968) (citations omitted).

²⁴ *Am. Gas Ass'n v. F.E.R.C.*, 593 F.3d 14, 19 (D.C. Cir. 2010) ("American Gas").

²⁵ "Courts reviewing agency action for compliance with NEPA must confirm 'that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious.'" *Nevada v. Dep't of Energy*, 457 F.3d 78, 87–88 (D.C. Cir. 2006).

***Roanoke, Giles, and Craig Counties' Request for Rehearing
Mountain Valley Pipeline Project (CP16-10-000)***

connection between the facts found and the choice made.”²⁶ While the scope of judicial review is “narrow and a court is not to substitute its judgment for that of the agency,” 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 choices made.’”²⁷ “A passing reference to relevant factors, however, is not sufficient to satisfy the Commission’s obligation to carry out ‘reasoned’ and ‘principled’ decisionmaking.”²⁸

NGA section 19r(b)²⁹ further provides that “the finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. Under this standard, substantial evidence is record evidence which is expressly found to be: (A) reliable and probative for the purpose of supporting a finding and (B) superior to competing evidence with respect to a given finding.”³⁰

²⁶ *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983) (“*Motor Vehicle*”) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168, 83 S. Ct. 239, 9 L. Ed. 2d 207 (1962) (“*Burlington Truck*”).

²⁷ *Motor Vehicle*, 463 U.S. at 43. Thus:

[i]f the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive.

Sec. & Exch. Comm'n v. Chenery Corp., 332 U.S. 194, 196–7, 67 S. Ct. 1760, 91 L. Ed. 1995 (1947); *see also Fed. Power Comm'n v. Texaco Inc.*, 417 U.S. 380, 397, 94 S. Ct. 2315, 41 L. Ed. 2d 141 (1974); *Columbia Gas Transmission Corp. v. Fed. Energy Regulatory Comm'n*, 628 F.2d 578, 593 (D.C. Cir. 1979). Similarly:

We noted in [a prior case] that we do not pretend to have the competence or the jurisdiction to resolve technical controversies in the record, or ... to second-guess an agency decision that falls within a ‘zone of reasonableness.’ Rather, our task is to ‘ensure public accountability,’ by requiring the agency to identify relevant factual evidence, to explain the logic and the policies underlying any legislative choice, to state candidly any assumptions on which it relies, and to present its reasons for rejecting significant contrary evidence and argument.

United Steelworkers of Am., AFL-CIO-CLC v. Marshall, 647 F.2d 1189, 1207 (D.C. Cir. 1980) (internal citations omitted).

“Most fundamentally, our task is ‘to ensure that the [agency] engaged in reasoned decisionmaking.’” *Farmers Union Cent. Exch., Inc. v. F.E.R.C.*, 734 F.2d 1486, 1500 (D.C. Cir. 1984) (“*Farmers Union*”) (quoting *Int'l Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 815 (D.C. Cir. 1983)).

²⁸ *American Gas*, 593 F.3d at 19 (quoting *Missouri Pub. Serv. Comm'n v. F.E.R.C.*, 234 F.3d 36, 41 (D.C. Cir. 2000)).

²⁹ 15 U.S.C. §717r(b).

³⁰ *See* 18 C.F.R. § 385.509 (“The presiding officer may also exclude from evidence any other material which the presiding officer determines is not of the kind which would affect reasonable and fair-minded persons in the conduct of their daily affairs.”); Fed. R. Evid. 702; *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 590, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993); *Motor Vehicle*, 463 U.S. at 43; *Burlington Truck*, 371 U.S. at 168. *See also Butte Cty., Cal. v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010): ***Roanoke, Giles, and Craig Counties’ Request for Rehearing Mountain Valley Pipeline Project (CP16-10-000)***

V.
ARGUMENT

A. The Final EIS Does Not Demonstrate a “Hard Look” at the Environmental Impacts of the MVP Project as Required by NEPA.

The Certificate Order states that the Commission received comments raising concerns regarding project impacts on “drinking water sources, surface water, karst, steep slopes, cultural resources, threatened and endangered species, forests, erosion, invasive species, visual resources, and health and safety.”³¹ It adopts the findings in the final EIS that most of these impacts will be insignificant:

construction and operation of the MVP and Equitrans Expansion Projects may result in some adverse environmental impacts on specific resources. The final EIS concludes that impacts on most environmental resources would be temporary or short-term. However, in the case of the clearing of forest, the final EIS concludes that impacts will be long-term and significant. For the other resources, impacts will be reduced to less-than-significant levels with the implementation of mitigation measures proposed by the applicants and other mitigation measures recommended by Commission staff and included as environmental conditions in this order.³²

The Certificate Order concludes: “[b]ased on our consideration of this information and the discussion above, we agree with the conclusions presented in the final EIS and find that the projects, if constructed and operated as described in the final EIS, are environmentally acceptable actions.”³³

The final EIS does not include adequate information to support the Commission’s findings that impacts related to water resources (ground waters, surface waters and fisheries, wetlands), forested land, conservation lands, visual resources, and cultural resources will be insignificant, or will otherwise be mitigated to the extent practicable.

...an agency’s refusal to consider evidence bearing on the issue before it constitutes arbitrary agency action within the meaning of § 706. This proposition may be deduced from case law applying the substantial evidence test, under which an agency cannot ignore evidence contradicting its position. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. Although we are dealing with the question whether agency action is arbitrary or capricious, in their application to the requirement of factual support the substantial evidence test and the arbitrary or capricious test are one and the same.

Id. (internal citations and quotation marks omitted).

³¹ Certificate Order, ¶ 131.

³² Certificate Order, ¶ 130.

³³ *Id.* at ¶ 308.

NEPA was designed to “prevent or eliminate damage to the environment.”³⁴ 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,” 42 U.S.C. § 4332(2)(C)(ii). A “reasonably complete discussion of possible mitigation measures” is implicitly required.

“Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA.” 40 C.F.R. § 1500.1. For this reason, agencies are under an affirmative mandate to “insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements[,] identify any methodologies used and ... make explicit reference by footnote to the scientific and other sources relied upon for conclusions[.]” 40 C.F.R. § 1502.24.³⁵

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.”³⁶ “The hallmarks of a ‘hard look’ are thorough investigation into environmental impacts and forthright acknowledgment of potential environmental harms.”³⁷

The Council for Environmental Quality’s (CEQ) regulations implementing NEPA make clear that the “hard look” standard applies to the agency’s consideration of measures to mitigate the environmental effects of the proposed and alternative actions.

³⁴ *Envtl. Def. v. U.S. Army Corps of Engineers*, 515 F. Supp. 2d 69, 77–78 (D.D.C. 2007) (citing 42 U.S.C. § 4321).

³⁵ *Id.* at 78. The Council for Environmental Quality (CEQ) has issued regulations for implementing NEPA, and specifically for preparing Environmental Impact Statements. *See* 40 C.F.R. § 1502.1 et seq.; *Nevada*, 457 F.3d at 87 (“Guiding the DOE’s NEPA analysis are regulations promulgated by the [CEQ], as well as the DOE’s own regulations, which track the CEQ regulations.”). The Commission “will comply with the regulations of the [CEQ] except where those regulations are inconsistent with the statutory requirements of the Commission.” 18 C.F.R. § 380.1.

³⁶ *Colorado Env’tl. Coal. v. Dombeck*, 185 F.3d 1162, 1171–72 (10th Cir. 1999) (citing *Bissell v. Penrose*, 49 U.S. 317, 350, 12 L. Ed. 1095 (1850)); *see also Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97, 103 S. Ct. 2246, 76 L. Ed. 2d 437 (1983). The purpose of taking a “hard look” is not “merely to force the agency to reconsider its proposed action, but, more broadly, to inform Congress, other agencies, and the general public about the environmental consequences of a certain action in order to spur all interested parties to rethink the wisdom of the action.” *Nat. Res. Def. Council, Inc. v. Hodel*, 865 F.2d 288, 296 (D.C. Cir. 1988).

³⁷ *Nat’l Audubon Soc’y v. Dep’t of Navy*, 422 F.3d 174, 187 (4th Cir. 2005) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350, 109 S. Ct. 1835, 104 L. Ed. 2d 351 (1989)). A “hard look” means more than a perfunctory listing of impacts. *Natural Resources Defense Council, Inc.*, 865 F.2d at 299.

***Roanoke, Giles, and Craig Counties’ Request for Rehearing
Mountain Valley Pipeline Project (CP16-10-000)***

The public is ... entitled to an accurate EIS that indicates whether a project's environmental impacts "can be fully remedied by, for example, an inconsequential public expenditure, [or whether they will] only be modestly ameliorated through the commitment of vast public and private resources."³⁸

An essential component of a reasonably complete mitigation discussion is an assessment of whether the proposed mitigation measures can be effective. *Compare Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1381 (9th Cir.1998) (disapproving an EIS that lacked such an assessment) *with Okanogan Highlands Alliance v. Williams*, 236 F.3d 468, 477 (9th Cir.2000) (upholding an EIS where "[e]ach mitigating process was evaluated separately and given an effectiveness rating"). The Supreme Court has required a mitigation discussion precisely for the purpose of evaluating whether anticipated environmental impacts can be avoided. *Methow Valley*, 490 U.S. at 351–52, 109 S. Ct. 1835 (citing 42 U.S.C. § 4332(C)(ii)). A mitigation discussion without at least *some* evaluation of effectiveness is useless in making that determination.³⁹

[O]mission of a reasonably complete discussion of possible mitigation measures would undermine the "action-forcing" function of NEPA. Without such a discussion, neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects.⁴⁰

CEQ's regulations governing procedures for preparing a final EIS require that the statement include "appropriate mitigation measures not already included in the proposed action or alternatives."⁴¹

The regulations define mitigation as more than any improvement. "Mitigation" includes:

- (a) Avoiding the impact altogether by not taking a certain action or parts of an action.
- (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.

³⁸ *Envtl. Def. v. U.S. Army Corps of Engineers*, 515 F. Supp. 2d 69, 84 (D.D.C. 2007). The court in Environmental Defense rejected the Army Corps' efforts to defend an erroneous mitigation calculation on the basis that the Army Corps' mitigation team would "implement, monitor, and adjust mitigation techniques so as to balance the project's twin aims of flood control and environmental protection." *Id.* The court stated: "If such assurances were allowed to paper over the flaws in the Corps' mitigation analysis, however, they would effectively gut the environmental safeguards that Congress enacted in the CWA and NEPA." *Id.* at 84-85.

³⁹ *S. Fork Band Council Of W. Shoshone Of Nevada v. U.S. Dep't of Interior*, 588 F.3d 718, 727 (9th Cir. 2009); *see also Pac. Coast Fed'n of Fishermen's Associations v. Blank*, 693 F.3d 1084, 1103 (9th Cir. 2012).

⁴⁰ *Robertson*, 490 U.S. at 352.

⁴¹ 40 C.F.R. § 1502.14(f).

- (c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.
- (d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.
- (e) Compensating for the impact by replacing or providing substitute resources or environments.⁴²

[A] court reviewing an EIS for NEPA compliance must take a holistic view of what the agency has done to assess environmental impact. [¶] Courts may not “**flyspeck**” an agency’s environmental analysis, looking for any deficiency, no matter how minor.... [H]owever, a totality of the circumstances approach means that a court must view deficiencies in one portion of an EIS in light of how they affect the entire analysis. *See* 40 C.F.R. § 1502.1 (requiring that an EIS “shall be supported by evidence that the agency has made the necessary environmental analyses”).... An agency may not, for example, paper over one inadequate mode of analysis by referencing another with shortcomings of its own. A reviewing court must therefore examine all of the various components of an agency’s environmental analysis in order to determine, on the whole, whether the agency has conducted the required “hard look.”⁴³

A court will not disturb a decision “[s]o long as the record demonstrates that the agencies in question followed the NEPA procedures, which require agencies to take a ‘hard look’ at the environmental consequences of the proposed action”⁴⁴

NEPA review, however, is not toothless. Reviewing courts must independently evaluate the record to confirm that the agency made a reasoned decision based on its analysis of the evidence before it. *See, Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 378, 109 S. Ct. 1851, 104 L. Ed. 2d 377 (1989). If it did not, a court “may properly conclude that the agency has acted arbitrarily and capriciously.”⁴⁵

⁴² 40 C.F.R. § 1508.20.

⁴³ *Nat'l Audubon Soc'y v. Dep't of Navy*, 422 F.3d 174, 186 (4th Cir. 2005).

⁴⁴ *Envtl. Def. v. U.S. Army Corps of Engineers*, 515 F. Supp. 2d 69, 78 (D.D.C. 2007) (quoting *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1163 (10th Cir. 2002), as modified on reh'g, 319 F.3d 1207 (10th Cir. 2003); see also *Robertson*, 490 U.S. at 350; *Nat. Res. Def. Council, Inc. v. Morton*, 458 F.2d 827, 838 (D.C. Cir. 1972).

⁴⁵ *Envtl. Def. v. U.S. Army Corps of Engineers*, 515 F. Supp. 2d at 78 (holding the Army Corps’ failure to provide a complete and accurate explanation of its fish habitat model violated NEPA’s “scientific integrity” requirement); see also *Sierra Club v. Fed. Energy Regulatory Comm'n*, 867 F.3d 1357, 1363 (D.C. Cir. 2017) (holding that the EIS did not contain adequate information regarding the project’s contribution to greenhouse-gas emissions and remanding to the agency for preparation of a conforming environmental impact statement); *Delaware Riverkeeper Network v. F.E.R.C.*, 753 F.3d 1304 (D.C. Cir. 2014) (holding that the EIS did not include meaningful ***Roanoke, Giles, and Craig Counties’ Request for Rehearing Mountain Valley Pipeline Project (CP16-10-000)***

The final EIS does not demonstrate that the Commission took the requisite hard look at the MVP Project's impacts on geologic, water, forest, visual, or historic and cultural impacts. The record shows that the Commission's analysis of these resources relied on incomplete, inaccurate, and/or undisclosed data. The errors and omissions in the analysis violate NEPA. As discussed below, they also undermine the Certificate Order's conclusion that the project complies with the NGA's implementing regulations which require that pipelines be sited to avoid or minimize impacts to scenic, historic, wildlife, and recreational values.

1. The Final EIS Does Not Show Geologic Hazards Will be Effectively Mitigated.

The Certificate Order finds that “[k]arst features could present a hazard to the MVP Project due to cave or sinkhole collapse.”⁴⁶ It adopts the final EIS's conclusion that impacts to geological resources “will be adequately minimized” through implementation of Mountain Valley's best management practices (BMPs) and as well as OEP Staff's recommendations regarding karst topography.⁴⁷

The final EIS summarizes risks associated with construction in karst that were raised in comments on the draft EIS:

- the degree of subsurface karst interconnectivity clearly shows the project's potential to impact water quantity and quality to area groundwater users (springs and wells);
- negative impacts to caves and cave fauna, as well as surface water during pipeline construction through mature karst areas;
- presence of the pipeline during its operational life would provide for long-term vulnerability to groundwater contamination due to the potential for spills and/or releases that may occur from a pipeline rupture caused by increased rates of corrosion due to oxygenated recharging groundwater flowing preferentially along the completed backfilled trench line; and
- the pipeline trench would function as a “zone of low hydraulic head” effectively acting as an interceptor trench that would preferentially “shunt” shallow groundwater flow into and along the trench increasing the likelihood of subsidence, collapse and pipeline failure.⁴⁸

assessment of the cumulative impact of the four projects approved and remanding to the agency for further consideration).

⁴⁶ Certificate Order, ¶ 151.

⁴⁷ *Id.* at ¶ 157, *see also* Final EIS, p. 5-2.

⁴⁸ Final EIS, p. 4-61.

The final EIS acknowledges that the risks associated with karst are compounded by the existence of other geological hazards, including weak soils, groundwater, and seismicity.⁴⁹ It nonetheless finds that these risks

would be mitigated by the measures identified for landslides, erosion, and steep slopes above, in addition to utilizing appropriate pipeline design such as using thicker-walled pipe in areas of potential seismic, landslide, and subsidence hazards. Mountain Valley would employ engineering geologists, geotechnical engineers, or other specialists, depending on the hazard, to monitor construction in areas where hazards have been identified and provide construction recommendations and mitigation measures including minor route adjustments, should they be required.⁵⁰

The final EIS does not adequately address deficiencies in the evaluation of karst impacts and mitigation raised by expert geologists and hydrogeologists on the record.⁵¹

For example, the Commission did not require Mountain Valley to undertake studies necessary to identify potential impacts to karst resources and measures to effectively mitigate those impacts at many karst resource locations along the project route. Paul Rubin, the Counties' hydrogeological expert, recommended that Mountain Valley conduct detailed geophysical traverses along critical karstic portions of the proposed route, tracer studies to document where the conduits that underlie sinkholes trend, and identification of hydrocarbons and gas that would

⁴⁹ *Id.* at 4-63.

⁵⁰ *Id.*

⁵¹ *See* Dr. Ernst Kastning, "An Expert Report on Geological Hazards in the Karst Regions of Virginia and West Virginia: Investigations and Analysis Concerning the Proposed Mountain Valley Gas Pipeline," eLibrary no. 2016713-5029 (July 13, 2016); Dr. Ernst Kastning, "Revised Report on the Potential Damage to the Karst Aquifer of the Mount Tabor, Virginia Area," eLibrary no. 20170310-5024 (Mar. 10, 2017); Dr. Ernst Kastning, "Supplemental Report regarding Geologic Issues with the Proposed Mountain Valley Pipeline," eLibrary no. 20170524-5177; Dr. Chris Groves, "Karst Landscapes and Aquifers of the Central Appalachian Mountains and Implications for the Proposed Mountain Valley Pipeline," eLibrary no. 20161223-5058 (Dec. 23, 2016); Roanoke County's Draft EIS Comments, eLibrary no. 20161222-5049 (Dec. 22, 2016), Att. 1 (Paul A. Rubin, "Expert Report on behalf of Giles and Roanoke Counties Virginia" (First Rubin Report)), Att. 2 (Dr. Pamela C. Dodds, "Hydrogeological Assessment of Impacts Caused by Constructing the Mountain Valley Gas Pipeline Through Roanoke County, Virginia"); Giles and Roanoke Counties, "Supplemental Comments regarding the Potential Impacts of Construction and Operation of the Mountain Valley Pipeline Project in Karst Terrain," eLibrary no. 20170602-5147 (June 2, 2017), Att. 1 (Paul A. Rubin, "Second Hydroquest Report regarding Environmental Issues Associated with Karst Geology Along the Proposed Mountain Valley Pipeline Project" (Second Rubin Report)); Dr. Pamela C. Dodds, "Hydrogeological Assessment of the Proposed Mountain Valley Pipeline Construction Impacts to Mill Creek, Bent Mountain Area, Roanoke Virginia," eLibrary no. 20170622-5028; Indian Creek Watershed Association's DEIS Comments, eLibrary no. 20161222-5540 (Dec. 22, 2016), Enc. 1 (Dr. Pamela C. Dodds, Hydrogeological Assessment of Karst Impacts of Constructing MVP across Peters Mountain"); Indian Creek Watershed Association's Supplemental Information, eLibrary no. 20161221-5434 (Dec. 21, 2016), Enc. 1 (Dr. Pamela C. Dodds, "Hydrogeological Assessment of the Proposed Mountain Valley Pipeline Route Through Subwatersheds with Tributaries to Indian Creek, Monroe County, WV").

be mobilized in the event of pipeline rupture.⁵² The final EIS states that Mountain Valley undertook evaluation of groundwater flow paths for “several” karst locations, but finds it unnecessary and infeasible to require dye trace studies at all karst features.⁵³ It does not cite to a specific basis for finding that the recommended studies are not relevant to the evaluation of reasonably foreseeable significant adverse impacts. It does not explain why study of additional locations is not feasible. It does not show that the costs would be exorbitant.⁵⁴

The final EIS summarily reports Mountain Valley’s analysis, but does not show independent evaluation of the analysis by OEP Staff. Further, the record does not disclose the names and qualifications of Mountain Valley’s karst specialists, and their names do not appear in the final EIS’s List of Preparers. This does not comply with CEQ regulations.⁵⁵

The final EIS does not include thorough evaluation of the impacts of pipeline rupture to karst formations and public safety along the proposed route. It finds that construction of the MVP Project “would represent only a slight increase in risk to the nearby public.”⁵⁶ This is based largely on assumptions regarding Mountain Valley’s ability to avoid or minimize undisputed risks associated with pipeline construction in a highly karstified setting. As stated above, the final EIS does not provide an adequate basis for those assumptions. Further, the Commission has not updated its analysis to address information submitted by Paul Rubin regarding the potential impacts of pipeline rupture and new recommendations for safety distances to avoid loss of life and property because of pipeline rupture.⁵⁷

⁵² First Rubin Report, p. 11.

⁵³ Final EIS, p. 4-34.

⁵⁴ See 40 C.F.R. § 1502.22.

⁵⁵ CEQ’s regulations provide:

The agency shall independently evaluate the information submitted and shall be responsible for its accuracy. If the agency chooses to use the information submitted by the applicant in the environmental impact statement, either directly or by reference, then the names of the persons responsible for the independent evaluation shall be included in the list of preparers (§ 1502.17). It is the intent of this paragraph that acceptable work not be redone, but that it be verified by the agency.

40 C.F.R. § 1506.5(a).

⁵⁶ Final EIS, p. 4-573.

⁵⁷ See Rubin Second Report. Rubin’s Second Report described studies and actual accidents that demonstrate the swift, severe, and potentially deadly consequences of pipeline ruptures. *Id.* at 3. He highlights a recent study that recommends a minimum safety distance of 2,300 meters (7,544 feet) from natural gas pipelines and important infrastructure or resources. Applying that recommendation to the MVP Project, Rubin found:

Russo and Parisi’s recommendations, when correlated with vulnerable karst areas along the proposed MVP Project route, demonstrate that the distances between fragile cave networks and the proposed pipeline are far lower than the recommended safety distance. Jones and Kastning (2017) provide examples showing that the Mount Tabor Variation crosses many significant and sensitive karst features. For example, Figure 8-1 in their report, “Five High-Risk Channel Crossings on the Mount Tabor Variation,” shows the proposed

2. The Final EIS Does Not Show Project Impacts on Waters Will Be Effectively Mitigated.

a. The final EIS does not support the Certificate Order’s findings regarding project impacts on sedimentation.

The Certificate Order notes “concerns regarding potential effects on surface waterbodies during construction and operation of the projects due to sedimentation or spills or leaks of hazardous materials.”⁵⁸ It responds: “[t]he final EIS concludes that dry open-cut waterbody crossings result in temporary (less than 4 days) and localized (for a distance of only a few hundred feet of the crossing) increases in turbidity downstream of construction, but the magnitude of this increase is minimal compared to increased turbidity associated with natural runoff events.”⁵⁹ It describes various measures Mountain Valley will implement pursuant to its Erosion and Sediment Control Plan and the Commission’s *Upland Erosion Control, Revegetation, and Maintenance Plan* (Commission’s Plan), and finds these measures “will provide acceptable protection of surface waterbodies.”⁶⁰

MVP route traversing a sinkhole-riddled area directly over a dye-traced conduit route tributary to the Slusser’s Chapel Cave stream. *There is no safety distance at all.* This makes the risk of ecological and human damage posed by the project immensely high....

Id. at 6.

Rubin provided specific examples of pipeline ruptures caused by sudden sinkhole collapse and subsidence and slumping of soils in steep terrain. In each example, there is record of a fiery explosion that sent segments of previously buried pipeline hundreds of feet away from the rupture centerline, causing injuries and extensive damage. *Id.* at 9-12. Ruben stated that the proposed route is vulnerable to sinkhole collapse and subsidence.

Rubin concluded, in part, that Mountain Valley:

has not adequately addressed the threats posed by the proposed pipeline in terms of likely, real-world consequences. It has not presented scientific evidence to support its claims that it can effectively avoid those threats and the attendant consequences by sidestepping sinkholes during construction and monitoring post-construction.... [T]he impacts of any pipeline rupture would likely be instantaneous and disastrous. I continue to recommend that the proposed pipeline route be re-evaluated and additional consideration given to avoiding adverse environmental impact in major karst areas.... [¶] MVP has not provided risk analyses that objectively calculate public safety distances from the proposed pipeline. Portions of the proposed pipeline route fall well within the safety distance determined by Russo and Parisi, and others (e.g., see the second recommendation bullet on page 6 of this report).... [¶] It is critically important that MVP fully disclose the true public risk associated with pipeline rupture and reroute all pipeline segments that are planned such that they fall within published safety distances.

Id. at 13-14.

⁵⁸ Certificate Order, ¶184.

⁵⁹ *Id.* at ¶ 185.

⁶⁰ *Id.* at ¶ 185 (citing Final EIS at 4-149).

The Certificate Order cites to the final EIS at 4-149 as the basis for this conclusion. The final EIS at 4-149 essentially states that there are no anticipated “long-term or significant impacts on surface waters as a result of the project” because Mountain Valley will bury the pipeline beneath the bed of all waterbodies, implement erosion and sedimentation controls, and restore streambanks and streambed contours as close as practical to pre-construction conditions.⁶¹ Absent hydrologic sedimentation analysis or comparable study, there is an inadequate scientific basis for this conclusion. A statement that mitigation will be effective with nothing more does not satisfy the Commission’s duty under NEPA to disclose the scientific basis for its findings.

The Certificate Order does not directly address the Counties’ and other parties’ requests for hydrologic analysis of sedimentation for the entire MVP Project route in order to evaluate project impacts on sedimentation. It does not explain why hydrologic sedimentation analysis was only required for the Jefferson National Forest. This decision is contrary to the recommendation of the U.S. Environmental Protection Agency (EPA) that, “the same parameters used for streams and waterbodies within the Jefferson National Forest be used for those resources outside of the Forest.”⁶²

Dr. Pamela Dodds provided an expert opinion⁶³ that hydrologic sedimentation analysis, such as that used for the Jefferson National Forest, was essential:

the Revised Universal Soil Loss Equation, has been used to quantify the amount of sediment that will be released during the proposed construction in the National Forest, but has not been applied in any other areas along the proposed MVP construction corridor. Calculations of increased stormwater discharge and of sediment released during construction are critical to an evaluation of increased sediment to streams from Best Management Practices structures, vertical stream bed scour, and downstream stream bank erosion.⁶⁴

The Hydrologic Sedimentation Analysis prepared by Environmental Solutions and Innovations, Inc. (ESI) on Mountain Valley’s behalf for the Jefferson National Forest shows the MVP Project will have substantial impacts on the stream systems studied.⁶⁵ The study found

⁶¹ Final EIS, p. 4-149.

⁶² EPA’s Draft EIS Comments, Enc. 1, p. 9.

⁶³ Preserve Bent Mountain, “Hydrogeological Assessment of Proposed Mountain Valley Pipeline Construction Impacts to Mill Creek, Bent Mountain Area, Roanoke County, Virginia” eLibrary no. 20170622-5028, pp. 41-42 (June 22, 2017).

⁶⁴ eLibrary no. 20170622-5028, p. 37. Dr. Dodds stated that stormwater, not just waterbody crossings should be considered: “[i]ncreased stormwater discharge causes downstream stream bank erosion, introducing sediment into the streams.” *Id.*

⁶⁵ ESI states:

Construction of MVP within the JNF and private lands has potential to introduce excess sediment into waterways within the JNF and downstream areas, which may result in changes to water quality and
***Roanoke, Giles, and Craig Counties’ Request for Rehearing
Mountain Valley Pipeline Project (CP16-10-000)***

that “[c]umulatively, approximately 29.31 miles of stream segments downstream of the Project Area within the JNF and within the study area are expected to have a 10 percent increase in sediment loads or more”⁶⁶ ESI defined any cumulative increase to sediment loads greater than 10% to be “substantial.”⁶⁷ Thus, the 3.4 mile crossing of the Jefferson National Forest will have potentially substantial impacts on approximately 30 miles of stream segments.

The results of the ESI study are strong indication that sedimentation impacts over the 300-mile pipeline route will be substantial according to the standards used by ESI. Due to the lack of hydrologic sedimentation analysis for the rest of the route, there is no scientific basis for concluding that sedimentation impacts will be lesser for waterways located on non-federal lands affected by the MVP Project.

Further, there is evidence in the record that Mountain Valley and the Commission have relied on inaccurate data in evaluating the effectiveness of proposed erosion and sedimentation control measures.⁶⁸ For example, the Commission’s finding regarding the effectiveness of proposed mitigation measures appears to rely on the assumption that silt fencing has a 79 percent

potentially impact aquatic biota. Although MVP will implement specific conservation measures (i.e., erosion and sediment controls) to minimize impacts to waterways, these measures are unlikely to prevent all sediment inputs. Sedimentation of streams by erosion is a natural process, but land development and disturbance may accelerate this process. Increased erodibility, due to the loosening and exposure of fine particles increases the likelihood of sediment-laden runoff from the Project into nearby waterways.

Final EIS, App. O, p. O3-4

⁶⁶ The study goes on to state that the study “likely” overestimates the MVP Project’s contribution to sediment loads above baseline because the study did not account for the pre-existing Pocahontas Road. Final EIS, App. O, p. O3-24. The Commission does not explain why it did not require Mountain Valley to correct this error.

⁶⁷ *Id.* at App. O, O3-6. ESI explained:

One commonly used impact threshold is one in which the metric of impact is increased by 10 percent or more (USEPA 2003). This approach recognizes the biological reality that even a relatively small (in absolute terms) amount of sediment may degrade a pristine stream, while a larger amount might be needed to further degrade a historically impacted stream. Therefore, to identify the extent of sedimentation effects from the proposed action on JNF (i.e., Cumulative Effect boundaries), stream segments downstream with a 10 percent increase over baseline in maximum yearly load are delineated.

Id. at O-29.

⁶⁸ See Dr. Pamela C. Dodds, *Hydrogeological Assessment of Proposed Mountain Valley Pipeline Construction Impacts to Mill Creek, Bent Mountain Area, Roanoke County, Virginia*, eLibrary no. 20170622-5028 (June 22, 2017), pp. 29-32.

***Roanoke, Giles, and Craig Counties’ Request for Rehearing
Mountain Valley Pipeline Project (CP16-10-000)***

effectiveness rating.⁶⁹ However, the standard effectiveness rating for silt fencing is actually 40 percent.⁷⁰

The Commission cannot reliably conclude that the proposed mitigation will effectively mitigate adverse sedimentation impacts to surface waters when it has not quantified the sedimentation impacts for roughly 90 percent of the MVP Project route, and has not provided any other scientific basis for this finding.

b. The final EIS does not support the Certificate Order’s findings regarding project impacts on groundwater quality.

The Certificate Order states that, “[b]ecause karst features provide a direct connection to groundwater, there is a potential for pipeline construction to increase turbidity in groundwater due to runoff of sediment into karst features or to contaminate groundwater resources by inadvertent spills of fuel or oil from construction equipment.”⁷¹ It finds that Mountain Valley’s implementation of the erosion control measures in the Commission’s Plan and Mountain Valley’s Karst-specific Erosion and Sediment Control Plan will minimize impacts on karst related groundwater.

As stated above, the Commission did not undertake a hydrologic sedimentation analysis for the majority of the MVP Project route. As a result, the Commission cannot reliably predict the potential sediment loads that will be entering surface or groundwaters as a result of project construction and operation. The Certificate Order does not explain how it determined that the

⁶⁹ See Dr. Pamela C. Dodds, “Notice of Objection to the Draft Record of Decision for the Mountain Valley Project Land and Resource Management Plan Amendment for the Jefferson National Forest, Monroe County, West Virginia And Giles And Montgomery Counties, Virginia, eLibrary no. 20170731-5067 (July 31, 2017), pp. 24-26:

RUSLE2 incorporates estimated sediment containment, through the use of Best Management Practices (BMPs) through the use of a “support practice factor”. The value selected unilaterally for the RUSLE2 evaluation presented in the MVP Hydrologic Analysis is 79% effectiveness or containment by use of silt fencing. *The 79% effectiveness is not endorsed by the VDEQ and is not the typical rating in any other document that evaluates BMPs. Most evaluations apply a 10% to 40% effectiveness for silt fencing* (p. 24).

...[MVP’s] use of a 79% sediment containment effectiveness is based on a M.S. thesis by Gregg Steven Dubinsky, 2014, “Performance Evaluation of Two Silt Fence Geosynthetic Fabrics During and After Rainfall Event”. The study used 4 feet by 8 feet sheets of plywood with compacted sediment on the surfaces tilted at 10%, 25%, and 33% slopes with rain event simulations. The results reported...: “*Overall measured results* showed that woven and nonwoven fabrics achieved performance efficiencies of 57 and 59 percent in turbidity, and 59 and 62 percent in suspended sediment concentrations, respectively.” ...The actual results, therefore, were less than the 79% effectiveness value used in the [MVP] calculations. (p. 25) (*emphasis added*).

⁷⁰ See Dr. Pamela C. Dodds, *Hydrogeological Assessment of Proposed Mountain Valley Pipeline Construction Impacts to Mill Creek, Bent Mountain Area, Roanoke County, Virginia*, eLibrary no. 20170622-5028 (June 22, 2017), p. 30.

⁷¹ Certificate Order, ¶ 171.

introduction of sediment to groundwaters would be minimized in the absence of studying or disclosing the potential increase in sediment loads over the entire project route.

Further, the Commission did not undertake dye trace studies to determine groundwater pathways. The Certificate Order reports that the “[Virginia Department of Conservation and Recreation (VADCR)] requests that Mountain Valley conduct additional dye-tracing studies to determine the underground connectivity and relationships between karst features and sinkholes in the vicinity of the MVP Project.”⁷² The Certificate Order rejects this request as “not feasible or necessary.”⁷³ It does not cite to scientific or other sources in support of this conclusion, and this information is not otherwise provided in the final EIS.

In addition to not requiring dye-tracing studies, the Commission did not require Mountain Valley to map “all of the locations of water wells, springs, and other drinking water sources within 150 feet (500 feet in karst terrain) of construction work areas and aboveground facilities” prior to issuing the final EIS or Certificate Order.⁷⁴ It did not provide a basis for limiting mapping of water sources to 500 feet in karst terrain.⁷⁵ By contrast, Virginia’s Office of Environmental Health and Safety recommended that “a sanitary survey within 1,000 feet on either side of the pipeline be performed at a minimum to ensure people and properties using local and regional groundwater and surface water for recreational use or human consumption are identified and protected.”⁷⁶ Due to its lack of investigation, the Commission does not know how many potential surface/groundwater connections there are along the project route that could be impacted.

The Commission’s decision not to require dye-tracing studies and mapping of groundwater sources located within karst deprived it of information necessary to determine the MVP Project’s impacts on groundwater sources. The Commission does not know the quantity or location of surficial features that could provide an entry point for sediment to groundwater, or the geographic extent of those features (i.e., how far sediment will be carried). The Commission

⁷² Certificate Order, ¶ 155. Other parties also requested dye-trace studies. *See, e.g.*, First Rubin Report, p. 10; letter from Robert Jones to Secretary Kimberly D. Bose, eLibrary no. 20170404-5277 (April 4, 2017).

⁷³ Certificate Order, ¶ 156.

⁷⁴ *Id.* at ¶ 172.

⁷⁵ Evidence in the record shows that 500-feet is an inadequate distance. Dr. Kastning submitted information regarding the contamination of Red Sulphur Public Service District spring on Peters Mountain, WV caused by the spill site and related sinkhole along the Columbia Gas-Celanese pipeline right of way. Dr. Ernst Kastning, *Geologic Hazards in the Karst Regions of Virginia and West Virginia*, eLibrary no. 20160713-5029 (July 13, 2016), p. 40. The pipeline was approximately one-half mile from the spring, which provided drinking water to over 4000 customers.

⁷⁶ Commonwealth of Virginia’s Response to Draft EIS, eLibrary no. 20161222-5394 (Dec. 22, 2016) (transmitting Memorandum from Dwayne Roadcap, Division Director of Office of Environmental Health and Safety to Drew Hammond, Acting Director Office of Drinking Water) (Dec. 9, 2016), p. 1).

cannot reliably conclude that the approved measures will effectively mitigate sedimentation impacts on groundwater in the absence of this information.

c. The final EIS does not show consideration of project impacts on groundwater recharge and flow routes.

In comments on the final EIS, the Counties asked that OEP Staff direct Mountain Valley to undertake study of the potential impacts to groundwater recharge and flow routes as a result of pipeline construction and operation.⁷⁷ In support, they cited reports by Paul Rubin⁷⁸ and Dr. Dodds providing a hydrogeological assessment of the MVP Project. Dr. Dodds found that deforestation and blasting for the MVP Project would likely “reduce groundwater recharge and cause significant changes to the amount of groundwater available as a drinking water source, as well as to groundwater flow routes.”⁷⁹ She stated:

Groundwater flows along bedrock bedding planes and fractures, forming seeps and springs where the bedding planes and fractures intercept the ground surface. The seeps and springs also occur within streams and along stream banks, providing water to streams during drought conditions. Deforestation results in reduced groundwater recharge, with the consequent decreased availability of groundwater. Blasting causes changes in the bedrock fractures, resulting in changes in the direction of groundwater flow. Consequently, seeps and springs will not receive the groundwater that was available prior to construction.⁸⁰

EPA also expressed concern about the MVP Project’s potential to alter groundwater flow pathways.⁸¹ In response to the draft EIS, it commented

The DEIS notes that blasting in karst can potentially change groundwater flow, create contamination, and affect yield and turbidity. It is also noted that potential impacts on water wells, springs, wetlands and other resources could occur. Although the DEIS states that Mountain Valley is aware of possible changes or loss to surface water and will use specialized construction techniques, EPA is concerned that there is insufficient information to conclude that karst blasting and other construction activities would only result in temporary, insignificant impacts. Changes in the geology, even just cracks and

⁷⁷ Counties’ Final EIS Comments, p. 10.

⁷⁸ First Rubin Report, p. 10.

⁷⁹ Roanoke County’s Draft EIS Comments, Att. 2, p. 4.

⁸⁰ *Id.* at 43-44; *see also* Dr. Pamela C. Dodds, “Hydrogeological Assessment of Proposed Mountain Valley Pipeline Construction Impacts to Mill Creek, Bent Mountain Area, Roanoke County, Virginia,” eLibrary no. 20170622-5028 (June 22, 2017), pp. 2, 23-24.

⁸¹ Letter from Jeffrey D. Lapp, EPA, to Nathaniel J. Davis, Sr., eLibrary no. 20170731-5091 (July 31, 2017) (EPA’s Final EIS Comments), Enc. 1, unnumbered p. 4; *see also* letter from Jeffrey D. Lapp, EPA, to Nathaniel J. Davis, Sr., eLibrary no. 20161229-0033 (Dec. 20, 2016) (EPA’s Draft EIS Comments), Enc. 1, p. 4.

fissures, can alter flow patterns, permanently impacting aquatic life and water chemistry. EPA recommends that FERC conduct a fracture trace/lineament analysis at all karst stream crossings and potential blasting areas along the route; additional monitoring or modifications of route should be proposed to avoid permanently altering flows and impacting biology in interconnected karst voids and cave systems. The impacts on groundwater and surface water are intertwined in karst ecosystems and that point should be elaborated; contaminating groundwater could lead to surface water contamination and altering subsurface flows could affect surface flows.⁸²

In comments on the final EIS, the EPA reiterated:

Alteration of shallow bedrock may modify hydrologic pathways and storage potential of aquifers. These impacts may not be consistent over the entire length of the pipeline and may need to be evaluated on a case-by-case basis where groundwater resources are used for farming practices or drinking water-supply.⁸³

The final EIS does not respond to this comment. As stated above, the final EIS and Certificate Order rejected requests for additional dye-tracing studies, which would have provided baseline data of existing groundwater pathways and permit evaluation of changes caused by the project.

Absent consideration of the MVP Project's potential impacts on groundwater recharge and flow routes, there is an inadequate record basis to conclude that impacts to groundwaters will be effectively mitigated by the conditions attached to the Certificate Order.

d. The final EIS does not show adequate consideration of project impacts on floodplains.

The Certificate Order does not make a specific finding regarding the MVP Project's impacts on floodplains.

The draft EIS did not thoroughly evaluate the MVP Project's impacts on floodplain capacity or habitat.⁸⁴ OEP Staff state that the final EIS has "been revised to further address impacts on floodplains, including flooding potential from large rainfall events."⁸⁵ However, the revisions are not adequate to demonstrate the project will not have significant impacts on floodplains. The final EIS references but does not annotate a Federal Emergency Management Agency Flood Insurance Rate Map for the project. It does not show where temporary and

⁸² EPA's Draft EIS Comments, Enc. 1, p. 13.

⁸³ *Id.* at Enc. 1, p. 6.

⁸⁴ See Giles County's Draft EIS Comments, pp. 21-23 (the draft EIS did not provide "information necessary to determine whether the project will comply with local regulations, which require a conditional use permit if there is to be greater than 5000 cubic yards of filling or excavation within the 100-year floodplain.").

⁸⁵ Final EIS, App. AA, LA14-8.
Roanoke, Giles, and Craig Counties' Request for Rehearing Mountain Valley Pipeline Project (CP16-10-000)

permanent structures will be placed in relation to the floodplain. It does not describe how structures will impact the base flood elevations/floodplain or applicable floodway. The final EIS only describes potential displacement of storage capacity.⁸⁶ The final EIS does not discuss the consistency with the requirements of Executive Order 11988.⁸⁷ Also, Table 4.3.2.7 in the final EIS is incorrect: it shows Franklin County as being in West Virginia rather than Virginia.⁸⁸

3. The Final EIS Does Not Support a Finding that Impacts to Forested Lands Have Been Mitigated to the Extent Practicable.

The Certificate Order cites the final EIS in finding that the MVP Project’s significant impacts to forest resources will be mitigated to the extent practicable:

The final EIS addresses forest habitat impacts and impact avoidance, minimization, and mitigation in sections 4.4 and 4.5. It concludes that impacts on forest resources would be significant, but have been minimized to the extent practicable. For example, the final EIS states that impacts on forest will be reduced by collocating the MVP Project adjacent to existing rights-of-way for about 30 percent of the project route. Mountain Valley will also reseed construction areas with native vegetation during restoration.⁸⁹

The final EIS does not show that Staff developed or fully considered mitigation measures for impacts on forested lands that would accomplish the objectives set out in 40 C.F.R. section 1508.20. It does not support the Certificate Order’s finding that “all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted.”⁹⁰

The final EIS recommends different mitigation measures for federal and non-federal forested lands. It does not explain the disparate treatment. The composition of the federal and non-federal forested lands affected by the MVP Project within Virginia are the same. Thus, there appear to be measures that are available and practicable to mitigate project impacts on forested lands, which are not being required for most of the forested lands that will be affected by the project.

⁸⁶ *Id.* at 4-128.

⁸⁷ “Executive Order 11988 requires federal agencies to avoid to the extent possible the long and short-term adverse impacts associated with the occupancy and modification of flood plains and to avoid direct and indirect support of floodplain development wherever there is a practicable alternative.” FEMA, “Executive Order 11988, Description and Intent,” available at <https://www.fema.gov/executive-order-11988-floodplain-management> (last accessed Nov. 13, 2017).

⁸⁸ *Id.*

⁸⁹ Certificate Order, ¶ 109. Dr. Carl Zipper submitted evidence that proposed seeding will not be effective to mitigate deforestation and forest fragmentation caused by the project. See letter from Dr. Zipper to Secretary Kimberly D. Bose, eLibrary no. 20170725-5023 (July 25, 2017).

⁹⁰ 40 C.F.R. § 1505.2(c) (requiring that the record of decision “[s]tate whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not.”).

a. **The final EIS does not adequately identify the impacts of forest fragmentation.**

The final EIS states that removal of interior forest to create the project right-of-way would contribute to forest fragmentation and the creation of forest edges, and result in the removal of habitat for interior species.⁹¹

However, the final EIS does not address the full range of loss of forest values⁹² when irreplaceable cores are permanently fragmented.”⁹³ According to the Virginia Department of Conservation and Recreation (VDCR):

Impacts of forest fragmentation on a diverse suite of forest ecosystem services is not thoroughly acknowledged, analyzed, nor quantified in the MVP Final EIS. Rather, forest fragmentation was initially addressed in the Migratory Bird Conservation Plan (MBCP), and it was only addressed for its impacts on bird habitat... Within the existing versions of the MBCP, an assessment of forest fragmentation impacts and mitigation is attempted via use of a Habitat Equivalency Analysis (HEA), *but this approach is not designed to and does not address forest fragmentation.*⁹⁴

Mountain Valley’s HEA also erred in the treatment and calculation of area of forest impacts:

⁹¹ Final EIS, p. 4-181.

⁹² Intact blocks of forest (at least 100 acres of interior forest) provide multiple forest values that “increase with area and provide valuable ecosystem services for as long as that core persists in an unfragmented state. These services include protections for air and water quality, erosion prevention, sediment retention, groundwater recharge, carbon sequestration, oxygen production, temperature regulation, protection from storm and flood damage, in addition to wildlife habitat and biodiversity values.” *Id.* The MVP-HEA divides forest into different types, and does not “account for the various intrinsic values that large forest cores provide by aggregating adjacent forest cover types into functional cores.” Letter from Clyde E. Cristman to Secretary Kimberly D. Bose, eLibrary no. 20170721-5183 (July 21, 2017), p. 3.

⁹³ *Id.*

⁹⁴ *Id.* at 2. The VDCR explained:

The MVP-HEA addresses impacts of the proposed MVP on habitat for migratory birds and a subset of ecosystem services by quantifying and weighting values of different forest cover types along the length of the construction footprint and within a 100-meter buffer into the adjacent forest. The decline in values between pre- and post-construction is used to calculate the total impact of the project to the services listed. There are two major issues with this approach. First, rather than consideration of ecosystem services *in addition to* habitat impacts and increasing the overall forest fragmentation impacts, their addition dilutes the importance of interior habitats (i.e. habitat quality becomes one of five categories of functional metrics, all with equal ranges of values and summed to calculate a composite metric). Second, it is highly unlikely that impacts to the full range of ecosystem services of large, intact forest cores can be estimated by the MVP-HEA, since it does not account for contiguousness, patch size, and landscape context.

Id. at 3 (italics in original; underline added).

The MVP-HEA defines the area of the construction footprint beyond these permanent disturbances as the area of temporary impact, because vegetation ... would be planted in these previously interior forested areas. While such an approach may be relevant for a forest habitat impact analysis it does not address the other critical ecosystem services provided by forest cores, beyond habitat values.⁹⁵

Instead, for purposes of fragmentation analysis, Mountain Valley should have defined the direct impact as the entire area of the construction footprint intersecting forest cores (i.e. the MVP's permanent ROW plus temporary ROW).⁹⁶ These errors resulted in a significant underestimate of the impacts of forest fragmentation, whereby VDCR estimated a total impact of 16,611 acres within Virginia compared to Mountain Valley's estimate of 3,993 acres.⁹⁷

The Commission erred in relying on Mountain Valley's incorrect analysis of forest fragmentation.⁹⁸ The Commission's choice of scientific methodology and experts is entitled to deference, but only when it has provided a reasoned explanation for its choice.⁹⁹ Such explanation must include disclosure and documentation for the scientific methodology used. It must also include the considerations the Commission found persuasive when choosing one expert over another in the face of competing evidence.¹⁰⁰ The Commission has not provided the

⁹⁵ *Id.* at 4.

⁹⁶ *Id.*

In the case of core forests, direct impacts include the area that would be replanted, because the full function of the impacted interior forest would not be replaced and fragmentation would be permanent. The new forest that would eventually mature (i.e. in the temporary ROW) would not be equivalent to the forest before pipeline disturbance, due to inevitable permanent changes in microhabitat conditions, vegetation structure, species composition and introduction of invasive vegetation in the short and long term.

Id.

⁹⁷ *Id.* at 4, Table 1.

⁹⁸ *See Natural Resources Defense Council v. U.S. Forest Service*, 421 F.3d 797, 812 (9th Cir. 2005); *Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 446-48 (4th Cir. 1996).

⁹⁹ 40 C.F.R. § 1502.24.

¹⁰⁰ *The Fund for Animals v. Norton*, 294 F. Supp. 2d 92, 110 (D.D.C. 2003), *motion for relief from judgment granted sub nom. Fund For Animals v. Norton*, 323 F. Supp. 2d 7 (D.D.C. 2004), and *enforcement denied*, 390 F. Supp. 2d 12 (D.D.C. 2005) ("Defendants have failed to point to any explanation in the record as to why NPS apparently chose to credit one expert over another. Thus, in light of the agency's mandate to protect the parks, the Court is at a loss to understand the agency decision."). *See also Small Refiner Lead Phase-Down Task Force v. U.S.E.P.A.*, 705 F.2d 506, 520 (D.C.Cir.1983) ("Moreover, as this Circuit has made abundantly clear, factual uncertainty does not give the agency decision-maker carte blanche to make unsupported choices. Rather, faced with conflicting evidence, the decision-maker must "identify the considerations he found persuasive." (internal quotations and citation omitted)).

***Roanoke, Giles, and Craig Counties' Request for Rehearing
Mountain Valley Pipeline Project (CP16-10-000)***

required explanation in support of its reliance on Mountain Valley’s analysis, which was not fully disclosed or documented,¹⁰¹ over the evidence and recommendations provided by VDCR.

The final EIS does not accurately disclose the impacts of forest fragmentation. As a result, the Commission does not have an adequate basis to find that the proposed mitigation will mitigate such impacts to the extent practicable.

b. The final EIS does not show that replanting trees in disturbed areas designated for restoration is impracticable.

The final EIS requires hand planting of woody vegetation within the Jefferson National Forest, but not non-federal forested lands.¹⁰² The final EIS acknowledges that oaks and similar native species are not likely to regenerate without re-planting.¹⁰³ However, it rejected requests for re-planting in non-federal forested areas: “[w]e do not believe that re-planting of trees in this ecoregion on this scale would provide a significant advantage to natural reforestation.”¹⁰⁴

The final EIS does not identify the methodologies used or reference the scientific sources relied upon for this conclusion. By contrast, Dr. Carl Zipper¹⁰⁵ offered numerous scientific sources in support of re-planting in order to mitigate the project’s unresolved impacts on forested

¹⁰¹ Letter from Clyde E. Cristman to Secretary Kimberly D. Bose, eLibrary no. 20170721-5183 (July 21, 2017), p. 3.

¹⁰² See Final EIS, “Table 2.4-2: Construction, Restoration, and Mitigation Plans for the Mountain Valley Project and the Equitrans Expansion Project,” p. 2-32 (incorporating Mountain Valley’s Habitat Mitigation Plan (eLibrary no. 0170511-5018) requiring hand planting within the Jefferson National Forest). See also U.S. Forest Service, Draft Record of Decision, Mountain Valley Project Land and Resource Management Plan Amendment for the Jefferson National Forest (June 2017), p. 23 (“The FS and MVP LLC have developed mitigation measures, such as reducing the long-term operational ROW ... Along the edge of this linear corridor a variety of FS-approved shrubs, small trees and shallow rooted trees will be planted ...”).

¹⁰³ See Final EIS, p. 4-173 (finding that oak reproduction is lacking). Dr. Zipper offered expert opinion that accepted practice in forestry is to re-plant trees of species intended for re-establishment that do not establish easily or do not move from current plantings into unplanted areas by natural recruitment (e.g. oaks and hickories) while allowing species that move cross landscapes and establish by natural recruitment easily to re-establish by natural recruitment (e.g., Virginia pine, tulip poplar). See letter from Dr. Zipper to Secretary Kimberly D. Bose, eLibrary no. 20161121-5051 (Nov. 20, 2017), pp. 8-9; letter from Dr. Zipper to Secretary Kimberly D. Bose, eLibrary no. 20170725-5023 (July 25, 2017), pp. 8-9.

¹⁰⁴ See Final EIS, App. AA, Response IND244-8. OEP Staff also responded: “[r]eplanting would limit the species planted to what is commercially available on a very large scale. Natural recruitment would allow for a more highly variable plant species and also would allow for species to regenerate that are best suited for the local conditions.” Dr. Zipper provided an extensive response based on his experience and expertise, and supported by numerous citations to scientific literature, which challenged Staff’s claim. See letter from Dr. Zipper to Secretary Kimberly D. Bose, eLibrary no. 20170725-5023 (July 25, 2017), pp. 11-14.

¹⁰⁵ Dr. Zipper is an expert in the field of Crop and Soil Sciences. His curriculum vitae is available at https://www.cses.vt.edu/content/dam/cses_vt.edu/people/tenure/cv/zipper-cv-2017.pdf (last checked Nov. 13, 2017).

lands.¹⁰⁶ VDCR also recommended replanting native trees.¹⁰⁷ The Certificate Order states that the final EIS responded to Dr. Zipper’s proposed forest mitigation measures, but does not acknowledge the summary and unsupported nature of the response.¹⁰⁸

c. The final EIS does not adequately evaluate project impacts related to invasive species.

The final EIS states that the removal of forest could introduce non-native invasive species.¹⁰⁹ It finds that Mountain Valley’s implementation of its *Exotic and Invasive Species Control Plan* would reduce the potential introduction and spread of non-native invasive plant and weed species.¹¹⁰ However, the final EIS does not include or cite to any scientific basis for finding that the proposed measures will be effective to mitigate the introduction and spread of non-native invasive species caused by project construction and operation. Mountain Valley’s plan does not provide this information.

Instead, the evidence in the record shows that the proposed mitigation measures will not be effective.¹¹¹ This does not comply with the Commission’s obligation to include a reasonably complete and independent assessment of whether proposed mitigation will be effective.

¹⁰⁶ See letter from Dr. Zipper to Secretary Kimberly D. Bose, eLibrary no. 20161121-5051 (Nov. 20, 2016), p. 8; letter from Dr. Zipper to Secretary Kimberly D. Bose, eLibrary no. 20170725-5023 (July 25, 2017), pp. 8-11.

¹⁰⁷ VDCR’s Final EIS Comments, p. 13. “The planted acres should be protected from conversion to any other land use in perpetuity through the use of a protective instrument that overlays the mitigation acreage.” *Id.*

¹⁰⁸ Certificate Order, ¶ 200.

¹⁰⁹ Final EIS, p. 4-181.

¹¹⁰ *Id.* at 4-191.

¹¹¹ See letter from Dr. Carl Zipper to Secretary Kimberly D. Bose, eLibrary no. 20170725-5023 (July 25, 2017), pp. 11-17; see also letter from Dr. Brian Murphy to Secretary Kimberly D. Bose et al., eLibrary no. 20161221-5349 (Dec. 19, 2016); letter from Dr. Brian Murphy to Secretary Kimberly D. Bose, eLibrary no. 20150616-5193 (June 15, 2015). Dr. Zipper identified the following deficiencies:

- Monitoring for two-years is inadequate because the “invasion potential will occur throughout the project’s lifetime;
- Hand cutting cannot effectively remove many of the invasive species that occur in the project area;
- The plan does not include a mechanism to prevent seed production by invasive exotic plants;
- The plan does not prioritize re-establishment of canopy cover by native forest trees;
- The plan does not include thorough rinsing of hydroseeder tanks to prevent spread of residual seed from other jobs.

Letter from Dr. Carl Zipper to Secretary Kimberly D. Bose, eLibrary no. 20170725-5023 (July 25, 2017), pp. 13-16. Dr. Zipper also provided detailed descriptions of “[e]xotic invasive plant species known as especially problematic in and near proposed disturbance areas,” which describes each species ecological threat, and the effectiveness of proposed mitigation measures to control the species. See *id.*, Ex. E.

***Roanoke, Giles, and Craig Counties’ Request for Rehearing
Mountain Valley Pipeline Project (CP16-10-000)***

4. The Final EIS Does Not Show that the Commission Properly Considered Project Impacts to and Mitigation for Visual Resources.

The Certificate Order references the final EIS’s conclusion “that the MVP Project will not have significant adverse visual impacts on the Weston and Gauley Bridge Turnpike Trail, Blue Ridge Parkway, Appalachian National Scenic Trail, and the Jefferson National Forest.”¹¹²

The final EIS acknowledges that “the pipeline corridor itself can be a significant visual feature, especially in mountainous terrain with multiple viewpoints,” and that construction of aboveground facilities would cause permanent visual impacts.¹¹³ It describes visual impacts assessments from Key Observation Points (KOPs) along the Appalachian Trail and within the Jefferson National Forest.¹¹⁴ It also states that mitigation measures would be required to meet Scenic Integrity Objectives for the Jefferson National Forest within 5 years of construction.¹¹⁵ It concludes that “overall impacts on land use and visual resources would be adequately minimized.”¹¹⁶

Mountain Valley stated that it assessed visual impacts from the project’s crossing of the Jefferson National Forest and Appalachian Trail “with management direction using USFS’s Scenery Management System (SMS).”¹¹⁷ It described the key specific tasks for this process as: “(1) define the analysis area, (2) identify KOPs, (3) conduct viewshed analysis for the KOPs; (4) assess visual impacts; and (5) assess Project consistency with the USFS management direction, based on the [Scenic Integrity Objectives (SIOs)].”¹¹⁸

The final EIS does not address the errors in Mountain Valley’s implementation of its methodology identified by the Counties and Roanoke Appalachian Trail Club.¹¹⁹ These errors include, but are not limited to: omission of KOPs;¹²⁰ photographs taken in foggy conditions,

¹¹² Certificate Order, ¶ 225.

¹¹³ Final EIS, p. 5-9.

¹¹⁴ *Id.* at 5-10.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ Mountain Valley, Jefferson National Forest Visual Impact Assessment, eLibrary no. 20170501-5410 (May 1, 2017), p. 1.

¹¹⁸ *Id.* at 2.

¹¹⁹ See letter from Dr. Diana Christopoulos to Secretary Kimberly D. Bose, eLibrary no. 20170223-5090 (Feb. 23, 2017).

¹²⁰ “Roanoke County staff prepared drone footage based on GIS shapefiles provided by Mountain Valley which show the potential impacts of the permanent ROW along the ridgeline towards Poor Mountain. The footage shows that the ridgeline is currently covered by mature trees. The path of the ROW along the ridgeline will be ***Roanoke, Giles, and Craig Counties’ Request for Rehearing Mountain Valley Pipeline Project (CP16-10-000)***”

rather than “typical viewing conditions;” and photographs taken from distances of 300 to 400 feet, rather than adjacent to the proposed crossings.¹²¹ The Commission has not responded to evidence that the final EIS’s predictions regarding the duration of visual impacts do not reflect real-world conditions.¹²²

In addition to errors in implementation of the methods for visual impact assessment, the record does not show that the Commission adequately considered mitigation for visual impacts outside of the Appalachian Trail and Jefferson National Forest. For example, the Forest Service described the mitigation measures that it was requiring to reduce the visual impacts of the project:

The [Forest Service] is working with Mountain Valley to incorporate additional mitigation measures, such as reducing the permanent operational right-of-way that is converted to herbaceous cover from 50 feet wide to 10 feet wide for its length on the Jefferson National Forest. This would significantly reduce the visibility of the pipeline, especially when viewed in the far middle-ground and background distance zones, and it would reduce or eliminate its visibility when viewed on an angle. Along the edge of this linear corridor a variety of FS approved shrubs, small trees and shallow rooted trees should be planted and maintained along a slightly undulating line in order to break up the straight edge and offer a variety of plant heights to reduce a hard shadow line. Reducing the herbaceous right-of-way width and allowing more of a vegetative transition within the operational corridor (i.e., grasses over the pipeline then shrubs between the grasses and treeline) would help mitigate the effects of the change to the scenic character of the area. This would also lessen the visual impacts of the pipeline as seen from the ANST from other viewsheds, including KOPs that were identified in public comments.¹²³

The final EIS did not consider and the Certificate Order does not require comparable measures to mitigate the visual impact on areas outside of the Jefferson National Forest.

5. The Final EIS Does Not Show Adequate Consideration of Potential Impacts on Cultural and Historic Resources.

The Certificate Order states that Commission Staff agrees with the determination of the Virginia Department of Historic Resources (VDHR) that “the MVP Project would have adverse

visible from multiple locations in Roanoke County, not just the KOPs identified” Roanoke and Giles Counties’ Final EIS Comments, p. 15.

¹²¹ Roanoke and Giles Counties Final EIS Comments, pp. 14-15; letter from Dr. Diana Christopoulos to Secretary Kimberly D. Bose, eLibrary no. 20170223-5090 (Feb. 23, 2017), pp. 2-6; *see also* Roanoke County’s Draft EIS comments, pp. 36-37.

¹²² Roanoke and Giles Counties Final EIS Comments, p. 15 (citing actual conditions on Peters Mountain four years after construction of the 10-inch Columbia/Celanese pipeline).

¹²³ Final EIS, App. AA, FA10-1.

effects on the Big Stony Creek Historic District, Greater Newport Rural Historic District, North Fork Valley Rural Historic District, Bent Mountain Rural Historic District, and Coles-Terry Rural Historic District because visual impacts will diminish the feelings and settings of these historic districts.”¹²⁴ It notes that Mountain Valley filed Treatment Plans with the Commission and VDHR to resolve adverse effects on these districts.”¹²⁵ It states that “Environmental Condition No. 15 of this order will ensure future consultations with the SHPOs [State Historic Preservation Officer] and reviews of treatment plans.”¹²⁶ Environmental Condition No. 15 requires completion of the NHPA section 106 process.¹²⁷

Under NEPA section 102(2)(C)¹²⁸ a federal agency must

include in every recommendation or report on proposals ... major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on— (i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action.

“The affected human environment reviewed under NEPA includes aesthetic, historic, and cultural resources as these terms are commonly understood, including such resources as sacred sites.”¹²⁹

¹²⁴ Certificate Order, ¶ 247.

¹²⁵ *Id.* at ¶ 252.

¹²⁶ *Id.*

¹²⁷ Certificate Order, App. C, p. 6. Environmental Condition No. 15 states:

Mountain Valley and Equitrans **shall not begin construction** of facilities and/or use staging, storage, or temporary work areas and new or to-be-improved access roads **until**:

- a. Mountain Valley and Equitrans each files with the Secretary:
- b. remaining cultural resources survey reports;
- c. site evaluation reports, avoidance plans, or treatment plans, as required; 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.
- d. the Advisory Council on Historic Preservation has been afforded an opportunity to comment if historic properties would be adversely affected; and
- e. the FERC staff reviews and the Director of OEP approves all cultural resources reports and plans, and notifies Mountain Valley and/or Equitrans in writing that either treatment measures (including archaeological data recovery) may be implemented or construction may proceed. (emphasis in original)

¹²⁸ 42 U.S.C. § 4332(c); *see also* 40 C.F.R. § 1502.16 (describing required contents for EIS’s discussion of Environmental Consequences).

¹²⁹ CEQ and ACHP, “NEPA and NHPA, Handbook for Integrating NEPA and Section 106,” available at http://www.achp.gov/docs/NEPA_NHPA_Section_106_Handbook_Mar2013.pdf (last checked Nov. 13, 2017).

The final EIS does not include a complete or accurate discussion of the MVP Project’s impacts to historic and cultural resources as required by NEPA section 102(2)(C). The Certificate Order expressly defers the completion of identification of effects and evaluation of avoidance, minimization, and mitigation to some future date prior to construction. This does not comply with NEPA, which requires that the environmental analysis be completed before the agency makes its decision.¹³⁰

On August 2, 2017, Roanoke and Giles Counties filed additional comments regarding the deficiencies in Mountain Valley’s analysis of project impacts on cultural resources.¹³¹ The Counties raised issues regarding the adequacy of Mountain Valley’s analysis of project impacts on visual resources within the historic districts within both Counties.¹³² They also identified several specific errors in the broader effects analysis, including mis-location of historic properties in relation to the ROW or other roads or workspaces.¹³³ These errors include, but are not limited to, the following:

- Mislocation of the Adlie Jones House, pole barn, and trace road, and errors in implementing the methodology for evaluating the Adlie Jones Farm trace road;¹³⁴
- Mislocation of the Welford Dowdy house, and errors in implementing the methodology for evaluating effects on the cultural attachment of the Dowdy family (5 generations) to the Welford Dowdy farm;¹³⁵
- Omission of Canoe Cave, a Virginia Significant Cave which also may be an archeological site, with evidence of civil war era nitre mining, from the effects analysis;¹³⁶
- Errors in applying the methodology for evaluating effects on the Puckett Farm;¹³⁷

¹³⁰ 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1500.1 (“NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken.”).

¹³¹ Giles and Roanoke Counties’ Request to Be Consulted under Section 106 of the National Historic Preservation Act, FERC eLibrary no. 20170802-5115 (Aug. 2, 2017).

¹³² *Id.*, pp. 2-4, 7-8.

¹³³ *Id.*, pp. 8-19.

¹³⁴ *Id.*, p. 8.

¹³⁵ *Id.*, pp. 8-9.

¹³⁶ *Id.*, p. 9.

¹³⁷ *Id.*

- Errors in applying the methodology for evaluating effects on the Bud Reynolds Farm, and the Reynolds’ family (four generations) cultural attachment to the farm;¹³⁸
- Errors in applying the methodology for evaluating depicting visual impacts on the Link Farm and 1912 Covered Bridge and the Link Family (7 generations) cultural attachment to the farm;¹³⁹
- Errors in applying the methodology for evaluating the effects of new permanent road MVP-GI-253.01 on historic properties in the vicinity, including the Frank Sibold House, Leffel/Givens House, Sibold property, Sibold and the Hugh Givens Property;¹⁴⁰
- Errors in applying the methodology for evaluating effects on the Newport Village Sidewalk (a Works Projects Administration (WPA) construction) connecting the GNRHD to its cultural center, the Newport Historic District (NHD);¹⁴¹
- Mis-location of and errors in evaluating the Martin Springbox;¹⁴²
- Errors in applying the methodology for evaluating effects of turning Green Hollow Drive, the longest extant gravel remnant of the historic Bent Mountain Turnpike, into a permanent project access road;¹⁴³
- Errors in applying the methodology for evaluating effects on the Fred Vest Farm;¹⁴⁴ and
- Errors in applying the methodology for evaluating effects on the King apple orchard.¹⁴⁵

OEP Staff did not issue any supplemental analysis or response to these comments, and the Certificate Order does not address them. Its analysis of project impacts is incomplete and inaccurate as a result.

¹³⁸ *Id.* at p. 10.

¹³⁹ *Id.* at pp. 10-11.

¹⁴⁰ *Id.* at p. 12.

¹⁴¹ *Id.* at 13-14, 16-19.

¹⁴² *Id.* at 12-13.

¹⁴³ Letter from Ann Rogers to Megan Neylon, eLibrary no.20170919-5105 (Sept. 19, 2017), p. 8

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*
***Roanoke, Giles, and Craig Counties’ Request for Rehearing
Mountain Valley Pipeline Project (CP16-10-000)***

B. The Commission Erred in Not Thoroughly Considering Reasonable Alternatives as Required by the NGA and NEPA sections 102(2)(C)(iii) and 102(2)(E).

The Certificate Order finds that there are no feasible system alternatives that would offer an environmental advantage over the MVP Project.¹⁴⁶

For example, it finds that a “one-pipe” alternative would not be technically feasible or practical, and would not offer a significant environmental advantage.¹⁴⁷ It explains:

While “the existence of a more desirable alternative is one of the factors which enters into a determination of whether a particular proposal would serve the public convenience and necessity,” that is not at issue in this case. Here, neither the “one-pipe” nor the “two-pipe, one right-of-way” alternative is a viable or desirable alternative. The final EIS nonetheless took a hard look at these alternatives.” We agree with the determination in the final EIS and need not consider either alternative any further.¹⁴⁸

Commissioner Cheryl LaFleur dissented based largely on the failure to thoroughly investigate system alternatives that would lessen environmental impacts of the projects: “I am particularly troubled by the approval of these projects because I believe that the records demonstrate that there may be alternative approaches that could provide significant environmental advantages over their construction as proposed.”¹⁴⁹

She cited the one-pipe alternative to show that there were likely other system alternatives that could lessen environmental impacts that had not been considered:

in the MVP FEIS, Commission staff evaluated a single pipeline alternative to the MVP project that would utilize the proposed [Atlantic Coast Pipeline (ACP)] to serve MVP’s capacity needs. While this alternative was found to have certain environmental disadvantages, such as the need for additional compression to deliver additional gas, the EIS acknowledges that this alternative would “essentially eliminate all environmental impacts on resources along the currently proposed MVP route.”

I recognize that the [ACP and MVP merged system alternatives] were eliminated from further consideration because they were deemed not to meet each project’s specific stated goals. *However, I believe that these alternatives demonstrate that the regional needs that these pipelines address may be met through alternative approaches that have significantly fewer environmental impacts.*¹⁵⁰

¹⁴⁶ Certificate Order, ¶¶ 297 – 304.

¹⁴⁷ *Id.* at ¶ 301.

¹⁴⁸ *Id.* at ¶ 106.

¹⁴⁹ *Id.* at Commissioner LaFleur’s dissenting opinion, p. 3.

¹⁵⁰ *Id.* at 4 (emphasis added).

Roanoke, Giles, and Craig Counties’ Request for Rehearing Mountain Valley Pipeline Project (CP16-10-000)

Commissioner LaFleur also raised concerns regarding the needs assessment for the MVP Project, noting that Mountain Valley had not provided specific evidence regarding the end use for the majority of the gas to be delivered on its pipeline.¹⁵¹ She stated 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.”¹⁵² She stated that “careful consideration of a fuller record could help the Commission better balance environmental issues, including downstream impacts, with the project need and its benefits.”¹⁵³

The Certificate Order does not directly address Commissioner LaFleur’s dissent.

The Commission’s regulations impose a substantive duty on the Commission to consider alternative pipeline routes that avoid or minimize environmental impacts.¹⁵⁴ Its Certificate Policy Statement also provides that the Commission’s “goal is to appropriately consider the enhancement of competitive transportation alternatives, the possibility of overbuilding, the avoidance of unnecessary disruption of the environment, and the unneeded exercise of eminent domain.”¹⁵⁵

Under the NGA, the Commission is obligated “to carry out ‘reasoned’ and ‘principled’ decisionmaking.”¹⁵⁶ “In cases where parties raise reasonable alternatives to the Commission’s position, [the U.S. Court of Appeals for the D.C. Circuit has] held that reasoned decisionmaking requires considering those alternatives.”¹⁵⁷ The court has applied this requirement to include consideration of alternatives raised by dissenting commissioners.¹⁵⁸

NEPA separately imposes certain procedures on federal agencies to ensure their decisions are fully informed regarding the potential environmental impacts of a proposed action. NEPA section 102(2)(C)(iii) requires a detailed statement of “alternatives to the proposed action.”¹⁵⁹ Under this section an EIS must

¹⁵¹ *Id.* at 3.

¹⁵² *Id.* at 4. Former Chair Norman Bay raised similar concerns regarding the need to examine other evidence, in addition to precedent agreements, to evaluate project need. *National Fuel Gas Supply Corp.* 158 FERC ¶ 61,145 (2017), *Separate Statement* by Commissioner Bay, p. 2.

¹⁵³ *Id.*

¹⁵⁴ 18 C.F.R. § 380.15(a).

¹⁵⁵ Certificate Policy Statement, p. 2.

¹⁵⁶ *American Gas Ass'n*, 593 F.3d at 19 (quoting *Missouri Public Service Com'n*, 234 F.3d at 41).

¹⁵⁷ *Id.* (citing *Laclede Gas Co. v. F.E.R.C.*, 873 F.2d 1494, 1498 (D.C. Cir. 1989)).

¹⁵⁸ *Id.*

¹⁵⁹ 42 U.S.C. § 4332(2)(C)(iii).
Roanoke, Giles, and Craig Counties’ Request for Rehearing Mountain Valley Pipeline Project (CP16-10-000)

present the alternatives to the proposed action. This discussion-of-alternatives requirement is intended to provide evidence that those charged with making the decision have actually considered other methods of attaining the desired goal, and to permit those removed from the decisionmaking process to evaluate and balance the factors on their own. A thorough consideration of all appropriate methods of accomplishing the aim of the proposed action is expected.¹⁶⁰

CEQ's regulations require that an EIS:

(a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.

(b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.

(c) Include reasonable alternatives not within the jurisdiction of the lead agency.¹⁶¹

(d) Include the alternative of no action.

(e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.

(f) Include appropriate mitigation measures not already included in the proposed action or alternatives.¹⁶²

A "rule of reason governs 'both *which* alternatives the agency must discuss, and the *extent* to which it must discuss them.'"¹⁶³

¹⁶⁰ *Sierra Club v. Morton*, 510 F.2d 813, 825 (5th Cir. 1975) (internal citations and notes omitted). *See also Sierra Club v. Watkins*, 808 F. Supp. 852, 874 (D.D.C. 1991) ("[E]ven if a project is found to be environmentally beneficial, an agency must still consider alternatives.").

¹⁶¹ CEQ guidance further clarifies that an EIS include those reasonable alternatives that "are practical or feasible from the technical and economic standpoint and using common sense, rather than simply desirable from the standpoint of the applicant." CEQ, "Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations," 46 Fed. Reg. 18026-01 (Mar. 23, 1981) (hereafter, "Forty Questions"), Question 2a.

¹⁶² 40 C.F.R. § 1502.14; *see also* 40 C.F.R. § 1508.25(b)(2).

¹⁶³ *City of Grapevine, Tex. v. Dep't of Transp.*, 17 F.3d 1502, 1506 (D.C. Cir. 1994) (quoting *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195 (D.C. Cir. 1991) (emphases in original)); *see also Tongass Conservation Soc. v. Cheney*, 924 F.2d 1137, 1140 (D.C. Cir. 1991).

NEPA section 102(2)(E) requires that the federal lead agency “study, develop, and describe appropriate alternatives to recommended course of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources”¹⁶⁴ The purpose is “to insist that no major federal project should be undertaken without intense consideration of other more ecologically sound courses of action, including shelving the entire project or of accomplishing the same result by entirely different means.”¹⁶⁵

Commissioner LaFleur’s dissent was not the only request for consideration of system alternatives to reduce environmental harm. In comments on the draft EIS, the EPA specifically requested that the Commission further evaluate system alternatives that would reduce environmental impacts, including the one-pipe alternative.¹⁶⁶

The final EIS is non-responsive to EPA’s request. It largely relies on the summary discussion in the draft EIS, stating that OEP Staff “evaluated merging the ACP and the MVP into one project (one pipeline alternative; using a variety of engineering options) along the ACP route.”¹⁶⁷ It acknowledges that this alternative “would essentially eliminate all environmental impacts on resources along the currently proposed MVP pipeline route.”¹⁶⁸ However, it notes this alternative could have other impacts related to the need for additional compression and lateral lines.¹⁶⁹ The final EIS ultimately finds “that the one-pipe alternative would not be technically feasible or practical.”¹⁷⁰

¹⁶⁴ 42 U.S.C. § 4332(2)(E).

¹⁶⁵ *Envtl. Def. Fund, Inc. v. Corps of Engineers of U.S. Army*, 492 F.2d 1123 (5th Cir. 1974); see Daniel R. Mandelker, *NEPA Law and Litigation* (Thompson West 2003), § 9:22, p. 9-53.

¹⁶⁶ EPA’s Draft EIS Comments, Encl. 1, p. 4. The EPA stated:

As the EIS recognizes the potential environmental advantages to this alternative, it may be appropriate to evaluate and weigh impacts from this alternative within the EIS and not, for example, eliminate the alternative on the basis of air impacts without considering its potential to reduce environmental impacts to other resources. We recommend FERC discuss potential modifications that could be made to increase the efficiency of the one pipe option, particularly which may allow for the combination of volumes into the currently proposed 42-inch diameter pipe. The use of the proposed 42-inch line (instead of 48-inch) would reduce impact of additional temporary workspace and increased construction ROW width. Although FERC concludes that this alternative may not be reasonable or practicable, EPA suggests FERC further consider ways to increase efficiency in to order to utilize the 42-inch pipe for the one pipe alternative. *Id.*

¹⁶⁷ Final EIS, p. 5-16.

¹⁶⁸ *Id.* at 3-14.

¹⁶⁹ Certificate Order, ¶ 300.

¹⁷⁰ Final EIS, p. 5-16.

The final EIS does not show that a one-pipe alternative is unreasonable and thus properly eliminated from further study.¹⁷¹ The final EIS eliminates from detailed consideration any system alternatives that would utilize one pipe from further study based on potential impacts to air quality and need for additional lateral lines. However, it does not provide any evidence in support of these findings. It states that a one-pipe alternative may require additional compression, which in turn “could triple air quality impacts in comparison to the MVP and ACP *considered individually*.”¹⁷² However, it does not state how the air quality impacts compare if the MVP and ACP Projects are *considered collectively*. It does not provide or cite to more detailed information on how the Commission estimated the air quality impacts. It does not provide adequate information to evaluate the potential impacts of lateral lines and permit comparison of those impacts to the MVP Project. This does not comply with its obligations under NEPA to “insure the professional integrity, including scientific integrity of the discussions and analyses in environmental impact statements,” to “identify any methodologies used,” and to cite scientific sources relied upon for conclusions in the final EIS.¹⁷³

The final EIS does not show that a one-pipe alternative could not be designed to meet the purpose or need of the MVP Project.¹⁷⁴ Indeed, as stated by Commissioner LaFleur, the record is incomplete regarding specific evidence of the end use of the gas to be delivered by the MVP Project. Such evidence is critical to identifying and evaluating alternatives that would meet project need while better achieving the Commission’s goals of enhancing competitive transportation, avoiding overbuilding, avoiding unnecessary disruption of the environment, and avoiding the unneeded exercise of eminent domain.¹⁷⁵

The record does not support the Certificate Order’s findings that there are no system alternatives that would provide a significant environmental advantage over the MVP Project.

C. The Record Does Not Support a Finding that the Project as Approved Avoids or Minimizes Impacts to Scenic, Historic, Wildlife, and Recreational Values as Required by the Commission’s Regulations.

The Certificate Order concludes:

¹⁷¹ See *State of California v. Block*, 690 F.2d 753 (9th Cir. 1982); *Natural Resources Defense Council v. U.S. Forest Service*, 421 F.3d 797 (9th Cir. 2005).

¹⁷² Final EIS, p. 3-15.

¹⁷³ 40 C.F.R. § 1502.24; see also *Izaak Walton League of Am. v. Marsh*, 655 F.2d 346, 368 (D.C. Cir. 1981) (“the administrative record must disclose the studies and data used in compiling environmental impact statements ... any methodologies relied upon should be carefully described.”).

¹⁷⁴ *Id.* For example, the final EIS generally describes potential disadvantages to servicing MVP’s proposed taps. It does not indicate any investigation by OEP Staff to evaluate those disadvantages or determine whether they could be overcome.

¹⁷⁵ See 40 C.F.R. § 1502.13 (requiring discussion of “the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.”).

We find that the benefits that the MVP Project will provide to the market outweigh any adverse effects on existing shippers, other pipelines and their captive customers, and landowners or surrounding communities. Consistent with the criteria discussed in the Certificate Policy Statement and NGA section 7(e), and subject to the environmental discussion below, we find that the public convenience and necessity requires approval of Mountain Valley’s proposal, as conditioned in this order.¹⁷⁶

The Commission administers Section 7 of the Natural Gas Act to authorize the construction and operation of interstate natural gas pipeline and storage projects.¹⁷⁷ The Commission’s decision whether to grant a pipeline certificate under the NGA section 7(c) is based upon a determination that the project is in the public interest. In weighing the public interest the Commission is required to consider a project’s potential impact on pipeline competition, the possibility of overbuilding, subsidization of existing customers, potential environmental impacts, avoiding the unnecessary use of eminent domain, and other factors.¹⁷⁸

The Commission’s Policy Statement states that applicants should structure “its proposed project to avoid adverse economic, competitive, environmental, or other effects on the relevant interests¹⁷⁹ from the construction of the new project....”¹⁸⁰ When elimination of all adverse effects is not possible, the Commission’s objective is to “encourage the applicant to minimize the adverse impact on each of the relevant interests.”¹⁸¹

As stated above, the evidence in the record does not demonstrate that the Commission followed the procedures necessary to demonstrate that the MVP Project, as conditioned and approved in the Certificate Order, identifies, avoids, or minimizes impacts on scenic, historic,

¹⁷⁶ Certificate Order, ¶ 64.

¹⁷⁷ 15 U.S.C. § 717f.

¹⁷⁸ Available at <http://www.ferc.gov/legal/maj-ord-reg/PL99-3-000.pdf>. See also FERC, “Order Clarifying Statement of Policy,” (Feb. 9, 2000), available at <http://www.ferc.gov/legal/maj-ord-reg/PL99-3-001.pdf>. See also *South Star Central Gas Pipeline, Inc.*, 124 FERC ¶ 61,042, 61,210-11 (2008). FERC’s “goal is to give appropriate consideration to the enhancement of competitive transportation alternatives, the possibility of overbuilding, subsidization by existing customers, the applicant’s responsibility for unsubscribed capacity, the avoidance of unnecessary disruptions of the environment, and the unneeded exercise of eminent domain in evaluating new pipeline construction.”

¹⁷⁹ FERC, “Policy Statement Certification of New Interstate Natural Gas Pipeline Facilities,” (Sept. 15, 1999) (Certificate Policy Statement), p. 23. “These are: the interests of the applicant’s existing customers, the interests of competing existing pipelines and their captive customers, and the interests of landowners and surrounding communities.” *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

wildlife, and recreational values.¹⁸² As such, the Commission has not shown that unnecessary effects on landowners and surrounding communities have been avoided or minimized. This does not comply with the Commission's substantive duty under the NGA.

D. The Record Does Not Show the Commission Has Complied with the National Historic Preservation Act.

As stated above, the Certificate Order describes Staff's agreement with the State Historic Preservation Officer's finding that the MVP Project will adversely affect several historic districts.¹⁸³ Environmental Condition No. 15 ostensibly requires that the Commission and Mountain Valley complete the Section 106 process prior to the commencement of construction.¹⁸⁴

Roanoke and Giles Counties are consulting parties for purposes of the Section 106 process. They filed comments on the draft and final EIS requesting that OEP Staff consult with them as required by Section 106.¹⁸⁵ As stated above, on August 2, 2017, Roanoke and Giles Counties filed additional comments regarding the inadequacy of consultation procedures to date, and deficiencies in Mountain Valley's analysis of project impacts on cultural resources.¹⁸⁶ The Commission did not respond to the Counties' comments prior to issuing the Certificate Order. On October 19, 2017, OEP Staff issued a "Notification of Adverse Effect for the Mountain Valley Project" (Notification).¹⁸⁷ The Notification does not address the issues raised by the Counties. It states the Commission's intention to enter into a Programmatic Agreement for the project.¹⁸⁸

1. The Commission Did Not Consult with Consulting Parties Prior to Issuing Findings of Effect.

¹⁸² See, e.g., Comment of James Chandler, eLibrary no. 20170622-5015 (June 22, 2017) (describing impacts to his property that were not addressed in the EIS); letter from Jerry J. Deplazes to Secretary Kimberly D. Bose, eLibrary no. 20170911-0014 (Sept. 11, 2017) (describing impacts to his family's property related to deforestation and forest fragmentation).

¹⁸³ Certificate Order, ¶ 247.

¹⁸⁴ *Id.* at App. C, p. 6.

¹⁸⁵ Roanoke County's Draft EIS Comments, pp. 30-36; Giles County's Draft EIS Comments, pp. 25-27; Giles and Roanoke Counties' Final EIS Comments, eLibrary no. 20170918-5180 (Sep. 18, 2017).

¹⁸⁶ See Giles and Roanoke Counties' Request to be Consulted under Section 106 of NHPA, eLibrary no. 20170802-5115 (Aug. 2, 2017).

¹⁸⁷ Letter from James Martin to Reid Nelson, eLibrary no. 20171019-318 (Oct. 19, 2017).

¹⁸⁸ *Id.* at 2.

According to its guidance, the Commission relies on project sponsors to “assist the Commission in meeting its obligations under the NHPA.”¹⁸⁹ However, the ultimate duty to comply with the NHPA rests with the Commission.¹⁹⁰

Under the Advisory Council on Historic Preservation’s (ACHP) regulations for implementing Section 106, the Commission “*shall* involve the consulting parties ... in findings and determinations made during the section 106 process.”¹⁹¹ The Counties, as representatives of local governments “with jurisdiction over the area in which the effects of an undertaking may occur,” are “*entitled*” to participate as consulting parties.¹⁹²

Under Section 106 regulations, the agency official must “[s]eek information, as appropriate, from consulting parties, and other individuals likely to have knowledge of, or concerns with, historic properties in the area, and identify issues relating to the undertaking’s potential effects on historic properties.”¹⁹³ The agency official then must “take the steps necessary to identify historic properties within the area of potential effects,” based in part on the information provided by consulting parties.¹⁹⁴ A phased identification and evaluation process used for corridor projects should “establish the likely presence of historic properties within the area of potential effects for each alternative or inaccessible area through background research, consultation and an appropriate level of field investigation, taking into account the number of alternatives under consideration, the magnitude of the undertaking and its likely effects, and the views of the SHPO/THPO *and any other consulting parties.*”¹⁹⁵

Only after properties have been identified and evaluated in consultation with the SHPO and consulting parties, can the agency official issue findings whether there are historic properties which may be affected by the undertaking.¹⁹⁶ If potential adverse effects are found, the agency official “shall notify all consulting parties, ... invite their views on the effects and assess adverse effects, if any”¹⁹⁷ The agency official “shall consider any views concerning such effects which have been provided by consulting parties and the public.”¹⁹⁸

¹⁸⁹ Office of Energy Projects, “Guidelines for Reporting on Cultural Resources Investigations for Pipeline Projects” (Dec. 2002), p. 1.

¹⁹⁰ 54 U.S.C. § 306108.

¹⁹¹ 36 C.F.R. § 800.2(a)(4) (emphasis added).

¹⁹² 36 C.F.R. § 800.2(c)(3) (emphasis added).

¹⁹³ 36 C.F.R. § 800.4(a)(3).

¹⁹⁴ 36 C.F.R. § 800.4(b).

¹⁹⁵ 36 C.F.R. § 800.4(b)(2) (emphasis added).

¹⁹⁶ 36 C.F.R. § 800.4(d).

¹⁹⁷ 36 C.F.R. § 800.4(d)(2).

¹⁹⁸ 36 C.F.R. § 800.5(a).

Roanoke, Giles, and Craig Counties’ Request for Rehearing Mountain Valley Pipeline Project (CP16-10-000)

The agency official must also afford the ACHP an opportunity to comment on the findings. The Commission must consider any advice provided by the ACHP prior to making a final decision on an undertaking.¹⁹⁹ According to the ACHP,

if the agency does not start following the prescribed steps of the Section 106 process early enough to consider a reasonable range of options, ACHP might say it failed to meet this standard [under 36 C.F.R. § 800.1(c)] and that further alternatives must be considered to adequately comply with 106. If agency planning is too far advanced before meaningful 106 review commences and commitments to a course of action are set, ACHP may determine that the agency has foreclosed ACHP's opportunity to comment.²⁰⁰

For purposes of the above steps, “[c]onsultation means the process of seeking, *discussing*, and considering the views of others, and, where feasible, seeking agreement with them on how historic properties should be identified, considered, and managed.”²⁰¹ Meaningful consultation is not “accomplished by a mere exchange of views. Consultation must include . . . the willingness to explore the possibilities for agreement—or at least for a narrowing of disagreement—among the consulting parties. Even if that exploration quickly shows or confirms that further discussion would be fruitless, the attempt is fundamental to the concept of consultation as envisioned by these standards and guidelines.”²⁰²

The agency official “must complete the section 106 process ‘prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license.’”²⁰³ Further, the “agency official shall ensure that the section 106 process is initiated early in the undertaking’s planning, so that a broad range of alternatives may be considered during the planning process for the undertaking.”²⁰⁴

The Commission’s issuance of the Certificate Order and Notification in advance of meeting with the Counties and other local consulting parties does not comply with the Section

¹⁹⁹ 36 C.F.R. § 800.9.

²⁰⁰ ACHP, “Section 106 Regulations Section-by-Section Questions and Answers,” *available at* <http://www.achp.gov/106q&a.html>.

²⁰¹ “The Secretary of the Interior's Standards and Guidelines for Federal Agency Historic Preservation Programs Pursuant to the National Historic Preservation Act,” 63 Fed. Reg. 20496-01 (April 24, 1998) (emphasis added); *see also* 36 C.F.R. § 800.16(f).

²⁰² 63 Fed. Reg. 20496, 20498.

²⁰³ *Id.*

²⁰⁴ 36 C.F.R. § 800.1(c).

106 regulations.²⁰⁵ As discussed below, the Commission also has erred in not documenting its alternatives and avoidance and minimization analysis on the record. These errors may result in foreclosure of the consideration of alternatives and measures that would avoid or minimize adverse effects to historic resources.

2. Evidence in the Record Shows Additional Adverse Effects on Resources within the Counties.

The Commission, in consultation with the SHPO and in consideration of concerns raised by consulting parties and the public, is required to apply the criteria of adverse effect to historic properties within the APE.²⁰⁶ The criteria of adverse effect provide:

An adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association. Consideration shall be given to all qualifying characteristics of a historic property, including those that may have been identified subsequent to the original evaluation of the property's eligibility for the National Register. Adverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative.²⁰⁷

The Counties have previously provided information that shows the MVP Project likely will have adverse effects according to these criteria, including:

- Physical destruction of or damage to all or part of the propert[ies];
- Change of the character of the propert[ies'] use or of physical features within the propert[ies'] setting that contribute to its historic significance; and
- Introduction of visual, atmospheric or audible elements that diminish the integrity of the propert[ies'] significant historic features.²⁰⁸

²⁰⁵ The Virginia SHPO objected to OEP Staff's proposal to complete the Section 106 process post-certificate: "It is DHR's [Virginia Department of Historic Resources] opinion that this [phased] approach limits FERC's ability to make an informed decision regarding potential effects to historic properties prior to authorization and limits the role of consulting parties in the resolution of any identified adverse effects." Letter from Roger W. Kirchen to Kimberly D. Bose, eLibrary no. 20161221-5348 (Dec. 21, 2016), p. 2.

²⁰⁶ 36 C.F.R. § 800.5(a).

²⁰⁷ 36 C.F.R. § 800.5(a)(1).

²⁰⁸ 36 C.F.R. § 800.5(a)(2).

Specific examples of adverse effects are listed above. The Commission has erred in not properly applying the ACHP’s criteria to these effects.

3. The Commission Erred in Issuing the Certificate Order Prior to Executing a Programmatic Agreement.

As stated above, the Commission issued the Certificate Order in advance of completing the Section 106 process.

Section 106 of the NHPA provides:

The head of any Federal department or independent agency having authority to license any undertaking, ... *prior to the issuance of any license*, shall take into account the effect of the undertaking on any historic property. The head of the Federal agency shall afford the Council a reasonable opportunity to comment with regard to the undertaking.²⁰⁹

ACHP’s regulations similarly require that agencies “must complete the section 106 process ... prior to the issuance of any license.”²¹⁰ The regulations also provide that “[t]his does not prohibit agency official from conducting or authorizing nondestructive project planning activities before completing compliance with section 106, *provided that such actions do not restrict the subsequent consideration of alternatives to avoid, minimize or mitigate the undertaking's adverse effects on historic properties.*”²¹¹

In the event an agency cannot complete the standard Section 106 process prior to license issuance, the ACHP’s regulations offer an alternative process. “An agency may negotiate with consulting parties to develop ‘a programmatic agreement to govern the implementation of a particular program or the resolution of adverse effects from certain complex project situations.’”²¹² This allows an agency to move forward with a phased identification process if it has not been able to complete surveys of affected properties.²¹³ The programmatic agreement must detail each of the avoidance, minimization, or mitigation measures the federal agency has agreed to ensure are implemented.²¹⁴ It must also describe administrative stipulations to cover “what happens when the undertaking changes or is modified, when disputes arise, when new

²⁰⁹ 54 U.S.C. § 306108 (emphasis added).

²¹⁰ *CTIA-Wireless Ass'n v. F.C.C.*, 466 F.3d 105, 107 (D.C. Cir. 2006) (quoting 36 C.F.R. § 800.1(c)).

²¹¹ 36 C.F.R. § 800.1.

²¹² *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 554 (8th Cir. 2003) (*Mid States Coalition for Progress*) (quoting 36 C.F.R. § 800.14(b)).

²¹³ 36 C.F.R. § 800.14(b).

²¹⁴ ACHP, “Guidance on Section 106 Agreement Documents,” available at <http://www.achp.gov/agreementdocguidance.html#ch2-4> (last checked Nov. 13, 2017).

historic properties are discovered, and how long the federal agency will take to ensure the stipulations are carried out.”²¹⁵

Only once a Section 106 or Programmatic Agreement is executed and filed with the ACHP is the federal agency allowed to issue a license for the undertaking. “Pursuant to Section 110(l) of the NHPA, and 36 CFR § 800.6(c), an executed and implemented MOA [Memorandum of Agreement] or project PA [Programmatic Agreement] evidences the agency official's compliance with Section 106 and governs the undertaking and all of its parts.”²¹⁶

Here, the Commission has not even completed the evaluation of avoidance and minimization measures that is necessary to prepare a Programmatic Agreement. Under the regulations implementing the NHPA, once a finding of adverse effect is made, the Commission must continue consultation “to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects on historic properties.”²¹⁷ The Commission issued the Notification on October 19, 2017. It offered a scant 15 days for comment, a schedule that did not consider the meeting schedules for either County’s Boards of Supervisors.²¹⁸ It has not yet held any meetings with the consulting parties to discuss avoidance or minimization measures. The final EIS does not otherwise document OEP Staff’s or Mountain Valley’s efforts to avoid or minimize effects to historic resources that will be affected by the MVP Project.²¹⁹

In *Mid States Coalition for Progress*, the U.S. Court of Appeals reviewed the Surface Transportation Board’s final approval of a railroad proposal to construct and upgrade several hundred miles of rail line. It held that the Board could not approve a project without completing a programmatic agreement.²²⁰ It explained that

²¹⁵ *Id.*

²¹⁶ *Id.* “Compliance with the procedures established by an approved programmatic agreement satisfies the agency's section 106 responsibilities for all individual undertakings of the program covered by the agreement until it expires or is terminated” 36 C.F.R. § 800.14(b)(2)(iii).

²¹⁷ 36 C.F.R., §800.6(a).

²¹⁸ OEP Staff stated it would consider comments provided by the Counties after 15 days, but would not commit to defer execution of a Programmatic Agreement until the Counties had an opportunity to consider the matter at a public meeting. Email from James Martin to Richard Chidester (Nov. 3, 2017).

²¹⁹ For example, in Mountain Valley’s Phase II Archaeological Evaluation Report of Sites 44RN0400 and 44RN0401, Mountain Valley states that its consultants conducted Phase I surveys for potential avoidance route around the two sites, but it could not avoid impacts on the two sites. MVP, “Supplemental Phase I Archaeological Survey Report of Tract VARO-054, and Phase II Archaeological Evaluation Report of Sites 44RN0400 and 44RN0401, Roanoke County, Virginia and Amended Site 44RN0400 and 44RN0401 Treatment Plan,” (referenced in MVP Letter to FERC dated September 25, 2017, eLibrary no. 20170925-5112). Mountain Valley does not document its avoidance evaluation; there is no description of alternatives considered.

²²⁰ *Mid States Coalition for Progress*, 345 F.3d at 555.

While the programmatic agreement itself must be in place before the issuance of a license, it gives an agency flexibility when “effects on historic properties cannot be fully determined prior to approval of an undertaking,”

If the programmatic agreement had been executed, the Board could have finalized the NHPA details at a future date according to the terms of the agreement, just as it wished. Not willing to delay publication of its decision until after a consensus could be reached on the terms of the programmatic agreement, the Board instead issued the license having neither secured a programmatic agreement nor completed the alternate NHPA process. On remand, it must do one or the other.²²¹

The Commission erred in issuing the Certificate Order prior to completing a Programmatic Agreement, as required by the NHPA and implementing regulations.

VI. REQUEST FOR STAY

The Commission reviews requests for a stay under the standard established by the APA, 5 U.S.C. § 705, and will grant a stay when “justice so requires.”²²²

In assessing a request for stay, the Commission considers several factors, including:

(1) whether the party requesting the stay will suffer irreparable injury without a stay; (2) whether issuing the stay may substantially harm other parties; and (3) whether a stay is in the public interest. The most important element of the stay standard is a showing that the movant will be irreparably injured without a stay. If the party requesting the stay is unable to demonstrate that it will suffer irreparable harm absent a stay, we need not examine other factors.²²³

As discussed below, the Counties satisfy the criteria for a stay under the APA.

A. The Counties Will Suffer Irreparable Harm for which There Is No Adequate Legal Remedy If They Prevail on Appeal.

The D.C. Circuit has held that the “basis for injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies.”²²⁴ Mere injuries, in terms of

²²¹ *Id.* at 554–55.

²²² 5 U.S.C. § 705; *see Florida Se. Connection, LLC Transcon. Gas Pipe Line Co., LLC Sabal Trail Transmission, LLC*, 154 FERC ¶ 61264 (Mar. 30, 2016) (finding justice did not require a stay).

²²³ *Florida Southeast Connection, LLC Transcontinental Gas Pipe Line Company, LLC Sabal Trail Transmission, LLC*, 154 FERC ¶ 61264.

²²⁴ *Wisconsin Gas Co. v. F.E.R.C.*, 758 F.2d 669 (D.C. Cir. 1985) (“*Wisconsin Gas*”).

money, time, and energy necessarily expended absent a stay, are not enough. However, the possibility that corrective relief will not be available if the project is allowed to proceed weighs heavily in favor of a finding of irreparable harm.²²⁵

In *National Fuel*, a citizens group requested a stay of construction of a compressor station, arguing that impacts on air and water quality constituted irreparable harm.²²⁶ The Commission denied the request. It found that even if the compressor station were built, so long as the developer complied with the terms of the certificate, the anticipated harm would be fully mitigated. That is not the case here. As described below, the Certificate Order does not fully mitigate the potential impacts to forested lands and groundwater supplies.

The MVP Project will remove acres of forest, including old growth and interior forest. The Forest Service has acknowledged that old growth forest “is not replaceable and the harvest of old growth cannot be mitigated.”²²⁷ Even if the Certificate Order is later vacated and the forest is allowed to regenerate, “it would take many years for trees to mature.”²²⁸ In the meantime these lands would no longer provide habitat for interior forest species, and would be vulnerable to invasive species. As stated above, forested lands provide important ecosystem services and are vital to the Counties’ economies.

The Certificate Order acknowledges the potential harm to groundwater resources as a result of construction.²²⁹ The Certificate Order does not fully mitigate these potential impacts. It only provides for repair of construction damages to the quantity or quality of domestic water supplies to “near pre-construction conditions” or for replacement water supply.²³⁰ As the Counties and individual property owners have testified, there is no suitable replacement for natural springs and wells on many properties along the project route.²³¹

Given the Certificate Order does not fully mitigate the loss of forested lands and damage to groundwater resources, the potential harm caused by the MVP Project is irreparable.

²²⁵ *Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958).

²²⁶ *National Fuel*, 139 FERC ¶ 61,037 (2012) (denying stay where not showing of irreparable harm).

²²⁷ Final EIS, App. AA, FA10-1.

²²⁸ Certificate Order, ¶ 192.

²²⁹ “Because karst features provide a direct connection to groundwater, there is a potential for pipeline construction to increase turbidity in groundwater due to runoff of sediment into karst features or to contaminate groundwater resources by inadvertent spills of fuel or oil from construction equipment.” Certificate Order, ¶ 171.

²³⁰ Certificate Order, ¶ 172.

²³¹ The Counties have also explained that it is not feasible to connect many properties along the project route to municipal water supplies. *See* Roanoke County’s Draft EIS comments, eLibrary no. 20161222-5459, pp. 10-12; *see also* Giles and Roanoke County’s Final EIS comments, eLibrary no. 20170918-5180, pp. 9-12. *See also* Memorandum from Dwayne Roadcap, Division Director of Office of Environmental Health and Safety to Drew Hammond, Acting Director Office of Drinking Water, *supra* n. 76.

B. Mountain Valley Would Not Be Substantially Harmed if a Stay Were Granted.

While the potential harm to Petitioners is irreparable in the absence of a stay, Mountain Valley would not be substantially harmed if a stay were granted. Mountain Valley is seeking to proceed to construction to meet the anticipated-service date of November 2018 under its precedent agreements.²³² However, even if Mountain Valley does not make the anticipated-service date, it will not face financial liability under the precedent agreements.²³³ Regardless, potential harm to Mountain Valley from breach of the precedent agreements would be an economic loss and does not constitute irreparable harm.²³⁴

C. Justice Requires a Stay.

The Counties meet the criteria for a stay under the Commission’s standards. Allowing the MVP Project to proceed in advance of remedying the errors identified in the Counties’ rehearing will result in unnecessary and irreparable harm to forest and water resources. By contrast, a stay will not substantially harm Mountain Valley.

**VII.
REQUEST FOR RELIEF**

The Counties request that the Commission consider the merits of the requests for rehearing, vacate the Certificate Order, and undertake further procedures to ensure that any certificate issued to Mountain Valley complies with the Commission’s statutory and regulatory obligations. The Counties also request that the Commission stay the effectiveness of the Certificate Order pending a decision on the merits of their rehearing request.

Dated: November 13, 2017

Respectfully submitted,



Richard Roos-Collins

²³² See, e.g., Precedent Agreement between Mountain Valley and Consolidated Edison Company of New York, Inc., eLibrary no. 20160127-5200 (Jan. 21, 2016).

²³³ See *id.* at ¶ 16.

²³⁴ *Wisconsin Gas*, 758 F.2d at 674 (“It is also well settled that economic loss does not, in and of itself, constitute irreparable harm.”). “Recoverable monetary loss may constitute irreparable harm only where the loss threatens the very existence of the movant’s business.” *Id.* (citing *Washington Metropolitan Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 n. 2 (D.C.Cir.1977)).

Julie Gantenbein
WATER AND POWER LAW GROUP PC
2140 Shattuck Avenue, Suite 801
Berkeley, CA 94704
(510) 296-5588
rrcollins@waterpowerlaw.com
jgantenbein@waterpowerlaw.com

Attorneys for GILES AND ROANOKE
COUNTIES

/s/ Gerald Duncan

Gerald Duncan,
County Administrator
CRAIG COUNTY, VIRGINIA
P O Box 308
New Castle, VA 24127
(540) 864-5010
gerald.craigco@tds.net

DECLARATION OF SERVICE

**Mountain Valley Pipeline, LLC's Mountain Valley Pipeline Project (CP16-10-000) and
Equitrans, LP's Equitrans Expansion Project (CP16-13-000)**

I, Emma Roos-Collins, declare that I today served the attached "Roanoke, Giles, and Craig Counties' Request for Rehearing of Order Issuing Certificates and Granting Abandonment Authority and Request for Stay" by electronic mail, or by first-class mail if no e-mail address is provided, to each person on the official service list compiled by the Secretary in this proceeding.

Dated: November 13, 2017

By:



Emma Roos-Collins
Paralegal/Firm Administrator
WATER AND POWER LAW GROUP, PC
2140 Shattuck Ave., Suite 801
Berkeley, CA 94704
(510) 296-5591
office@waterpowerlaw.com