

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

In the Matter of

MOUNTAIN VALLEY PIPELINE, LLC

Docket Nos. CP21-57-000
CP16-10-000

**JOINT COMMENTS ON THE AUGUST 2021 ENVIRONMENTAL
ASSESSMENT FOR THE MOUNTAIN VALLEY PIPELINE PROJECT BY
ALLEGHENY-BLUE RIDGE ALLIANCE; APPALACHIAN VOICES; BLUE
RIDGE ENVIRONMENTAL DEFENSE LEAGUE; CENTER FOR
BIOLOGICAL DIVERSITY; CHESAPEAKE CLIMATE ACTION NETWORK;
DEFENDERS OF WILDLIFE; GFWC (GENERAL FEDERATION OF
WOMEN’S CLUBS) STAR WOMAN’S CLUB; INDIAN CREEK WATERSHED
ASSOCIATION; MOTHERS OUT FRONT, ROANOKE; NATURAL
RESOURCES DEFENSE COUNCIL; PRESERVE BENT MOUNTAIN;
PRESERVE CRAIG, INC.; PRESERVE FRANKLIN; PRESERVE GILES
COUNTY; PRESERVE MONTGOMERY COUNTY, VA (PMCVA); PRESERVE
SALEM; PROTECT OUR WATER, HERITAGE, RIGHTS (POWHR); SIERRA
CLUB; VIRGINIA CONSERVATION NETWORK; WEST VIRGINIA
HIGHLANDS CONSERVANCY; WEST VIRGINIA RIVERS COALITION;
AND WILD VIRGINIA**

In accordance with the Commission’s August 13, 2021 solicitation of public comments on the August 2021 Environmental Assessment for the Mountain Valley Pipeline Project (“EA”),¹ Allegheny-Blue Ridge Alliance; Appalachian Voices; Blue Ridge Environmental Defense League; Center for Biological Diversity; Chesapeake Climate Action Network; Defenders of Wildlife; GFWC (General Federation of Women’s Clubs) Star Woman’s Club; Indian Creek Watershed Association; Mothers Out Front, Roanoke; Natural Resources Defense Council; Preserve Bent Mountain;

¹ Fed. Energy Regul. Comm’n, Office of Energy Projects, Mountain Valley Pipeline Amendment Project: Environmental Assessment, Docket No. CP21-57-000, Cover Letter at 2 (Aug. 2021) (Accession No. 20210813-3009).

Preserve Craig, Inc.; Preserve Franklin; Preserve Giles County; Preserve Montgomery County VA (PMCVA); Preserve Salem; Protect Our Water, Heritage, Rights (POWHR); Sierra Club; Virginia Conservation Network; West Virginia Highlands Conservancy; West Virginia Rivers Coalition; and Wild Virginia (collectively, “Commenters”) submit the following comments on the EA drafted by Commission staff under the National Environmental Policy Act (“NEPA”) to analyze the environmental impacts of the application by Mountain Valley Pipeline, LLC (“Mountain Valley”) for an amendment to the certificate of public convenience and necessity for the Mountain Valley Pipeline (“MVP”).² The United States Army Corps

² We incorporate into our comments by reference, as if they were fully set forth herein, the exhibits cited herein, and the following previously submitted comments, as if they were fully set forth herein:

- Joint NEPA Scoping Comments on the Environmental Issues for the Proposed Amendment to the Certificate of Public Convenience and Necessity for the Mountain Valley Pipeline Project by Allegheny Blue-Ridge Alliance et al. (Apr. 15, 2021) (Accession No. 202104145-5319) (attached as Ex. 1) [hereinafter “Scoping Comments”];
- Letter from Derek Teaney, Appalachian Mountain Advocates, Inc., et al., to Adam Fannin, U.S. Army Corps of Eng’rs, Re: Public Comments on Mountain Valley Pipeline, LLC’s Application for a Department of the Army Permit Under Section 10 of the Rivers and Harbor Act of 1899 and Section 404 of the Clean Water Act; Public Notice Nos. LRH-2015-00592-GBR, LRP-2015-798, and NAO-2015-0898 (May 28, 2021) (Accession No. 20210603-5141) (attached as Ex. 2) [hereinafter “404 Comments”]; and
- Joint Supplemental NEPA Scoping Comments on Environmental Issues for the Proposed Amendment to the Certificate of Public Convenience and Necessity for the Mountain Valley Pipeline Project by Allegheny Blue-Ridge Alliance et al. (Aug. 2, 2021) (Accession No. 20210802-5192) (attached as Ex. 3) [hereinafter “Supplemental Scoping Comments”].

of Engineers (“Corps”) is a cooperating agency on the EA because of Mountain Valley’s pending application for Department of the Army (“DA”) permits under Section 10 of the Rivers and Harbors Act and Section 404 of the Clean Water Act.

As explained further below, the EA falls far short of what is required by NEPA, and neither the Commission nor the Corps can rely on it to support any action on Mountain Valley’s pending applications. As a threshold matter, the supplemental NEPA document for this project must be a Supplemental Environmental Impact Statement (“SEIS”), rather than an EA. Moreover, the EA’s consideration of the impacts of open-cut, dry-ditch crossings on aquatic resources and its alternatives analysis are fatally deficient, and the EA fails to sufficiently examine geologic conditions and the risk of borehole collapse, the climate impacts of the project, the cumulative effects of connected actions related to the MVP, and the impacts on special wetland resources like those on Bent Mountain in Virginia. Furthermore, the Commission cannot approve Mountain Valley’s amendment application without a Section 401 certification (or waiver thereof) from the affected states. Finally, even if the Commission were able to lawfully approve the amendment application, it must include additional conditions to protect the environment and the public interest,

To the extent that the EA inadequately responds—or entirely fails to respond—to issues raised in those comments, Commenters reiterate those issues here in their comments on the EA and request that the Commission and/or the United States Army Corps of Engineers address them before acting on the various pending applications related to the Mountain Valley Pipeline Project.

including requiring Mountain Valley to obtain National Pollution Discharge Elimination System (“NPDES”) permits for its stormwater discharges.

I. THE COMMISSION AND THE CORPS MUST PREPARE AN SEIS; AN EA WILL NOT SUFFICE.

In their previous comments, Commenters laid out the reasons why an SEIS is required here and why an EA will not suffice. Nonetheless, the Commission decided to proceed with an EA. That decision constitutes legal error. In these circumstances, an SEIS is required for at least two reasons.

First, because the MVP was subjected to an EIS when certificated in 2017, supplemental NEPA documentation for the project must take the form of an SEIS. Under the pre-2020 NEPA regulations—which, as Commenters explained in their April 15, 2021 scoping comments, are the applicable regulations—a supplement to a prior EIS for an action must be “prepare[d], circulate[d], and file[d] . . . in the same fashion as a draft and final statement”³ Even if the 2020 regulations were lawful and applicable to the MVP, the provision in those regulations that purports to allow a Supplemental EA⁴ cannot validate the Commission’s choice to prepare an EA rather than an EIS because of the Corps’ NEPA regulations. Those regulations are relevant because the Corps is a cooperating agency in this NEPA process, as well as an agency that may attempt to adopt and rely on the product of this process to satisfy its own

³ 40 C.F.R. § 1502.9(c)(4) (2019).

⁴ 40 C.F.R. § 1502.9(d)(4) (purporting to authorize agencies to make a finding of no significant impact, supported by an environmental assessment, when examining changes to a proposed action).

NEPA obligations if it were to grant Mountain Valley’s pending application for an individual Section 404 permit. The Corps’ regulations provide that “[a] supplement to a final EIS should be prepared and filed first as a draft supplement and then as a final supplement. Supplements will be filed and circulated in the same manner as a draft and final EIS”⁵ The Corps’ regulations have not been modified to conform to the 2020 Council on Environmental Quality regulations and do not contemplate, let alone authorize, the use of an EA to supplement an EIS. Accordingly, the decision to proceed with an EA, rather than an SEIS, is unlawful and would result in a procedurally defective agency action.

Second, the use of an EA in these circumstances—as opposed to an SEIS—does not allow for sufficient examination of alternatives to the proposed action. Because the Corps may attempt to rely on and adopt the product of this NEPA process if it were to decide to issue the individual Section 404 permit that Mountain Valley seeks, whatever NEPA document results from this process must take a hard look at and include a robust review of alternative stream crossing methods. The Corps’ Section 404(b)(1) Guidelines prohibit the Corps from issuing a permit for the discharge of dredged and/or fill material unless it makes a factual determination that the proposed discharge is the least environmentally damaging practicable alternative

⁵ 33 C.F.R. § 230.13(b).

("LEDPA").⁶ The Corps has acknowledged that the NEPA document produced through this process must be adequate to fulfill the Corps' regulatory obligations.⁷ And, as discussed below, the EA does not meet those requirements.

Corps regulations explain that "the analysis of alternatives required for NEPA environmental documents, including supplemental Corps NEPA documents, will in most cases provide the information for the evaluation of alternatives under these Guidelines."⁸ However, "[o]n occasion, these NEPA documents . . . may not have considered the alternatives in sufficient detail to respond to the requirements of these Guidelines," such that it is "necessary to supplement these NEPA documents with this additional information."⁹

Mountain Valley's pending application presents just that situation, such that supplemental NEPA analysis is required. Consideration of alternatives "is the heart

⁶ 40 C.F.R. § 230.10(a); *see also generally Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152 (10th Cir. 2002), *modified on reh'g*, 319 F.3d 1207 (10th Cir. 2003).

⁷ *See, e.g.*, Letter from Jon T. Coleman, Pittsburgh District, U.S. Army Corps of Eng'rs, to Kimberly D. Bose, Secretary, Fed. Energy Regul. Comm'n Re: Acceptance of Cooperating Agency Responsibility (Mar. 10, 2021) (Accession No. 20210310-5059) (acknowledging that the Commission's certificate amendment will require authorization under Section 404 and requesting that, "to ensure the information presented in any National Environmental Policy Act (NEPA) document is adequate to fulfill the Corps' statutory requirements, including the requirements of Section 404(b)(1) of the Clean Water Act (40 CFR 230) and the Corps' public interest review (33 CFR 320.4), . . . the topics listed in Enclosure 1 be included in the scoping and evaluation of any submitted NEPA document").

⁸ 40 C.F.R. § 230.10(a)(4).

⁹ *Id.*

of the environmental impact statement.”¹⁰ The “discussion of alternatives must rigorously explore and objectively evaluate all reasonable alternatives.”¹¹ The obligation to consider alternatives flows from the NEPA statute itself and exists for any proposal, such as the MVP, “which involves unresolved conflicts concerning alternative uses of available resources.”¹²

In its letters to the Commission accepting cooperating agency responsibility on Mountain Valley’s application to modify the Commission’s certificate to allow conventional boring at numerous waterbody crossings, the Corps itself acknowledged that additional information must be included in supplemental NEPA documentation.¹³ In order to support the Corps’ application of the 404(b)(1) Guidelines, including selection of the LEDPA, the Corps explained that this new NEPA document must “evaluate how the Project was designed to avoid and minimize the discharge of dredged and/or fill material into waters of the United States[.]”

¹⁰ *Id.* § 1502.14.

¹¹ *Union Neighbors United, Inc. v. Jewell*, 831 F.3d 564, 568 (D.C. Cir. 2016).

¹² 42 U.S.C. § 4332(2)(E).

¹³ Letter from Jon T. Coleman, Pittsburgh District, U.S. Army Corps of Eng’rs, to Kimberly D. Bose, Secretary, Fed. Energy Regul. Comm’n, Re: Acceptance of Cooperating Agency Responsibility (Mar. 10, 2021) at 1–2 (explaining that the information in the NEPA document must be “adequate to fulfill the Corps’ statutory requirements, including the requirements of Section 404(b)(1) of the Clean Water Act (40 CFR 230) and the Corps’ public interest review (33 CFR § 320.4)”).

including analysis of “on-site avoidance and minimization alternatives and avoidance and minimization alternatives for any off-site borrow, spoil, or mitigation areas.”¹⁴

An EA is not the appropriate vehicle for the robust alternatives analysis that the Corps’ regulations require. EAs have only ever had to include brief discussions of alternatives.¹⁵ In contrast, EISs must “[r]igorously explore and objectively evaluate all reasonable alternatives” and “[d]evote substantial treatment to each alternative considered in detail.”¹⁶ The Commission and the cooperating agencies cannot short-circuit the need for a hard look at stream crossing alternatives by electing to perform an EA over an EIS. Accordingly, an SEIS—and its attendant rigorous and detailed alternatives analysis—is required.

II. THE CORPS MUST CONDUCT ITS OWN SUPPLEMENTAL ENVIRONMENTAL ANALYSIS UNDER NEPA BECAUSE THE 2017 FEIS AND THE EA ARE INSUFFICIENT TO SATISFY THE CORPS’ NEPA OBLIGATIONS.

The EA acknowledges that the Corps, as a federal cooperating agency, may adopt this EA per 40 CFR 1501.8 if, after an independent review of the document, it concludes that their [*sic*] requirements and/or regulatory responsibilities have been satisfied. However, the [Corps]

¹⁴ *Id.* at 3; *see also id.* at 4 (“The NEPA document should provide a sufficient analysis to determine compliance with the Guidelines.”).

¹⁵ 40 C.F.R. § 1501.5(c)(2) (“An environmental assessment shall . . . [b]riefly discuss the . . . alternatives as required by section 102(2)(E) of NEPA”); 40 C.F.R. § 1508.9(b) (2019) (“Environmental assessment . . . [s]hall include brief discussions . . . of alternatives as required by section 102(2)(E)”).

¹⁶ 40 C.F.R. § 1502.14(a)–(b) (2019); *see also, e.g., Union Neighbors United*, 831 F.3d at 569; *Dubois v. U.S. Dep’t of Agric.*, 102 F.3d 1273, 1286–90 (1st Cir. 1996); 40 C.F.R. § 1502.14(b) (2020) (requiring that the alternatives section of an EIS “[d]iscuss each alternative considered *in detail*” (emphasis added)).

would present its own conclusions and recommendations in its respective and applicable records of decision or determinations. Otherwise, it may elect to conduct its own supplemental environmental analysis.¹⁷

As explained below, however, the Corps *cannot* conclude that the EA satisfies its regulatory responsibilities and *must* conduct its own supplemental environmental analysis.

As the Fourth Circuit recently observed, “an agency may only adopt [another agency’s NEPA document] if it ‘meets the standards for an adequate statement’ under the applicable regulations.”¹⁸ If a NEPA document precludes meaningful analysis of an issue, then the potential adopting agency must conduct an independent review of that issue.¹⁹ If an agency acquiesces to an inadequate alternatives analysis, such an action is arbitrary and capricious.²⁰

Here, although the Corps may be tempted to simply adopt the 2017 FEIS and the EA and call it a day, such a course would leave the Corps’ NEPA obligations unfulfilled and leave any DA permit it may issue to Mountain Valley vulnerable on judicial review. That is so for two reasons.

First, the Corps must conduct a supplemental environmental review of the environmental consequences of open-cut, dry-ditch crossings. The Commission’s

¹⁷ EA at 2–3.

¹⁸ *Cowpasture River Pres. Ass’n v. Forest Serv.*, 911 F.3d 150, 170 (4th Cir. 2018), *rev’d and remanded on other grounds by U.S. Forest Serv. v. Cowpasture River Pres. Ass’n*, 140 S.Ct. 1837 (2020).

¹⁹ *Id.*

²⁰ *Id.* at 173.

cursory statements in the 2017 FEIS and the EA about the environmental effects of trenching through hundreds of mountain streams and wetlands fail to constitute meaningful analysis, triggering the Corps' obligation to review those impacts independently.²¹ That is particularly true given developments since the 2017 FEIS was completed.

Second, the Corps must supplement the alternatives analysis, and that must be done in an SEIS.²² Under the Section 404(b)(1) Guidelines, where NEPA documents do not “consider[] alternatives in sufficient detail to respond to the requirements of these Guidelines,” it is “necessary to supplement these NEPA documents with this additional information.”²³ As explained below, the alternatives analysis in the EA—even if combined with the 2017 FEIS—is insufficient to satisfy the NEPA obligations of either the Commission or the Corps.

A. The Corps Must Prepare an SEIS that Examines the Environmental Impacts of Open-Cut, Dry-Ditch Crossings on Surface Water Resources.

Although the Commission stated in its 2017 FEIS that “[n]o long-term or significant impacts on surface waters are anticipated” as a result of Mountain Valley’s construction of dry-ditch, open-cut waterbody crossings,²⁴ developments

²¹ See *Cowpasture River*, 911 F.3d at 170–73.

²² 33 C.F.R. § 230.13(b); see also Section I, *supra*.

²³ 40 C.F.R. § 230.10(a)(4).

²⁴ FEIS at 4-149.

since 2017—including recent determinations by environmental resource agencies, on-the-ground experience with Mountain Valley’s construction activities, and the overwhelming scientific literature currently before the Corps—undermine and preclude reliance on the Commission’s 2017 conclusions. Given the significant differences in information available to the Commission and the Corps today from that before the Commission in 2017, it would be unlawful for either the Commission or the Corps to rely on the Commission’s stale 2017 analysis of these topics.²⁵

Among the developments since 2017 that present a different picture of the environmental effects of the MVP from that considered by the Commission in the FEIS is the September 2020 determination by the U.S. Fish and Wildlife Service (“FWS”), based on its review of the scientific literature, that it must assume that “effects to benthic invertebrates in aquatic areas that receive significant increased sedimentation as a result of the MVP will persist for up to four years.”²⁶ In the FEIS, the Commission itself defined impacts that persist for more than three years as “long-

²⁵ See *Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 443 (4th Cir. 1996) (explaining that “[a]n agency must prepare a supplemental EIS when ‘[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts,’” particularly where the agency is faced with “a seriously different picture of the environmental impact of the proposed project from what was previously envisioned”) (first citing 40 C.F.R. §1502.9(c)(1)(ii), and then citing *Hickory Neighborhood Def. League v. Skinner*, 893 F.2d 58, 63 (4th Cir. 1990)); see also *Cowpasture River*, 911 F.3d at 170–73.

²⁶ U.S. Fish and Wildlife Serv., Mountain Valley Pipeline, LLC; Revised Biological Opinion 96 (Sept. 4, 2020) (Accession No. 20200904-3027) [hereinafter BiOp].

term.”²⁷ Accordingly, by the Commission’s own definition, its previous conclusion that there will be no long-term impacts to surface waters is erroneous.

And FWS is not alone among the federal agencies with concerns about significant, long-term aquatic impacts from the MVP. In May 2021, Region 3 of the Environmental Protection Agency (“EPA”) warned the Corps that “the direct, secondary, and cumulative impacts from the discharges associated with this project to those watersheds may result in significant degradation of the waters of the United States and reduce the ability for remaining aquatic resources to maintain hydrologic, geochemical, and biologic functions.”²⁸ Regarding Mountain Valley’s proposed dry-ditch, open-cut crossings, EPA concluded that, “[w]hile many of the discharges of fill associated with the proposed construction may be considered temporary, **the impacts from those discharges may have lasting effects, particularly due to the sensitivity of the aquatic resources and the repetitive nature of impacts to some of the tributaries.**”²⁹

Moreover, Mountain Valley’s track record since 2017 demonstrates that impacts from completed crossings have been greater than regulators predicted or

²⁷ FEIS at 4-1.

²⁸ Letter from Jeffrey Lapp, Chief, Wetlands Branch, U.S. Environmental Protection Agency Region 3, to Michael Hatten, Chief, Regul. Branch, Huntington District, U.S. Army Corps of Eng’rs, Re: LRH-2015-00592-GBR, LRP-2015-798, NAO-2015-0898, Mountain Valley Pipeline, LLC; Mountain Valley Pipeline, Wetzel County, West Virginia to Pittsylvania County, Virginia at 2 (May 27, 2021) (attached as Ex. 4) [hereinafter “Lapp Letter”].

²⁹ *Id.* at 4 (emphasis added).

authorized. Since 2017, Mountain Valley has completed a number of crossings using open-cut, dry-ditch methods, and available documents establish excessive sedimentation and other problems at a minimum of four completed crossings.

In Virginia, Mountain Valley constructed its dry-ditch, open-cut crossing of S-G36—the North Fork of the Roanoke River—on July 19, 2018.³⁰ Mountain Valley’s inspectors reported problems with sedimentation and turbidity from the pump-around outlet.³¹ Citizen inspectors, trained by Trout Unlimited in turbidity monitoring, documented sediment deposits and consistent turbidity increases downstream from the crossing location throughout their sampling period from July 19, 2018 through September 9, 2018.³² Because sediment deposits and turbidity are harmful to aquatic life and interfere with the aquatic life use by smothering benthic macroinvertebrates, the downstream impacts documented by the citizen inspectors constitute violations of Virginia narrative water quality criteria.

In West Virginia, Mountain Valley constructed a pipeline right-of-way crossing through stream S-IJ64—an unnamed tributary of Little Stony Creek in Monroe County—and its attendant right-of-way bridge in May 2018.³³ In an inspection on

³⁰ Mountain Valley Pipeline, Visual Site Inspection Report #4841 (July 19, 2018) (attached as Ex. 5).

³¹ *Id.*

³² Elizabeth Struthers Malbon, Changes in Turbidity of the North Fork of the Roanoke River in Catawba Valley After the Start of Construction of the Mountain Valley Pipeline (2018) (attached as Ex. 6).

³³ W. Va. Dep’t of Env’tl. Prot., Inspection Report (May 9, 2018) (attached as Ex. 7).

May 9, 2018, a WVDEP inspector documented “conditions not allowable” (that is, a narrative water quality standards violation) that resulted from MVP’s neglect of “[b]ridge matting [that] failed contributing sediment laden water at the right-of-way crossing at S-IJ64.”³⁴ The inspector concluded that the resulting sediment deposits caused the “conditions not allowable.”³⁵

Also in West Virginia, a September 30, 2018 Commission inspection of the completed crossing of S-N8A in Nicholas County—a crossing that required blasting—revealed that the dam for the dam-and-pump was installed outside the permitted area and contributed silt-laden water to the stream.³⁶ On October 5, 2018, an inspection of the completed trench crossing through W-B51 in Lewis County, West Virginia revealed that Mountain Valley’s initial topsoil restoration efforts had failed.³⁷ Preconstruction contours were not successfully restored—as required by the Commission’s wetland procedures—resulting in an alteration to the hydraulic flow in W-B51 and its hydraulic connections to stream S-B70.³⁸

³⁴ *Id.*

³⁵ *Id.*

³⁶ Fed. Energy Regul. Comm’n, Environmental Compliance Monitoring Program Weekly Summary Report for the Period September 30 through October 6, 2018, at 4 (attached as Ex. 8).

³⁷ *Id.* at 14.

³⁸ *Id.*; *see also id.* at 19 (compiling photos of the hydraulic problems at W-B51).

Based on the recognition by the federal environmental resource agencies that the impacts of Mountain Valley’s dry-ditch, open-cut waterbody crossings will be measured in years rather than days, and based on the evidence that Mountain Valley’s completed crossings are causing violations of water quality standards, the Commission and the Corps must take a hard look at the environmental impacts of all of Mountain Valley’s crossings and discuss those impacts in their NEPA documents. As discussed in Commenters’ May 28, 2021 comments on the Corps’ public notice of Mountain Valley’s individual permit application, those impacts will include long-term and significant impacts, water quality standards violations, and significant degradation to waters of the United States.³⁹

But the EA utterly fails to acknowledge the developments since 2017 that undermine the FEIS’s conclusory assessment of the impacts of open-cut, dry-ditch crossings, despite Commenters having called the Commission’s attention to those developments in their Supplemental Scoping Comments.⁴⁰ Instead, the EA simply parrots the FEIS’s conclusory assessment that “open-cut dry crossing methods would appropriately minimize turbidity and sedimentation and no long-term or significant impacts on surface waters are anticipated as a result of the Mountain Valley Pipeline Project[.]”⁴¹ without any additional analysis. As a result, the EA falls short, and an

³⁹ 404 Comments at 68–120.

⁴⁰ Supplemental Scoping Comments at 65–102.

⁴¹ EA at 98.

SEIS examining the environmental impacts of open-cut, dry-ditch crossings is required. At a bare minimum, the Corps and the Commission must grapple with the litany of post-2017 evidence in the record that contradicts the EA's and FEIS's rosy mischaracterizations of impacts.

Moreover, it would also be arbitrary and capricious for the Corps to adopt the Commission's NEPA documents without conducting an independent review because the EA does not respond to the Corps' scoping comments. When a cooperating agency in a NEPA review submits scoping comments to the lead agency, and those comments are not addressed in the resulting NEPA document, the cooperating agency cannot simply adopt that resulting NEPA document without independent review.⁴²

Here, when the Corps accepted the Commission's invitation to be a cooperating agency, it provided specific scoping comments "to ensure the information presented in any National Environmental Policy Act (NEPA) document is adequate to fulfill the Corps' statutory requirements, including the requirements of Section 404(b)(1) of the Clean Water Act (40 CFR 230) and the Corps' public interest review (33 CFR 320.4)[.]"⁴³ Among the items that the Corps requested the Commission evaluate in the resulting NEPA document were issues related to compliance with the Section

⁴² *Cowpasture River*, 911 F.3d at 170–73; see also *Sierra Club v. U.S. Forest Serv.*, 897 F.3d 582, 594–96 (4th Cir. 2018).

⁴³ Letter from Teresa D. Spagna, Chief, North Regul. Branch, Huntington Dist., U.S. Army Corps of Eng'rs, to Kimberly D. Bose, Secretary, Fed. Energy Regul. Comm'n, Re: Acceptance of Cooperating Agency Responsibility at 2 (Mar. 8, 2021) (Accession No. 20210311-5077).

404(b)(1) Guidelines, which includes whether discharges from the project would cause or contribute to violations to water quality standards or significant degradation of the waters of the United States—in other words, issues related to crossing impacts on surface waters.⁴⁴ Indeed, the Corps insisted that “[t]he NEPA document should provide a sufficient analysis to determine compliance with the Guidelines.”⁴⁵ Because the EA simply repeated a stale, four-year-old conclusion without addressing developments in the interim, it is not responsive to the Corps’ scoping comments. Accordingly, the Corps cannot adopt the EA and must instead prepare an SEIS that examines the water quality effects of open-cut, dry-ditch stream crossings.

B. The Alternatives Analysis in the EA Cannot Support Agency Action by Either the Commission or the Corps.

Neither the 2017 FEIS nor the EA, individually or together, include an alternatives analysis sufficient to satisfy the NEPA obligations of the Commission or the Corps. The Commission has arbitrarily and capriciously ignored important comments it received on alternatives during the scoping period, resulting in an incomplete and inadequate alternatives analysis. And as discussed above, Corps regulations require any NEPA document on which that agency relies for an action to include an alternatives analysis that “consider[s] the alternatives in sufficient detail to respond to the requirements” of the Section 404(b)(1) Guidelines, including those Guidelines’ requirements for a robust analysis and factual determinations that

⁴⁴ *Id.* at 3–4.

⁴⁵ *Id.*

identify the LEDPA.⁴⁶ Plainly stated, to support any issuance of an individual Section 404 permit by the Corps, the NEPA document must consider all the alternatives in sufficient detail to support the Corps' LEDPA analysis. This EA does not.

Consideration of alternatives “is the heart of the environmental impact statement.”⁴⁷ The “discussion of alternatives must rigorously explore and objectively evaluate all reasonable alternatives.”⁴⁸ As described below, the EA's alternative analysis falls short of the legal obligations of the Commission and the Corps for at least six reasons.⁴⁹

First, the alternatives analysis fails to consider *routing* alternatives. As Commenters explained in their comments on Mountain Valley's individual permit application to the Corps and in their supplemental scoping comments, the alternatives analyses of Mountain Valley's trenching and boring plans must consider both construction method alternatives and routing alternatives.⁵⁰ The routing

⁴⁶ 40 C.F.R. § 230.10(a)(4).

⁴⁷ 40 C.F.R. § 1502.14.

⁴⁸ *Union Neighbors United*, 831 F.3d at 568.

⁴⁹ In their comments on the Corps' public notice of Mountain Valley's individual permit application and their supplemental scoping comments, Commenters set forth a host of reasons why the Corps cannot rely on the 2017 FEIS to satisfy its NEPA obligations. 404 Comments at 57–68; Supplemental Scoping Comments at 50–60. The EA does not remedy the deficiencies. Accordingly, the Commission and the Corps must prepare NEPA documents responsive to the issues raised in Commenters' previous comments, as well as in those presented here.

⁵⁰ 404 Comments at 6, 12–13, 16–17, 48–49; Supplemental Scoping Comments at 41–42, 44, 53–54.

alternatives that must be considered— on a crossing-by-crossing basis—include, *inter alia*, routing alternatives that would allow Mountain Valley to cross stream reaches or wetlands at locations with lesser environmental impacts.

Mountain Valley’s proposed Blackwater River crossing perfectly illustrates the type of alternatives analysis that is unlawfully lacking from the EA. The Blackwater River is a Section 10 River that Mountain Valley intends to trench through using an open-cut, dry-ditch crossing method.⁵¹ The EA includes a discussion of the Blackwater River crossing in an attempt “to support the [Corps’] review of the joint application for Section 10 regulated streams.”⁵² The EA accepts Mountain Valley’s assertions that “site conditions” at its proposed Blackwater River crossing location do not provide enough space to allow the company to cross the Blackwater River at that location with a trenchless crossing, and the Commission’s staff purports to “confirm[] that there may not be space for spoil storage within the limits of disturbance and the slope on one side of the stream may not be conducive to a trenchless crossing.”⁵³ But the EA never considers whether any nearby locations exist at which Mountain Valley could use a trenchless method to cross the Blackwater River.

⁵¹ EA at 93.

⁵² *Id.*

⁵³ *Id.* As discussed below, the Commission staff’s review of Mountain Valley’s characterization of the Blackwater River crossing is problematic for additional reasons.

Because of the Blackwater River’s status as a tributary of an important recreational reservoir, and because that river is subject to a total maximum daily load for sediment under Section 303 of the Clean Water Act, the Virginia Department of Environmental Quality recently submitted comments on the EA recommending that the Commission and the Corps “[r]eevaluate the location of the Blackwater River crossing and move it to a location that permits the trenchless crossing technique.”⁵⁴ That is exactly the sort of evaluation that the Commission—as the lead agency—and the Corps—as a cooperating agency—should have included in the EA’s alternatives analysis—but not just for the Blackwater River. Examining such routing alternatives for each and every stream crossing is required under both NEPA and the Section 404(b)(1) Guideline’s LEDPA analysis. But the alternatives analysis in the EA does not do that. Accordingly, the Commission has failed to comply with NEPA, and the Corps cannot rely on the EA to satisfy its own NEPA and Clean Water Act obligations.

Second, the alternatives analysis is deficient for the Corps’ purposes because the “no action” alternative is specific to the amendment application and does not look at alternatives to action by the Corps. As Commenters explained in their comments on the Corps’ public notice for Mountain Valley’s individual permit application, the Corps must consider a “No Section 404 Permit” alternative *for each and every*

⁵⁴ Letter from Bettina Rayfield, Virginia Dep’t of Env’tl. Quality, to Kimberly D. Bose, Fed. Energy Regul. Comm’n, Re: Federal Energy Regulatory Commission Draft Environmental Assessment for the Mountain Valley Pipeline Amendment Project (OEP/DG2E/Gas 3, Mountain Valley Pipeline, LLC, Docket No. CP21-57-000, DEQ 21-102F), Att. A, page 16 (Sept. 8, 2021) (Accession No. 20210908-5077) (attached as Ex. 9).

proposed open-cut, dry-ditch crossing.⁵⁵ The alternatives analysis cannot operate at such a high level of generality that it is meaningless. Rather, the agencies must consider—on a crossing-by-crossing basis—an alternative that does not involve a Section 404 permit.

In this case, those “No Section 404 Permit” alternatives consist of trenchless crossings of *each* stream or wetland where Mountain Valley proposes an open-cut, dry-ditch crossing. In other words, the Corps cannot simply adopt the alternatives analysis in the EA because it does not consider substituting trenchless crossing methods at each individual crossing. Indeed, with the exception of the Blackwater River crossing, the EA does not even attempt such analyses, and its analysis of the Blackwater River crossing falls short for the reasons described elsewhere in these comments. Accordingly, the Corps must develop a supplemental NEPA document that includes a “no action” alternative for each requested crossing location.

Third, the EA’s discussion of Mountain Valley’s screening criteria for alternative crossing techniques at pages 94 through 97 applies a level of generality too high to be meaningful or provide any real examination of Mountain Valley’s claims about technical and/or cost feasibility. The EA notes that

[t]he construction method proposed for each crossing in the Amended Project was the result of a feasibility analysis conducted by Mountain Valley to compare trenchless methods, predominantly conventional and guided bores, with the previously approved open-cut crossing method for the sensitive resources.⁵⁶

⁵⁵ 404 Comments at 15–17.

⁵⁶ EA at 94.

But rather than scrutinize or independently review Mountain Valley’s feasibility analyses, all the EA does is identify the factors that Mountain Valley purported to consider and summarize those factors.⁵⁷ And within that summary, the EA describes Mountain Valley’s conclusions but does nothing to examine whether Mountain Valley’s conclusions are accurate; instead, it uncritically accepts the company’s own self-serving say-so.

Because it is devoid of analysis and merely parrots the applicant’s positions, the EA’s consideration of construction technique alternatives is not sufficient to satisfy the NEPA obligations of either the Commission or the Corps. Nor is it sufficient to satisfy the Corps’ obligation under the Section 404(b)(1) Guidelines. As noted elsewhere, in performing its 404(b)(1) Guidelines LEDPA analysis, the Corps has “an obligation to independently verify the information supplied to it” by the applicant.⁵⁸ And—as also noted elsewhere—the Corps’ NEPA documents must

⁵⁷ *Id.* Two of those factors relate to spoil storage area—bore pit depth and slope steepness. *Id.* at 94–95. The alternatives analysis appears to contend that spoil storage can make trenchless crossings infeasible. *Id.* That contention, however, is inconsistent with the assumption the Commission’s staff makes elsewhere in the EA that, “[i]n terms of the total volume of spoil material subject to movement by construction equipment, bore pit backfilling would be similar that the amount that was previously analyzed for open-cut dry crossings.” *Id.* at 77. In other words, in one breath the Commission states that the volume of spoil material generated by trenchless crossings is similar to the volume generated for open-cut dry crossings, and in another breath accepts Mountain Valley’s contention that the volume of spoil generated by trenchless crossings frequently makes them infeasible. Such an inconsistency renders the EA’s comparison of stream-crossing techniques arbitrary and capricious.

⁵⁸ *Friends of the Earth v. Hintz*, 800 F.2d 822, 835 (9th Cir. 1986).

include sufficient information to allow it to perform its LEDPA analysis.⁵⁹ Because the EA only identifies the feasibility factors that Mountain Valley purported to consider, and entirely fails to examine or independently verify Mountain Valley's application of those factors, its alternatives analysis is deficient and the Corps cannot rely on it to satisfy either its NEPA or Clean Water Act obligations.

Fourth, at the sole open-cut, dry-ditch crossing where the EA even attempts a crossing-specific alternatives analysis, it fails to take a hard look at the issues presented by the crossing. The Blackwater River crossing, as described above, is the sole open-cut, dry-ditch crossing location even mentioned in the EA's alternatives analysis. The following is the entirety of the EA's examination of that crossing:

As discussed in section B.2.2, the Mountain Valley Pipeline Project would cross five Section 10 streams. All of these streams, except for the Blackwater River, would be crossed via a trenchless crossing method. We have included the following discussion in order to support the [Corps'] review of the joint application for Section 10 regulated streams. At the Blackwater River crossing, Mountain Valley stated that site conditions do not provide adequate space to stockpile spoil from bore pits that would be almost 40-feet-deep. We reviewed the Blackwater River crossing location and confirmed that there *may not* be space for spoil storage within the limits of disturbance and the slope on one side of the stream *may not* be conducive to a trenchless crossing.⁶⁰

It is unclear as a threshold matter whether the Commission's staff's "review" of the Blackwater crossing location was a desktop review or a field evaluation. But in either event (and more fundamentally), rather than examining Mountain Valley's

⁵⁹ 40 C.F.R. § 230.10(a)(4).

⁶⁰ EA at 93 (emphasis added).

statements or their underlying engineering assumptions and premises, the EA purports to “confirm” that Mountain Valley “may be” right about the feasibility of a trenchless crossing. While that sort of conclusion may suffice for a single off a 1980 Billy Joel album,⁶¹ it falls far short of the hard look required by federal environmental law. Stated otherwise, the EA fails to either confirm or refute Mountain Valley’s analysis; at most it acknowledges that Mountain Valley’s assessment is within the realm of possibility.

Such thin sauce not only violates NEPA but also falls short of what is required of the Corps under the Section 404(b)(1) Guidelines. The 404(b)(1) Guidelines prohibit the issuance of a Section 404 permit where “there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem[.]”⁶² “[P]racticable alternatives include, but are not limited to, (i) Activities which do not involve a discharge of dredged or fill material into the waters of the United States . . . [and] (ii) Discharges of dredged or fill material at other locations in waters of the United States or ocean waters[.]”⁶³ The burden to demonstrate that the proposed alternative is the LEDPA lies on the applicant.⁶⁴ In performing the LEDPA

⁶¹ Billy Joel, *You May Be Right* (1980).

⁶² 40 C.F.R. § 230.10(a).

⁶³ *Id.* § 230.10(a)(1).

⁶⁴ *Utahns for Better Transp.*, 305 F.3d at 1187; *see also Alliance for Legal Action v. U.S. Army Corps of Eng’rs*, 314 F.Supp.2d 534, 543 (M.D.N.C. 2004) (holding “the burden to clearly demonstrate a lack of practicable alternatives lies with the project applicant”).

analysis, the Corps has “an obligation to independently verify the information supplied to it” by the applicant.⁶⁵

Mountain Valley’s conclusory statements about the site conditions at the Blackwater River crossing fall short of what is required to carry its burden to demonstrate that an open-cut, dry-ditch crossing of the Blackwater River is the LEDPA. And a conclusion after a cursory “review” of a crossing location that Mountain Valley “may be” correct about the feasibility of a trenchless crossing certainly fails to verify the applicant’s characterization of the site, as is required of the Corps under *Hintz*. Accordingly, the EA’s treatment of the Blackwater River crossing falls short of what is required under NEPA and the Clean Water Act, and is no model for what the Commission and the Corps must do with regard to routing and construction method alternatives at the other crossing locations.

Fifth, the EA acknowledges, but does not examine, Mountain Valley’s credibility issues regarding crossing technique feasibility. In their comments to the Corps, and in their supplemental scoping comments, Commenters presented in detail Mountain Valley’s numerous flip-flops on and misrepresentations of which technologies are feasible for which crossings—including Mountain Valley’s

As EPA explains it, “[t]he burden of proof to establish compliance with the Guidelines rest with the applicant; where insufficient information is provided to determine compliance, the Guidelines require no permit be issued.” Memorandum to the Field, Subject: Appropriate Level of Analysis Required for Evaluating Compliance with the Section 404(b)(1) Guidelines Alternatives Requirements (Aug. 23, 1993), *available at* 62 Fed. Reg. 31,492, 31,497–99 (June 9, 1997).

⁶⁵ *Friends of the Earth v. Hintz*, 800 F.2d 822, 835 (9th Cir. 1986).

remarkable change in position earlier this year on whether 38 trenchless crossings along the first 77 miles of the route are feasible.⁶⁶ Despite that detailed presentation, the EA underwhelmingly states, “We also received comments noting that Mountain Valley previously rejected boring of waterbodies and wetlands as too costly and risky during the application process for the Mountain Valley Pipeline Project.”⁶⁷ In an apparent effort to excuse Mountain Valley’s willingness to change its position on feasibility as suits its interests, the EA states that “various legal, regulatory, and permitting challenges have prevented Mountain Valley from completing construction of the Mountain Valley Pipeline Project as previously certificated[,]” leading “Mountain Valley [to] reevaluate[] the crossing method for all remaining crossings.”⁶⁸ Stated differently, the EA attributes Mountain Valley’s inconsistent statements to the loss of its streamlined Nationwide Permit 12 authorization in litigation and its choice to resort to Plan B in order to survive the scrutiny that an individual permit application brings. The EA provides no further explanation for Mountain Valley’s shifting positions on technical and cost feasibility. Remarkably, the EA proceeds to accept Mountain Valley’s various current representations about technological and cost feasibility without any real analysis.⁶⁹

⁶⁶ 404 Comments at 18–29; Supplemental Scoping Comments at 16–28.

⁶⁷ EA at 92.

⁶⁸ *Id.* at 92–93.

⁶⁹ *See id.* at 93–98.

A federal agency acts arbitrarily and capriciously when it bases an action on unreliable information.⁷⁰ Accordingly, the Commission and the Corps must independently review and closely scrutinize *every* representation Mountain Valley makes about the feasibility of the technologies it is proposing. Because the EA fails to grapple meaningfully with Mountain Valley’s prior inconsistent statements, it cannot lawfully support a certificate amendment by the Commission or a permit issuance by the Corps.

Sixth, the EA’s alternatives analysis suffers from the same defect as its consideration of the environmental impacts of open-cut, dry-ditch crossings on water quality and climate change—it ignores the Corps’ specific requests in its scoping comments. Accordingly, the EA itself is unlawful, and reliance on it by the Corps would be arbitrary and capricious.

When a cooperating agency in a NEPA review submits scoping comments to the lead agency, and those comments are not addressed in the resulting NEPA document, the cooperating agency cannot simply adopt that resulting NEPA

⁷⁰ See, e.g., *Colorado Fire Sprinkler, Inc. v. Nat’l Lab. Rel. Bd.*, 891 F.3d 1031, 1041 (D.C. Cir. 2018) (holding agency decision to be arbitrary and capricious because of its reliance on “demonstrably untrustworthy” information); *Friends of Boundary Waters Wilderness v. Bosworth*, 437 F.3d 815, 825 (8th Cir. 2006) (holding an agency cannot rely on questionable data without independently validating it); *Menorah Med. Ctr. v. Heckler*, 768 F.2d 292, 295–96 (8th Cir. 1985) (reliance on untrustworthy survey rendered decision arbitrary and capricious); *St. James Hosp. v. Heckler*, 760 F.2d 1460, 1467 n.5 (7th Cir. 1985) (“[I]t is an agency’s duty to establish the statistical validity of the evidence before it prior to reaching conclusions based upon that evidence.”).

document without independent review.⁷¹ As discussed above, when the Corps accepted the Commission’s invitation to be a cooperating agency, it provided specific scoping comments “to ensure the information presented in any National Environmental Policy Act (NEPA) document is adequate to fulfill the Corps’ statutory requirements, including the requirements of Section 404(b)(1) of the Clean Water Act (40 CFR 230) and the Corps’ public interest review (33 CFR 320.4)[.]”⁷² Among the items that the Corps requested the Commission evaluate in the resulting NEPA document were compliance with the Section 404(b)(1) Guidelines, including the prohibition against authorizing a discharge where there is a practicable alternative with a less adverse impact.⁷³ The Corps further informed the Commission that “[t]he NEPA document should provide a sufficient analysis to determine compliance with the Guidelines”—which would include the Guidelines’ LEDPA provisions.⁷⁴

Moreover, the Corps told the Commission in its scoping comments that a “fundamental precept of the Corps’ Regulatory Program under Section 404 of the Clean Water Act is that the discharge of dredged and/or fill material into waters of the United States will be avoided and minimized, where it is practicable to do so,”

⁷¹ *Cowpasture River*, 911 F.3d at 170–73; *see also Sierra Club*, 897 F.3d at 594–96.

⁷² Letter from Teresa D. Spagna, Chief, North Regul. Branch, Huntington Dist., U.S. Army Corps of Eng’rs, to Kimberly D. Bose, Secretary, Fed. Energy Regul. Comm’n, Re: Acceptance of Cooperating Agency Responsibility at 2 (Mar. 8, 2021) (Accession No. 20210311-5077).

⁷³ *Id.* at 3.

⁷⁴ *Id.* at 4.

such that a “Section 404 of the Clean Water Act permit may only authorize the least environmentally damaging practicable alternative.”⁷⁵ Thus, in order for the EA to have been responsive to the Corps’ scoping comments and even close to sufficient to support the Corps’ permitting process, it would have had to “evaluate how the Project was designed to avoid and minimize the discharge of dredged and/or fill material into waters of the United States” including analysis of “avoidance and minimization alternatives.”⁷⁶

For the reasons discussed above, the EA fails to include the information and alternatives analysis requested by the Corps in its scoping comments. For example, trenchless crossings represent one potential avoidance and minimization alternative for the crossings that Mountain Valley proposes to accomplish using the open-cut, dry-ditch method. For the Corps to rely on the EA, the EA would have had to separately evaluate the practicability of requiring Mountain Valley to employ trenchless crossing methods at each and every location.⁷⁷ But the EA does not do so.

⁷⁵ *Id.* at 3.

⁷⁶ *Id.*; *see also* 40 C.F.R. § 230.10(a)(4) (requiring supplementation of NEPA documents that do not consider alternatives in sufficient detail to address the “least environmentally damaging practicable alternatives” requirements of the Section 404(b)(1) guidelines).

⁷⁷ It is not just Commenters endorsing that requirement—EPA does as well. On May 27, 2021, EPA Region 3 submitted comments to the Corps on Mountain Valley’s pending application for an individual Section 404 permit for the MVP’s waterbody crossings. Lapp Letter. In those comments, EPA Region 3 stated that the MVP “may not comply with the [Section 404(b)(1)] Guidelines,” and recommended “that the permit not be issued until modifications described in the attachment . . . have been addressed and incorporated into the project.” *Id.* at 2. Among the reasons underlying

Because such evaluations are utterly lacking, it would be arbitrary and capricious for the Corps to rely on the EA to satisfy its NEPA obligations under the Fourth Circuit's precedent in *Cowpasture River* and *Sierra Club v. U.S. Forest Service*.⁷⁸ The Corps should learn from the Forest Service's mistakes in that agency's review of the MVP and conduct its own robust NEPA analysis of the alternatives to the proposed stream crossings.

EPA's recommendations were its concerns about Mountain Valley's presentation of crossing alternatives. *Id.* at 4–6.

EPA recognized that alternatives to the proposed action should include “not only geographical siting but also operational options, such as design modifications.” *Id.* at 4. To accomplish a robust alternatives analysis, EPA recommended that “a full range of practicable alternatives” be considered for each crossing. *Id.* Indeed, EPA specifically recommended further consideration of trenchless crossings “at streams where [such methods are] not currently proposed, particularly streams that will be crossed multiple times, streams that are of good quality, and/or streams that may contain threatened or endangered aquatic species” *Id.* at 5.

EPA's recommendations echo the Commenters' consistent refrain: the NEPA review by the Commission and the Corps must include a site-specific, crossing-by-crossing, alternatives analysis to take a hard look at the environmental impacts of the available alternative stream-crossing methods at each proposed crossing.

⁷⁸ *Cowpasture River*, 911 F.3d at 170–73; see also *Sierra Club*, 897 F.3d at 594–96.

III. THE EA FAILS TO RATIONALLY ASSESS THE POTENTIAL IMPACTS ASSOCIATED WITH POTENTIAL BORING FAILURES.

A. Mountain Valley Has Failed to Conduct Adequate Site-Specific Hydrogeological Characterizations of the Crossing Locations Necessary to Predict and Minimize the Potential for Unsuccessful Bore Attempts That Pose Serious Environmental Risks.

As the Commission has previously acknowledged, when conducting a conventional bore, the “greatest risk to the waterbody is the possibility of the borehole collapsing without warning. In such a case the bed of the waterbody could collapse and reroute the waterbody into the bore pathway.”⁷⁹ Commenters previously submitted a report by expert geologist Pete Nimmer that explained that a failed borehole “has the potential to result in formation of a very large conduit that could result in the diversion of significant quantities of surface water or groundwater.”⁸⁰

⁷⁹ Fed. Energy Regul. Comm’n, Southgate Project Final Environmental Impact Statement at 4-37, Docket No. CP19-14 (Feb. 2020) (Accession No. 20200214-3010) [hereinafter FERC Southgate Project FEIS]. *See also* Mountain Valley Pipeline, Supplemental Environmental Report for Proposed Certificate for Avoidance of Waters of the United States, Resource Report 1 at 1-8 to 1-9 (Accession No. 20210219-5176) (listing “insurmountable issues” that could prevent a successful bore, including “[u]nanticipated geological or hydrological conditions in which ground or surface water affects construction, or the geologic materials become unstable or collapse”).

⁸⁰ Pete Nimmer, Greenstar Environmental Solutions, LLC, Comments on Mountain Valley Pipeline’s Requested Amendment to its Certificate of Public Convenience and Necessity at 7 (2020) (Accession No. 20210415-5319) (attached as Ex. 10) [hereinafter “Nimmer Report”]; *see also id.* at 3 n.1 (“If a borehole cannot be completed the failed borehole has the potential to become a major underground hydraulic conduit which may result in dewatering of surface water bodies.”); *id.* at 6–7 (“The large diameter of the proposed boreholes has the potential to result in formation of a very large conduit that could result in the diversion of significant quantities of surface water or groundwater.”); FERC Southgate Project FEIS at 4-37 (“Of greatest risk to the waterbody is the possibility of the borehole collapsing without warning. In such a case the bed of the waterbody could collapse and reroute the waterbody into the bore pathway.”).

Mr. Nimmer advised that “[o]ne or more failed boreholes should be considered a likely possibility given the size of the individual crossings . . . , the cumulative total borehole distance . . . , and varying geologic conditions at the [different crossing locations].”⁸¹

In order to minimize the potential for borehole failure, a much more detailed hydrogeological characterization of the crossing locations than what is presented in the EA is required. Mr. Nimmer explained that, in the absence of pre-boring characterization of geologic conditions at crossings, “it is not possible to assess the likelihood of encountering geologic conditions,” including “the presence of boulders or weathered bedrock,” “which may prevent completion of boreholes, or to anticipate and prevent problems with the proposed drilling method.”⁸² Such an analysis at a

Mountain Valley attempts to downplay the likelihood of borehole collapse by insisting that, in most instances, “the line pipe is installed immediately behind the bore pipe once the boring is completed, leaving no unsupported hole that could potentially collapse. Because the borehole is continuously supported by pipe throughout the process, the risk of bore collapse is minimal.” Mountain Valley Pipeline, Supplemental Environmental Report for Proposed Certificate for Avoidance of Waters of the United States, Resource Report 1 at 1-4 (Accession No. 20210219-5176) at 1-4. This does not address the situation where a borehole has to be abandoned because of adverse geologic conditions, and the drilling rig withdrawn from the borehole, in which case nothing would remain to support the borehole. Nothing in the Commission’s January 2021 EA, the information submitted in support of the pending application, or the August 2021 EA addresses the impacts of such a scenario. Accordingly, the risks of borehole collapse and conduit creation are not as minimal as the August 2021 EA suggests.

⁸¹ Nimmer Report at 6.

⁸² Nimmer Report at 4; *see also id.* at 6 (“Several [geologic] conditions would result in a borehole that cannot be completed to its intended length such as unexpected geology, problematic geology or soils, or equipment issues.”); *See also* Kwast-Kotlarek et al., *Introducing Bentonite into the Environment in the Construction Stage of Linear Underground Investment Using the HDD Method*, 8 APPLIED SCIENCES 17 (Nov. 2018) (attached as Ex. 11) (“Designing the routes of gas pipeline systems is important for the function of ecosystems. Each gas pipeline construction project has to be based on thorough ecological and physiographic studies and a reliable evaluation of the

minimum would assess “soil thickness,” “the depth of the soil/bedrock interface,” and “bedrock hardness which may affect drilling, or presence of fracturing or permeability that may increase the likelihood of forming an unintentional hydraulic connection between surface water and groundwater.”⁸³ Without such analysis, “there is an increased risk of failure or encountering unexpected conditions such as borehole collapse.”⁸⁴ Indeed, the Commission itself submitted a request to Mountain Valley for information necessary to determine the likelihood of borehole failures including the likelihood of encountering “boulders more than one-third the size of the casing,”⁸⁵ “mixed-face conditions of soil and solid rock,” and “flowing/heaving sands and artesian groundwater conditions.”⁸⁶

But Mountain Valley failed to provide sufficient information to rationally assess the likelihood of encountering such conditions and, as a result, the EA falls short of what NEPA requires. Mountain Valley’s response to the Commission’s information request fails to provide site-specific information, stating only that based

environmental impact, which specify variant solutions for ensuring minimal losses and the lowest possible limitations to the function of the natural environment.”); *id.* (explaining that drilling fluids such as bentonite “constitute a type of waste that is difficult to manage, as its nature may change depending on the chemical nature of the drilling fluid used and the geological and technological drilling conditions”).

⁸³ Nimmer Report at 4.

⁸⁴ *Id.*; *see also id.* at 5 (“No information is provided regarding depths of water bodies, bathymetry of surface water at crossings, cross-sections, an understanding of bank conditions and how these compare to the proposed depth of each borehole.”).

⁸⁵ The EA recognizes that the conventional bore machine can only handle “Boulders and cobbles up to one third of the diameter of the installed pipe.” EA at 9.

⁸⁶ Accession No. 20210412-3045.

on the desktop USGS data and its “familiarity with regional geology,” “[s]ubsurface conditions at the proposed bore locations *generally* consist of thick heterogeneous valley fill deposits of poorly graded silt, sand, gravel, cobbles, and boulders.”⁸⁷ This does not reveal the likelihood of encountering boulders greater than one-third the size of the casing nor much of the other information suggested by Nimmer such as “bedrock hardness” or the “presence of fracturing or permeability.” And the Commission arbitrarily and capriciously accepts a desktop review without further investigation. That is, instead of conducting site-specific analysis for each crossing, the EA instead relies on a generic desktop analysis, looking only at depth to bedrock using existing United States Geological Survey (USGS) soil survey data and concluding only that bedrock “would be encountered at depths greater than 7 feet at 73 percent of the crossings.”⁸⁸

The EA references actual measurements of depth to bedrock for “select sites,”⁸⁹ but these measurements were only performed at two locations: the crossings of the Elk and Greenbrier Rivers. At those sites, Mountain Valley conducted test borings and Resistivity Imaging Study to obtain a detailed picture of the subsurface hydrogeologic conditions likely to be encountered.⁹⁰ In order to predict and minimize

⁸⁷ Accession No. 20210427-5306 at 19 (emphasis added).

⁸⁸ EA at 23.

⁸⁹ *Id.* (citing filings in Docket No. CP16-10 under accession number 20201013-5344).

⁹⁰ *See, e.g.*, Elk River Crossing Variance Request No. C-34 at 2 (“The possibility of encountering hard rock that cannot be penetrated by the auger or cobbles that divert the bore away from the intended path is a risk. Test borings were conducted near the guided conventional bore pit location south of the crossing to determine the type of material expected to be encountered during the conventional boring process.”); *id.*

the likelihood of borehole failure, such detailed, site-specific analyses needed to be performed for each crossing location. The failure to do so renders the EA inadequate.

B. Mountain Valley's Borehole Failure Contingency Plan Remains Inadequate.

In addition to failing to adequately assess and minimize the likelihood of borehole failure by accurately characterizing the geological conditions at each boring location, the Commission likewise fails to provide a sufficient analysis of what will happen in the likely event that a borehole cannot be completed. Nimmer analyzed Mountain Valley's Amendment Application and noted that "there is a very limited discussion of what actions will be taken if obstacles are encountered which cannot be accommodated by the drilling method, or what will occur if boreholes are abandoned to prevent environmental impacts."⁹¹ The EA is similarly inadequate.

The EA states only that, "[s]hould Mountain Valley encounter one or more [insurmountable construction] issues, it would notify the appropriate FERC compliance monitor and attempt another bore 10 feet to either side of the original

("Mountain Valley also completed a Resistivity Imaging Study for crossing the Elk River in accessible areas to help identify the subsurface geology along the guided conventional bore path."); Greenbrier River Crossing Variance Request F-23 at 3 ("The predominant risk associated with the 42-inch Direct Pipe© bore include the possibility of encountering hard rock or cobbles that cannot be penetrated by the auger or cobbles that divert the bore away from the intended path. Direct Pipe© literature indicates that rock harder than 21,500 psi and cobbles/boulders larger than 30% of the pipe diameter can preclude Direct Pipe© methods. Test borings were conducted near the bore pit locations on both sides of the crossing to determine the type of material expected to be encountered during the boring process."); *id.* ("Mountain Valley also completed a Resistivity Imaging Study for crossing the Greenbrier River in accessible areas to help identify the subsurface geology along the Direct Pipe© bore path.").

⁹¹ Nimmer Report at 6.

bore path within the existing right-of-way. Should the failure involve a stuck pipe and a standard recovery fails, the pipeline in this area would be abandoned in place and backfilled with grout.”⁹²

As Nimmer previously explained, “[t]his limited description is not a contingency plan for how a failed borehole will be properly abandoned to prevent forming a major hydraulic conduit underlying wetlands or surface water which may cause dewatering of surface water bodies.”⁹³ A meaningful contingency plan must “assess how the decision will be made to terminate a bore, how the bore will be properly abandoned so it does not create a hydraulic conduit or damage overlying surface water, inspections, or what actions will be taken to prevent bore collapse or limit the potential for a release of pressurized drilling fluids.”⁹⁴ In a subsequent report, Nimmer explained that

the use of grout to fill or seal incomplete or failed boreholes is not without risk. Use of grout is not necessarily going to fully seal off all potential conduits. Grout is known to move in unexpected directions and is susceptible to bridging which can leave portions of a failed borehole open to the environment. Grout injection into horizontal bores would need to be done under pressure and therefore potential release of the pressurized fluids into wetlands or overlying waterbodies is a risk. Cement grout may have other materials mixed in, such as bentonite or other additives, and release of this material can have adverse consequences in sensitive receptor communities. Additional information regarding grouting of failed bores, such as detailed monitoring plans and pollution prevention plans, should be provided⁹⁵

⁹² EA at 15.

⁹³ Nimmer Report at 6.

⁹⁴ *Id.* at 8.

⁹⁵ Pete Nimmer, Greenstar Environmental Solutions, LLC, Comments on FERC’s January 7, 2021 Environmental Assessment, Mountain Valley Pipeline’s February 2021 Applications to Amend its Certificate of Public Convenience and Necessity and

The EA entirely fails either to analyze these risks or to discuss whether or how impacts associated with such risks could be minimized.

The EA itself recognizes that Mountain Valley lacks an adequate plan to deal with borehole failure events, noting that if the bore breaches a streambed and too much water enters the bore pits to maintain a dry workspace, “Mountain Valley would work with the appropriate agencies to establish a repair methodology. This would most likely include grouting the bore hole and rebuilding the streambed.”⁹⁶ The EA fails to assess what impacts would likely occur during the time it takes Mountain Valley to secure regulatory approval to work in the streambed, nor does it analyze the likelihood that Mountain Valley can successfully rebuild a streambed in the face of such subsurface disturbance. The EA thus fails to satisfy NEPA’s mandate that the Commission take a “hard look” at the potential impacts of the Amendment.

IV. THE COMMISSION MAY NOT ISSUE THE CERTIFICATE AMENDMENT AND THE CORPS MUST CONDUCT FURTHER NEPA ANALYSIS FOR THE 404 PERMIT BECAUSE THE EA’S NEPA ANALYSIS DOES NOT ADEQUATELY CONSIDER CLIMATE IMPACTS.

The EA’s analysis of climate impacts is inadequate. And, as addressed in previous comments submitted by the Commenters, the climate impacts analysis in the 2017 FEIS was also inadequate.⁹⁷ Consequently, the Commission must not issue

for an Individual Section 404 Permit, FERC’s March 12, 2021 Environmental Information Request, and Mountain Valley Pipeline’s March 29, 2021 Response at 3 (2021) (Accession No. 20210415-5319) (attached as Ex. 12).

⁹⁶ EA at 36.

⁹⁷ Supplemental Scoping Comments at 112, 129–30; *see also* Maya Weber, *Environmentalists Push FERC on MVP Environmental Review Plans, Carbon*

the certificate amendment pursuant to this inadequate NEPA analysis. Furthermore, the Corps cannot issue a 404 permit without conducting further climate impacts analysis to satisfy its own public interest review and NEPA obligations. Finally, it is imperative that both agencies begin heeding our national climate policy, as every new pipeline approval makes it less likely that we can succeed at meeting our national and international commitments.

A. The EA’s Analysis of Climate Impacts is Inadequate.

The EA’s analysis of climate impacts falls far short of fulfilling the Commission’s NEPA obligations. The EA discusses climate change generally but makes no attempt to consider the climate impacts of the pipeline as a whole, instead limiting its quantitative analysis to only the additional construction emissions of the boring amendment. Such a limitation on the EA renders it inadequate. Even that analysis—within that impermissibly narrow scope—falls short, as the EA claims that no methodology allows it to quantify the project’s climate impacts. Worse still, in making this erroneous claim, the EA disregards public comments submitted by the Commenters describing available methods for analyzing this project’s climate impacts, including the Social Cost of Carbon and Life Cycle Analysis.⁹⁸

Impacts, S&P GLOBAL (Aug. 6, 2021), <https://www.spglobal.com/platts/en/market-insights/latest-news/electric-power/080621-environmentalists-push-FERC-on-mvp-environmental-review-plans-carbon-impacts>; Scoping Comments of Allegheny-Blue Ridge Alliance et al. (Apr. 15, 2021), at 43–50.

⁹⁸ Supplemental Scoping Comments at 130–33; Scoping Comments at 48–50.

1. *Because the EA is limited to emissions increases due to the amendment, its NEPA analysis for the project as a whole is inadequate.*

The EA’s assertion that the requisite scope of the analysis is limited to the increases in emissions caused by the amendment itself⁹⁹ ignores the fact that the Commission has not yet fulfilled its NEPA obligations for the project as a whole. In doing so, the EA fails to assess the significance of this project as the Commission did in *Northern Natural Gas Company*¹⁰⁰ and sets the Commission up to fail what it promised to do “[g]oing forward” in a press release on March 18, 2021.¹⁰¹ In that press release, Chairman Glick stated that

[g]oing forward, [the Commission is] committed to treating greenhouse gas emissions and their contribution to climate change the same as all other environmental impacts we consider. . . . A proposed pipeline’s contribution to climate change is one of its most consequential environmental impacts and we must consider all evidence in the record—both qualitative and quantitative—to assess the significance of that impact.¹⁰²

⁹⁹ EA at 69–70.

¹⁰⁰ 174 FERC ¶ 61189 (2021).

¹⁰¹ News Release, Fed. Energy Regul. Comm’n, FERC Reaches Compromise on Greenhouse Gas Significance (Mar. 18, 2021), https://www.FERC.gov/news_events/news/FERC-reaches-compromise-greenhouse-gas-significance#.

¹⁰² *Id.*

Taken together, the 2017 FEIS and the EA fail to “assess the significance of” the project’s climate impact, as NEPA requires.¹⁰³ The EA ignores the scoping comments submitted by many organizations and individuals detailing the need for the Commission’s NEPA analysis to consider the full context of the proposed pipeline’s climate impacts using a Life Cycle Analysis, not solely the additional climate impacts of boring.¹⁰⁴

2. *Even the discussion of construction emission increases due to the proposed Amendment is inadequate.*

Even when the EA limits its analysis of climate impacts to the increase in construction emissions from the proposed change in crossing methods, it still fails to adequately quantify and analyze these climate impacts. The EA addresses greenhouse gas emissions and/or climate change in several places, but each time its treatment fails to take the requisite hard look at the project’s climate impacts.

First, the EA includes a paragraph stating that greenhouse gases cause climate change; listing carbon dioxide, methane, and nitrous oxide as greenhouse gases; and defining the term “CO₂ equivalents.”¹⁰⁵ This paragraph contains no

¹⁰³ For a discussion of this decision and the Commission’s March 18, 2021, press release and the ways the 2017 FEIS falls short of both, see Supplemental Scoping Comments at 129.

¹⁰⁴ See Scoping Comments submitted by Jessica Sims on behalf of Appalachian Voices, West Virginia Rivers Coalition, Protect Our Water Heritage Rights, and Chesapeake Climate Action Network at 2 (Apr. 15, 2021) (Accession No. 20210415-5251).

¹⁰⁵ EA, at 68.

indication of how such basic information applies to this pipeline and is couched in a section about the Clean Air Act and the National Ambient Air Quality Standards.¹⁰⁶

Second, the EA indicates that the boring amendment “would result in increases in construction emissions[,]” but this section only quantifies the increase in construction emissions from a change from dry-ditch, open-cut to trenchless methods for the selected crossings and draws conclusions about the impact on localized air quality rather than climate.¹⁰⁷

Third, the EA offers several pages of background information on the importance of climate change, only to go on to claim that Commission staff could not analyze the project-level climate impacts because “staff has not identified a methodology to attribute discrete, quantifiable, physical effects on the environment to the Amendment Project’s incremental contribution to GHGs.”¹⁰⁸

¹⁰⁶ *Id.* at 67–68.

¹⁰⁷ *Id.* at 69.

¹⁰⁸ *Id.* at 69–73. This is not the only instance of the EA acknowledging the impacts of climate change in one context while ignoring them in another. In the EA, Commission staff acknowledge that climate change will lead to “changes to water resources” and that “certain weather events are becoming more frequent and more severe.” EA at 70. Elsewhere, however, the EA’s analysis ignores the substantial changes to weather and precipitation patterns that will occur in the future. For example, the EA relies on data for the period 1985 to 2014 to characterize the regional climate, while describing recent precipitation levels as “unusually high.” EA at 19–20. In so doing, the EA ignores that precipitation and other weather patterns that appear highly “unusual” compared to historic data are quickly becoming the norm. The EA fails to properly account for these shifting patterns attributable to climate change.

The EA states that atmospheric modeling was “not reasonable for Project-level analysis” because “global models are not suited to determine the incremental impact of individual projects, due to both scale and overwhelming complexity.”¹⁰⁹ The EA further states that “staff could not identify a reliable, less complex model . . . and thus staff could not determine specific localized or regional physical impacts from GHG emissions from the Amendment Project.”¹¹⁰ The EA additionally states that, despite national and state-level commitments to emissions reduction targets, “Commission staff have not been able to find an established threshold for determining the Amendment Project’s significance when compared to established GHG reduction targets at the state or federal level.”¹¹¹

This explanation ignores available methods—raised by Commenters—of analyzing the significance of project-level climate impacts, including the Social Cost of Carbon.¹¹² There is no credible argument that the Social Cost of Carbon is not yet an accepted method, as it was first adopted in 2010 and was updated earlier this year.¹¹³ Indeed, the White House Office of Climate Policy is currently applying the

¹⁰⁹ *Id.* at 73.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 73–75.

¹¹³ *See generally* Interagency Working Group on Social Cost of Greenhouse Gases, Technical Support Document (2021), *available at* https://www.whitehouse.gov/wp_content/uploads/2021/02/TechnicalSupportDocument_SocialCostofCarbonMethaneNitrousOxide.pdf; Interagency Working Group on

same principles to develop a Social Cost of Methane.¹¹⁴ The EA does not even mention the Social Cost of Carbon, much less explain or justify the decision not to use it. Instead, the EA pays lip service to the importance of climate change, only to revert to the traditional excuse that incremental increases in a global problem are difficult to quantify. This type of glib excuse for failing to adequately consider climate impacts, even when they are difficult to quantify, is becoming increasingly unacceptable to courts.¹¹⁵

Finally, the EA oddly concludes that the increase in construction emissions from the amendment (listed as 14,626.02 metric tons of CO₂e in one place¹¹⁶ and 13,268.5 metric tons CO₂e in another¹¹⁷) is not significant because the Commission

the Social Cost of Carbon, Technical Support Document (2010), *available at* https://www.epa.gov/sites/production/files/201612/documents/scc_tsd_2010.pdf.

¹¹⁴ Zack Colman, *Scientists Say the World Urgently Needs to Cut Methane Emissions. The Politics Aren't as Simple.*, POLITICO (Aug. 24, 2021), <https://www.politico.com/news/2021/08/24/methane-emissions-cut-politics-506736>.

¹¹⁵ *See, e.g., Sovereign Inupiat for a Living Arctic v. Bureau of Land Mgmt.*, ___ F. Supp. 3d ___, No. 3:20-CV-00290-SLG, 2021 WL 3667986, at *11–*12, *46 (D. Alaska Aug. 18, 2021) (vacating an oil and gas project's approval after finding that agency's exclusion of foreign end-use emissions from NEPA analysis was arbitrary and capricious where the agency based its decision on negligible environmental impact and purported lack of information as to foreign energy consumption and emissions patterns but failed to thoroughly explain why estimating foreign emissions was impossible, failed to cite any materials or research relied upon, and failed to discuss how downstream foreign oil consumption could change carbon dioxide equivalents analysis).

¹¹⁶ EA at 69.

¹¹⁷ *Id.* at 75.

had previously found that an entire project that would emit a total of 20,006 metric tons of CO₂e would not be significant.¹¹⁸ Of course, that comparison is inapt, as it makes little sense to compare an increase in emissions for a project that will already result in very high emissions to the total emissions anticipated from an entire project. Thus, even the limited analysis of the project's increase in emissions from the boring amendment is entirely inadequate.

3. *The Commission should refuse to adopt an order on the pending application until its staff follows the Chairs' March 2021 directive on the consideration of climate impacts.*

As discussed above, in March 2021, Chairman Glick committed to considering all evidence related to the greenhouse gas emissions and climate change impacts of the projects that the Commission approves.¹¹⁹ In the EA, however, Commission staff completely failed to honor that commitment. In its forthcoming decision on the pending amendment application, the Chair and the Commission have the opportunity to demonstrate that their words are not empty platitudes and that they are serious about climate change. Accordingly, the Commission should refuse to act on the

¹¹⁸ *Id.*

¹¹⁹ News Release, Fed. Energy Regul. Comm'n, *FERC Reaches Compromise on Greenhouse Gas Significance* (Mar. 18, 2021), https://www.FERC.gov/news_events/news/FERC-reaches-compromise-greenhouse-gas-significance#.

pending application until staff fully considers all of the evidence in the record about the climate change impacts of the Mountain Valley Pipeline.

B. The Corps Cannot Issue a 404 Permit to Mountain Valley Without a Supplemental NEPA Analysis Because this EA and the 2017 FEIS Do Not Adequately Consider Climate Impacts.

In previous comments, many organizations have emphasized that, if the Commission failed to adequately consider the project's climate impacts in this NEPA document, the Corps would need to conduct its own NEPA analysis due to the inadequacy of the 2017 FEIS.¹²⁰ It is now clear that the Corps will have to prepare a separate NEPA analysis that fully considers the climate impacts of the pipeline, including methane emissions from the pipeline infrastructure and end-use greenhouse gas emissions over its entire expected lifespan.

It would be arbitrary and capricious for the Corps to simply adopt the 2017 FEIS and the EA without conducting its own NEPA review of the climate change effects of the MVP. As discussed elsewhere in these comments, when a cooperating agency in a NEPA review submits scoping comments to the lead agency, and those comments are inadequately addressed in the resulting NEPA document, the cooperating agency cannot simply adopt that resulting NEPA document without independent review.¹²¹ Here, when the Corps accepted the Commission's invitation to be a cooperating agency, it provided specific scoping comments "to ensure the information presented in any National Environmental Policy Act (NEPA) document

¹²⁰ See Supplemental Scoping Comments at 126–33; Scoping Comments at 48–50.

¹²¹ *Cowpasture River*, 911 F.3d at 170–73; see also *Sierra Club*, 897 F.3d at 594–96.

is adequate to fulfill the Corps' statutory requirements, including the requirements of Section 404(b)(1) of the Clean Water Act (40 CFR 230) and the Corps' public interest review (33 CFR 320.4)[.]”¹²² Among the items that the Corps requested the Commission evaluate in the resulting NEPA document were the Corps' public interest review factors, including, but not limited to, general environmental concerns, energy needs, and the needs and welfare of the people.¹²³ The Corps informed the Commission that those “factors should be scoped and evaluated in the NEPA document.”¹²⁴

Climate change and the need for carbon-free energy sources fit squarely within the public interest review factors the Corps requested be included in the Commission's NEPA document, especially the categories of general environmental concerns, energy needs, and the needs and welfare of the people. And, of course, climate change and the shift to carbon-free energy sources are extremely high priorities for both the federal government and the public—as evidenced, respectively, by President Biden's executive orders and rejoining of the Paris Agreement¹²⁵ and by the sheer volume of public comments expressing concern for this project's climate impacts and lock-in of fossil fuel infrastructure. Accordingly, the Corps must evaluate

¹²² Letter from Teresa D. Spagna, Chief, North Regul. Branch, Huntington Dist., U.S. Army Corps of Eng'rs, to Kimberly D. Bose, Secretary, Fed. Energy Regul. Comm'n, Re: Acceptance of Cooperating Agency Responsibility, at 2 (Mar. 8, 2021) (Accession No. 20210311-5077).

¹²³ *Id.* at 4–5.

¹²⁴ *Id.* at 5.

¹²⁵ *See infra* Section III.C.

climate impacts in its public interest review. But, as described above, the Commission's consideration of those issues in the 2017 FEIS and the EA are wholly inadequate. As a result, under *Cowpasture River*, the Corps cannot simply adopt the Commission's NEPA documents. Rather, it must independently review the climate impacts of the Mountain Valley Pipeline Project in its public interest review **and** in a supplemental NEPA document.¹²⁶

¹²⁶ Mountain Valley's recently announced "mitigation" plan does not render this project's climate impacts insignificant because it addresses only a small portion of the emissions resulting from the pipeline. Mountain Valley plans to mitigate its GHG emissions by purchasing \$150 million in carbon offsets, which would be generated through a methane abatement program at a coal mine in Southwestern Virginia that would convert methane into carbon dioxide and water before release. Laurence Hammack, *Mountain Valley Pipeline to Purchase \$150 Million in Carbon Offsets*, ROANOKE TIMES (July 12, 2021), https://roanoke.com/business/local/mountain-valley-pipeline-to-purchase-150-million-in-carbon-offsets/article_9126aac6-e34c-11eb-89da-7bc791f77d9d.html. Mountain Valley admits that the purchased offsets only cover the pipeline's first ten years of operational emissions (only one-fifth of its expected lifespan). *Id.* It is likely that Mountain Valley's purchased offsets will cover an even smaller portion than it claims of its operational methane emissions—which include leakage and intentional releases of methane from the pipeline and compressor stations—as recent research has shown that these methane emissions are routinely underestimated by both industry and government agencies. Even if Mountain Valley's claims are accurate, the program will do nothing to mitigate the pipeline's methane leaks and releases during the balance (approximately 40 years) of its expected lifespan. Lastly, and most importantly, the plan does nothing to mitigate the greenhouse gas emissions resulting from end-use combustion. *Id.*

The inadequacy of Mountain Valley's carbon offset plan is plain. Indeed, even as Mountain Valley touts its carbon offset plan, others have recognized its inadequacies. Laurence Hammack, *Pipeline's Plan to Offset Greenhouse Gas Emissions Questioned by Environmentalists*, ROANOKE TIMES (July 30, 2021), https://roanoke.com/business/local/pipelines-plan-to-offset-greenhouse-gas-emissions-questioned-by-environmentalists/article_bb46c980-f17a-11eb-84c6-6fcf1344e5e8.html; *see also* William Limpert, *Pipeline's Carbon Offsets Don't Come Close to Adding Up*, VA. MERCURY (July 28, 2021), <https://www.virginiamercury.com/2021/07/28/pipelines-carbon-offsets-dont-come-close-to-adding-up/>. This plan does not curtail the project's grievous climate impacts and does nothing to distract from the obvious conclusion that the pipeline would be

C. Now is the Time for Federal Agencies to Move Beyond Rhetoric and Actually Apply Our National Climate Policy.

The gulf between this Administration’s statements and action on climate change is increasingly noted in the media, both in terms of this pipeline¹²⁷ and more generally.¹²⁸ Permitting this project will severely undermine the public’s trust that

extremely harmful for the climate and cannot be squared with the federal government’s climate commitments.

¹²⁷ See, e.g., Crystal Cavalier & Michael E. Mann, *Biden Must Stop Methane Pipelines to Delivery on Climate Change and Environmental Justice*, USA TODAY (June 21, 2021) (“The Mountain Valley Pipeline and others awaiting approval are nails in America’s climate coffin. . . . We fervently hope the Biden administration intends to make genuine progress on the paired crises of climate change and environmental justice. The MVP, for starters, has no place in that vision for America.”).

¹²⁸ See, e.g., Darryl Fears, *Biden Officials Trumpet How Solar Can Provide Nearly Half of the Nation’s Electricity by 2050*, WASH. POST (Sept. 8, 2021), <https://www.washingtonpost.com/climate-environment/2021/09/08/biden-solar-climate-change/> (“[I]n recent weeks some environmental groups have begun to question Biden’s commitment to curbing fossil fuels linked to climate change, especially since the Interior Department announced it would hold an oil and gas sale on 80 million acres in the Gulf of Mexico this fall”); Lisa Friedman, *Biden Administration Defends Huge Alaska Oil Drilling Project*, NY TIMES (May 26, 2021), <https://www.nytimes.com/2021/05/26/climate/biden-alaska-drilling.html>; Brad Plumer, *Nations Must Drop Fossil Fuels, Fast, World Energy Body Warns*, NY TIMES (May 18, 2021), <https://www.nytimes.com/2021/05/18/climate/climate-change-emissions-IEA.html> (“We’re seeing more governments around the world make net-zero pledges, which is very good news,’ [International Energy Agency Director Fatih] Birol said. ‘But there’s still a huge gap between the rhetoric and the reality.”); Christopher Flavelle, *Climate Change is Making Big Problems Bigger*, NY TIMES (May 12, 2021), <https://www.nytimes.com/2021/05/12/climate/climate-change-epa.html> (“While Dr. [Kristina Dahl, a senior climate scientist with the Union of Concerned Scientists,] applauded the Biden administration for updating and expanding its climate data, she said the work that matters is changing those trends. ‘It’s a bare minimum that this kind of data should be updated regularly and available to the public,’ Dr. Dahl said. ‘We have a very long, uphill road ahead of us for actually enacting policies that will make change.”).

the Administration is willing to move beyond rhetoric and actually implement the policies it espouses.

Furthermore, there has been a recent increase in attention on reducing methane emissions in addition to carbon dioxide, because methane is many times more powerful than carbon dioxide in warming the atmosphere over a short timescale.¹²⁹ In the United States, the gas industry is a prominent source of this potent greenhouse gas from both inadvertent leaks and intentional venting occurring throughout natural gas infrastructure.¹³⁰ In May, a new report from the United Nations Environment Programme declared:

Lower methane concentrations would rapidly reduce the rate of warming, making methane mitigation one of the best ways of limiting warming in this and subsequent decades. Doing so would also help limit dangerous climate feedback loops, while simultaneously delivering important health and economic benefits from reducing ground-level ozone.¹³¹

The report further explains that “without relying on future massive-scale deployment of unproven carbon removal technologies, expansion of natural gas infrastructure and usage is incompatible with keeping [global] warming to 1.5° C[.]”¹³² the goal the

¹²⁹ Ilissa B. Ocko et al., *Acting Rapidly to Deploy Available Methane Mitigation Measures By Sector Can Immediately Slow Global Warming*, 16 ENVTL. RESEARCH LETTERS 054042 (2021), available at <https://doi.org/10.1088/1748-9326/abf9c8>.

¹³⁰ See generally INT’L ENERGY AGENCY, DRIVING DOWN METHANE LEAKS FROM THE OIL AND GAS INDUSTRY: A REGULATORY ROADMAP AND TOOLKIT (2021).

¹³¹ UNITED NATIONS ENVIRONMENT PROGRAMME, GLOBAL METHANE ASSESSMENT, Executive Summary at 8 (2021), <https://bit.ly/2TanDvg>.

¹³² *Id.* at 10.

United States agreed to work toward by rejoining the Paris Agreement.¹³³ Increasing emissions of methane by building new gas infrastructure will thus make it extremely difficult to curb catastrophic warming in the short term. There is a clear conflict between our national climate policy and building this pipeline, a conflict that is not escaping anyone’s notice.

V. THE NEPA DOCUMENTS FOR THE CERTIFICATE AMENDMENT AND ANY CORPS PERMIT MUST EXAMINE THE CUMULATIVE EFFECTS OF THE HUNDREDS OF CROSSINGS PROPOSED BY MOUNTAIN VALLEY.

Among the factual findings that the Corps must make under the 404(b)(1) Guidelines is a “[d]etermination of cumulative effects on the aquatic ecosystem.”¹³⁴ Cumulative effects must also be evaluated as part of the factual determinations of the effects of the proposed discharge on the physical substrate, the effects of suspended particulates and turbidity, and the effects on the structure and function of the aquatic ecosystem and organisms.¹³⁵

In its scoping comments to the Commission, the Corps expressly requested that the NEPA document the Commission was working on “scope[] and evaluate[]” “[t]he cumulative and indirect impacts on aquatic resources resulting from the Project.”¹³⁶

¹³³ *The Paris Agreement*, UNITED NATIONS, <https://www.un.org/en/climatechange/paris-agreement>.

¹³⁴ 40 C.F.R. § 230.11(g).

¹³⁵ *Id.* § 230.11(a), (c), & (e).

¹³⁶ Letter from Teresa D. Spagna, Chief, North Regul. Branch, Huntington Dist., U.S. Army Corps of Eng’rs, to Kimberly D. Bose, Secretary, Fed. Energy Regul. Comm’n, Re: Acceptance of Cooperating Agency Responsibility at 5 (Mar. 8, 2021) (Accession No. 20210311-5077).

The Commission, however, completely ignored that request by the Corps. Accordingly, under Fourth Circuit precedent, it would be arbitrary and capricious for the Corps to adopt and rely on the EA; rather, the Corps must independently review the cumulative impacts of the MVP on aquatic resources.¹³⁷

Here, to lawfully support any authorization by the Commission or the Corps, the NEPA document must include a detailed statement of the cumulative environmental effects of all of the proposed crossings, regardless of any purported effect of the 2020 NEPA regulations on a federal agency's obligation to consider cumulative effects. That is so because:

- (1) the Corps, as a cooperating agency, has to ensure that the information in the NEPA document produced in this process is “adequate to fulfill the Corps’ statutory requirements, including the requirements of Section 404(b)(1) of the Clean Water Act,”¹³⁸
- (2) the pre-2020 NEPA regulations require an examination of cumulative effects,¹³⁹ and
- (3) Mountain Valley’s proposed crossings are “connected actions” whose impacts require review even under the 2020 NEPA regulations.¹⁴⁰

¹³⁷ *Cowpasture River*, 911 F.3d at 170–73; *see also Sierra Club*, 897 F.3d at 594–96.

¹³⁸ Letter from Jon T. Coleman, Pittsburgh District, U.S. Army Corps of Eng’rs, to Kimberly D. Bose, Secretary, Fed. Energy Regul. Comm’n, Re: Acceptance of Cooperating Agency Responsibility (Mar. 10, 2021) at 1–2.

¹³⁹ *See, e.g.*, 40 C.F.R. § 1508.25(c)(3) (2019).

¹⁴⁰ 40 C.F.R. § 1501.9(e). Because all of Mountain Valley’s proposed crossings are indisputably connected actions under that regulation, the Commission and the Corps

The 404(b)(1) Guidelines recognize that, “[a]lthough the impact of a particular discharge may constitute a minor change in itself, the cumulative effect of numerous such piecemeal changes can result in a major impairment of the water resources and interfere with the productivity and water quality of existing aquatic ecosystems.”¹⁴¹ That description of cumulative effects remarkably tracks the conclusions of the scientific literature on the significant cumulative effects of dry-ditch, open-cut crossings:

The potential for cumulative effects associated with pipeline crossing construction should be taken into consideration in assessing the impacts of these activities on rivers and streams. Construction of a single crossing on a stream or river, or within a watershed, may not have significant effects on fish and fish habitat in that system. **Construction of multiple crossings on a stream or river, or within a watershed, however, has the potential for cumulative effects on that system. In such cases, the capacity of the system to recover from impact may be exceeded, and the detrimental effects of crossing construction permanent. The same may be said for the frequency of crossing construction within a given system; rivers and streams will have limited capacities to recover from multiple impacts.**¹⁴²

Despite the 404(b)(1) Guidelines’ requirements for factual findings regarding cumulative effects, and despite the scientific literature’s clear predictions of

must consider the additive or cumulative effects of each crossing, along with the additive or cumulative effects of the crossings and upland construction, which are also connected actions. This section of the comments should be construed to use the term “cumulative effects” to include the additive/combined effects of the various connected actions necessary to complete the MVP as proposed by Mountain Valley.

¹⁴¹ *Id.* § 230.11(g).

¹⁴² Lévesque and Dubé, *Review of the Effects of In-stream Pipeline Crossing Construction on Aquatic Ecosystems and Examination of Canadian Methodologies for*

significant effects, Mountain Valley’s application to the Corps is devoid of any useful analysis of the cumulative effects of its proposed crossings. The absence of such information raised concerns for EPA, as described in that agency’s May 27, 2021 comments on Mountain Valley’s application to the Corps.¹⁴³ For example, EPA recommended “a conclusive evaluation at watershed scale (i.e. HUC 12) be provided to ensure that measures are undertaken to avoid and minimize the potential of cumulative impacts,”¹⁴⁴ and asked the Corps to require special provisions applicable to streams and wetlands impacted multiple times by construction of the MVP.¹⁴⁵

In previous comments, Commenters have repeatedly detailed the cumulative effects that the agencies must consider, including the streams and watersheds that the MVP would cut multiple times with its proposed open-cut trenches.¹⁴⁶ Thus far, the agencies have ignored those comments. But they do so at their peril. Any NEPA review that omits examination of the cumulative effects of Mountain Valley’s crossings will be insufficient to support an agency action on the company’s pending permits.

Impact Assessment, 132 ENVTL. MONITORING & ASSESSMENT 395, 406–07 (2007) (attached as Ex. 13).

¹⁴³ Lapp Letter at 1 (noting an “insufficient assessment of secondary and cumulative impacts”).

¹⁴⁴ *Id.* at 8.

¹⁴⁵ *Id.* at 7.

¹⁴⁶ 404 Comments at 133–36; Supplemental Scoping Comments at 105–08.

Furthermore, to be complete, the environmental review the Commission and the Corps conduct must account for the combined effects of *trenchless* crossings with *open-cut*, *dry-ditch* crossings. There may be cumulative impacts from those two methods that the Commission and the Corps must analyze in their NEPA documents. For example, trenchless crossings in a watershed may affect water *quantity* in such a way as to reduce the flow available in downstream reaches to clear sedimentation from open-cut, dry-ditch crossings in downstream reaches.

One key cumulative impacts issue that the EA ignores is the extent to which bore pit dewatering will affect nearby surface waters and wetlands, especially those that are proposed for both trenched and trenchless crossings in close proximity.¹⁴⁷ A 2021 report by the Virginia Scientist-Community Interface notes that “[h]eadwater streams, wetlands, and groundwater form a complex hydrologic network, and hillslopes, headwater streams, and downstream waters are best described as individual elements of integrated hydrological systems.”¹⁴⁸ It would be arbitrary to

¹⁴⁷ One example occurs in Virginia, near Bent Mountain, where Mountain Valley proposes seven crossings—a combination of trenched and trenchless—within .4 miles of one another, all affecting wetlands along Mill Creek and tributaries to Mill Creek, which flows parallel to and very near the right-of-way. See Mountain Valley Pipeline, LLC, Roanoke County Detail Map Fig. 4-653 (Feb. 2021) This map ostensibly is available with Mountain Valley’s individual permit application materials at Accession No. 2021-0304-5122, but the FERC eLibrary returns an unexpected error message when access is attempted; the map is also available via Virginia DEQ at <https://www.deq.virginia.gov/home/showpublisheddocument/5400/637502240076230000>.

¹⁴⁸ Virginia Scientist-Community Interface, Geology, Hydrology, Ecology, and Soils May Present Challenges for Construction of the Mountain Valley Pipeline near Bent Mountain, Virginia at 3 (July 2021) (attached as Ex. 14) (Accession No. 20210802-5098).

ignore the risk—and at some sites, the likelihood—that bore pit dewatering operations will also dewater nearby surface waters and wetlands. For example, licensed professional geologist Pamela C. Dodds, Ph.D., notes, in the vicinity of Bent Mountain, Virginia, the hydraulic connectivity between the area’s perched aquifers and its surface waters and wetlands.¹⁴⁹ It is incumbent upon the Commission and the Corps to account for the cumulative impacts of trenching and tunneling, including bore pit dewatering, in areas like this along the pipeline route. Notably, however, this cumulative impacts analysis will require site-specific information because, as the Virginia Scientist-Community Interface notes with respect to construction challenges near Bent Mountain, “[p]ublicly available data and best available science demonstrate the ecological important, environmental heterogeneity, and sensitivity of Blue Ridge headwater streams and underlying aquifers.”¹⁵⁰ Indeed, the Virginia Scientist-Community Interface report explains: “Because of the considerable hydrological connection between groundwater and surface water . . . dewatering of [the] bore pits may impact groundwater sources and lead to alterations of the wetlands they sustain. Because geological, terrain, and soil characteristics on Bent Mountain are highly heterogenous, field-based site-specific planning and geotechnical analysis must take place before construction begins.”¹⁵¹

¹⁴⁹ Pamela C. Dodds, Hydrogeological Assessment of Proposed Mountain Valley Pipeline Construction Impacts to Mill Creek, Bent Mountain Area, Roanoke County, Virginia at 24 (June 2017) (attached as Ex. 15).

¹⁵⁰ Virginia Scientist-Community Interface (2021) at 5.

¹⁵¹ *Id.* at 2 (emphasis omitted).

Also missing from the EA is any examination of the cumulative impacts that would result from the combination of Mountain Valley's upland activities and proposed stream crossings. Mountain Valley's upland activities have already led to substantial sediment deposits along streams in its path. Expert Starr Silvis predicts these impacts from upland disturbances:

The conversion of forested land to maintained right-of-way increases runoff volumes, which will change stream morphology. Lack of intact forest cover has been found to change stream morphology for two to four years post-disturbance (Reid & Anderson 1999). Methods to maintain the right-of-way include the use of pesticides and herbicides which can be mobilized in stormwater runoff and cause degradation of aquatic ecosystems. The construction of temporary and permanent access roads also increases runoff volumes and increases turbidity and sediment migration from upland areas to water bodies. The increases in stormwater runoff volumes can alter stream morphology and stream bed composition. There are also long-term increases in temperature associated with the reduction of forested canopy for both streams and wetlands.¹⁵²

And, as Hansen & Betcher (2021) conclude, given that Mountain Valley “has been contributing sediment to streams along the pipeline’s route during upland construction[, c]onstruction of stream crossings would only compound the sediment inputs to streams along the pipeline’s route.”¹⁵³ As a result, the Commission and the Corps must consider whether the locations that would be affected by sedimentation from Mountain Valley’s proposed open-cut stream crossings have also been affected

¹⁵² Starr Silvis, Review of Mountain Valley Pipeline, LLC’s Application for an Individual Section 404 Permit from the U.S. Army Corps of Engineers at 4 (May 27, 2021) (attached as Ex. 16).

¹⁵³ Evan Hansen & Meghan Betcher, Sediment Generation and Impacts from Dry-Ditch Open-Cut Stream Crossings Such as Those Proposed for the Mountain Valley Pipeline at 5 (May 26, 2021) (attached as Ex. 17).

by sedimentation and runoff from Mountain Valley's upland activities and determine the cumulative effects of those discharges on the aquatic ecosystems.

In sum, because of the requirements of the 404(b)(1) Guidelines, the scientific literature establishing potentially permanent impacts to watersheds from multiple trenched crosses in the same watershed, the silence of Mountain Valley's application on those issues, and the connected nature of the actions that would occur under the proposed certificate amendment and Corps permit, the Commission and the Corps must take a hard look at the combined effects of Mountain Valley's proposed crossings in their NEPA documents. The EA does not do so. Accordingly, it cannot support any agency action authorizing Mountain Valley to trench through or bore under waterbodies in its path.

VI. THE NEPA DOCUMENT MUST EXAMINE THE UNIQUE NATURE OF THE WETLANDS ON BENT MOUNTAIN IN VIRGINIA.

The wetlands in the vicinity of Bent Mountain, Virginia, provide a case study in the kind of review the Corps must undertake—and thus the kind of information that must be present (but isn't) in the NEPA document. The EA should have taken a hard look at the environmental impacts of Mountain Valley's requested amendment activities and stream crossings and equipped the Corps to make its required substantive determinations, including its public interest review determinations under 33 C.F.R. § 320.4.¹⁵⁴ But it did not. That deficiency must be remedied before the Commission or the Corps act on Mountain Valley's pending application.

¹⁵⁴ See, e.g., Letter from Jon T. Coleman, Pittsburgh Dist., U.S. Army Corps of Eng'rs, to Kimberly D. Bose, Secretary, Fed. Energy Regul. Comm'n Re: Acceptance of

Commenters and others including EPA have noted that Mountain Valley's application materials are far too general and that the Commission and the Corps must undertake site-specific analyses. As explained below, the wetlands in the vicinity of Bent Mountain, Virginia are entitled to consideration under the Corps' public interest regulations such that a permit presumptively may not issue.¹⁵⁵ Those wetlands are also a microcosm of conditions likely to be found along the proposed pipeline route and highlight information that must be addressed in the agencies' NEPA documents.

The Corps' public interest regulations recognize that "[m]ost wetlands constitute a productive and valuable public resource, the unnecessary destruction or alteration of which should be discouraged as contrary to the public interest."¹⁵⁶ The same regulations also recognize that wetlands can face major impairment due to the cumulative effect of numerous piecemeal changes, and the regulations require the Corps to evaluate "the particular wetland site for which an application is made . . . with the recognition that it may be part of a complete and interrelated wetland area."¹⁵⁷ Finally, the regulations identify eight non-exclusive categories of wetlands

Cooperating Agency Responsibility (Mar. 10, 2021) ("[T]o ensure the information presented in any National Environmental Policy Act (NEPA) document is adequate to fulfill the Corps' statutory requirements, including the requirements of Section 404(b)(1) of the Clean Water Act (40 CFR 230) and the Corps' public interest review (33 CFR 320.4), the Corps requests the topics listed in Enclosure 1 be included in the scoping and evaluation of any submitted NEPA document.").

¹⁵⁵ See 33 C.F.R. § 320.4(b)(4).

¹⁵⁶ 33 C.F.R. § 320.4(b).

¹⁵⁷ 33 C.F.R. § 320.4(b)(3).

that are “considered to perform functions important to the public interest”¹⁵⁸ and create a rebuttable presumption that “no permit will be granted which involves the alteration” of wetlands in those categories unless the Corps expressly concludes that “the benefits of the proposed alteration outweigh the damage to the wetlands resource.”¹⁵⁹

The wetlands in and around Bent Mountain perform functions important to the public interest as described in 33 C.F.R. § 320.4(b)(2) and, therefore, fall into

¹⁵⁸ 33 C.F.R. § 320.4(b)(2). Those categories of wetlands include:

- (i) Wetlands which serve significant natural biological functions, including food chain production, general habitat and nesting, spawning, rearing and resting sites for aquatic or land species;
- (ii) Wetlands set aside for study of the aquatic environment or as sanctuaries or refuges;
- (iii) Wetlands the destruction or alteration of which would affect detrimentally natural drainage characteristics, sedimentation patterns, salinity distribution, flushing characteristics, current patterns, or other environmental characteristics;
- (iv) Wetlands which are significant in shielding other areas from wave action, erosion, or storm damage. Such wetlands are often associated with barrier beaches, islands, reefs and bars;
- (v) Wetlands which serve as valuable storage areas for storm and flood waters;
- (vi) Wetlands which are ground water discharge areas that maintain minimum baseflows important to aquatic resources and those which are prime natural recharge areas;
- (vii) Wetlands which serve significant water purification functions; and
- (viii) Wetlands which are unique in nature or scarce in quantity to the region or local area.

33 C.F.R. § 320.4(b)(2)(i)–(viii).

¹⁵⁹ 33 C.F.R. § 320.4(b)(4).

many of the specially-protected categories of wetlands itemized in that regulation. For example, a June 2017 report by licensed professional geologist Pamela C. Dodds, Ph.D., notes that “[e]xtensive wetlands areas are developed along first order stream tributaries to Mill Creek as well as along Mill Creek,” and that “[t]he headwater areas and wetlands associated with the first order stream tributaries to Mill Creek provide the essential aquatic habitats for aquatic species and associated terrestrial fauna and fowls within the entire length of the river continuum.”¹⁶⁰ Dodds’ statement is consistent with a 2021 report by the Virginia Scientist-Community Interface, which states that the “[s]treams and wetlands surrounding Bent Mountain are a part of the headwaters of the Roanoke River,” and explains that “[h]eadwater streams are widely recognized as providing valuable aquatic habitat for a variety of aquatic species and it has been recognized that the biological integrity of entire river networks may be greatly dependent on the individual and cumulative impacts occurring in the many small streams that constitute their headwaters.”¹⁶¹

The wetlands in and around Bent Mountain are inextricably linked to groundwater in the area.¹⁶² For example, Dodds notes that the proposed pipeline route encounters “numerous wetlands which have formed in areas of a perched water table.”¹⁶³ Dodds explains:

¹⁶⁰ Dodds (2017) at 1; *see also* 33 C.F.R. § 320.4(b)(2)(i).

¹⁶¹ Virginia Scientist-Community Interface (2021) at 3 (internal quotation marks and emphasis omitted).

¹⁶² *See* 33 C.F.R. § 320.4(b)(2)(vi).

¹⁶³ Dodds (2017) at 24.

Perched aquifers are numerous in the watersheds of Mill Creek and Bottom Creek, accounting for the numerous wetlands. During a rain event, water will penetrate the ground and slowly migrate downward to the perched aquifer. Water in the perched aquifer will then provide water through springs to tributary streams in wetland areas, sometimes causing a large stream flow several days after a rain event.¹⁶⁴

Finally, Dodds notes that these perched aquifers “form[] seeps and springs where the bedding planes and fractures [in bedrock] intercept the ground surface,” and that these “seeps and springs also occur within streams and along stream banks, providing water to streams during drought conditions.”¹⁶⁵

The NEPA process must account for the fact that the Corps is obligated to favor these wetlands and presumptively may not issue a permit absent an express finding that the benefits outweigh the costs.¹⁶⁶ In other words, under the Corps’ regulations, even equipoise favors the wetlands on Bent Mountain. And, even as Bent Mountain’s wetlands merit special solicitude in their own right, they also demonstrate the reality that myriad other wetlands along the pipeline right are surely also entitled to a presumption of protection under 33 C.F.R. § 320.4(b)(4). Thus far, the agencies have cooperated on a NEPA document that cannot support the lawful issuance of a Corps permit. The only way to remedy that defect is for the Commission and the Corps take a hard look at the site-specific characteristics of the streams and wetlands Mountain Valley proposes to degrade.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 37.

¹⁶⁶ 33 C.F.R. § 320.4(b)(4).

VII. THE COMMISSION MAY NOT GRANT THE REQUESTED AMENDMENT ABSENT STATE CERTIFICATION OR WAIVER FROM VIRGINIA AND WEST VIRGINIA UNDER SECTION 401 OF THE CLEAN WATER ACT.

The requested certificate amendment, if granted, would constitute a “Federal license or permit to conduct [an] activity . . . which may result in [a] discharge into the navigable waters,” thereby triggering the need for state certification under Section 401 of the Clean Water Act.¹⁶⁷ The Commission cannot grant the requested certificate amendment absent state certification or waiver from Virginia and West Virginia.

A. Background

On February 19, 2021, Mountain Valley submitted an application to the Commission requesting that the Commission issue an order “amending Mountain Valley’s certificate of public convenience and necessity for the Mountain Valley Pipeline Project to grant Mountain Valley the ability to change the crossing method for specific wetlands and waterbodies yet to be crossed by the Project from the open-cut crossings to one of several trenchless methods.”¹⁶⁸ In its application, Mountain Valley proposes “to use trenchless methods at 120 locations to cross 181 waterbodies and wetlands that the Commission originally authorized as open-cut. Mountain

¹⁶⁷ 33 U.S.C. § 1341.

¹⁶⁸ Accession No. 20210219-5176 at 1.

Valley is also requesting authorization for two minor right-of-way shifts to avoid resources.”¹⁶⁹

On March 12, 2021, the Commission issued an environmental information request that, among other things, asked Mountain Valley whether its application for a certificate amendment required new certifications under Section 401 of the Clean Water Act, 33 U.S.C. § 1341.¹⁷⁰ Mountain Valley submitted a response on March 29, 2021.¹⁷¹ Mountain Valley took the position that:

[n]o additional 401 Water Quality Permit is required for the Amendment Project, including trenchless crossings of Section 10 streams. The Virginia State Water Control Board issued a water quality certification on December 8, 2017, that expressly covers future modifications to the Project approached by the Commission As required by the certification, Mountain Valley notified the Virginia Department of Environmental Quality of the Amendment Project on February 19, 2021. The West Virginia Department of Environmental Protection issued a general waiver of its authority to issue a water quality certification for the MVP Project on November 1, 2017¹⁷²

In their April 15, 2021 scoping comments, Commenters informed the Commission that Mountain Valley’s position is incorrect.¹⁷³ Commenters explained that there is no genuine dispute the requested certificate amendment triggers Section

¹⁶⁹ *Id.*

¹⁷⁰ Accession No. 20210310-3016.

¹⁷¹ Accession No. 20210329-5300.

¹⁷² *Id.* at 1.

¹⁷³ Accession No. 20210415-5319.

401.¹⁷⁴ To reiterate: Section 401 requires state certification before “a Federal license or permit to conduct any activity including, but not limited, the construction or operation of facilities, which may result in any discharge into the navigable waters” may issue.¹⁷⁵ The label on the federal approval in question is immaterial so long as it would authorize an “activity which may result in any discharge.”¹⁷⁶ Section 401 does not require any pollutant to be discharged: a discharge of water will suffice and the statute is triggered by the potential for a discharge to occur, rather than the presence of an actual discharge.¹⁷⁷

Commenters explained that Section 401’s standard is met here¹⁷⁸ and that, contrary to Mountain Valley’s position, Virginia’s 2017 upland certification and West Virginia’s 2017 waiver do not satisfy the Commission’s current obligation under Section 401.¹⁷⁹

¹⁷⁴ *Id.*

¹⁷⁵ 33 U.S.C. § 1341(a)(1).

¹⁷⁶ *Del. Riverkeeper Network v. FERC*, 857 F.3d 388, 398 (D.C. Cir. 2017) (cleaned up).

¹⁷⁷ *S.D. Warren Co. v. Maine Bd. of Env’tl. Prot.*, 547 U.S. 370, 375–84 (2006) (holding the term “discharge” in Section 401 does not require an addition of anything and that flowing water constitutes a discharge); Environmental Protection Agency, Clean Water Act Section 401 Certification Rule, 85 Fed. Reg. 42,237 (Jul. 13, 2020) (explaining that the statute “is triggered by the potential for a discharge to occur, rather than the presence of an actual discharge”).

¹⁷⁸ *See* Accession No. 20210415-5319

¹⁷⁹ *Id.*

On May 12, 2021, Commission staff wrote to the Virginia Department of Environmental Quality (“DEQ”) and the West Virginia Department of Environmental Protection (“WVDEP”) requesting those agencies’ “opinion . . . as to whether certification under Section 401 of the CWA is required for the amendment application activities.”¹⁸⁰ Many of the undersigned organizations subsequently wrote DEQ and WVDEP to explain that the requirements of the Clean Water Act are not a matter of opinion and that state certification is required by law.¹⁸¹

DEQ responded to the Commission’s inquiry on June 25, 2021¹⁸² and WVDEP responded on July 20, 2021.¹⁸³ Each agency offered its own dubious reasons why state actions from 2017 would obviate the need for any further state review or approval under Section 401 at this juncture.

¹⁸⁰ Letter from James Martin, FERC Office of Energy Projects, to Melanie Davenport, Virginia Department of Environmental Quality (May 13, 2021), Accession No. 20210513-3016; Letter from James Martin, FERC Office of Energy Projects, to Brian Bridgewater, West Virginia Department of Environmental Protection (May 13, 2021) (Accession No. 20210513-3012).

¹⁸¹ See Letter from Wild Virginia *et al.* to Melanie Davenport, Virginia Department of Environmental Quality and Donald Anderson, Virginia Office of the Attorney General (May 20, 2021) (Accession No. 20210520-5090); Letter from Wild Virginia *et al.* to Melanie Davenport, Virginia Department of Environmental Quality and Donald Anderson, Virginia Office of the Attorney General (June 21, 2021) (Accession No. 20210622-5067); Letters from Derek Teaney, Appalachian Mountain Advocates, to Brian Bridgewater, West Virginia Department of Environmental Protection (May 20, 2021 and June 21, 2021) (Accession No. 20210622-5093).

¹⁸² Accession No. 20210625-5242.

¹⁸³ Accession No. 20210723-5171.

In their August 2, 2021 supplemental scoping comments,¹⁸⁴ Commenters explained that the Commission’s own precedent confirms Section 401 certifications are “specific to individual federal authorization applications.”¹⁸⁵ Consequently, the Commission cannot satisfy its current obligation under Section 401 of the Clean Water Act by bootstrapping its action on Mountain Valley’s amendment application to years-old state actions on the pipeline’s original certificate.

The EA does not address the Section 401 issue. Rather, Commission staff noted that a “determination of whether a Section 401 certification is required for the Amendment Project” “may be addressed . . . in the subsequent Commission Order in this proceeding.”¹⁸⁶

B. Discussion

Commenters reiterate that the Commission cannot approve Mountain Valley’s requested certificate amendment absent state certification or waiver from Virginia and West Virginia under Section 401 of the Clean Water Act.

In particular, the Commission cannot satisfy its Section 401 obligation by relying on DEQ’s June 25 letter and WVDEP’s July 20 letter. Rather than forego the Section 401 process by assuming the outcome, the Commission must first answer the “logically antecedent” question of whether Section 401 is triggered.¹⁸⁷ As commenters

¹⁸⁴ Accession No. 20210802-5192.

¹⁸⁵ *Pacific Connector Gas Pipeline, LP*, 174 FERC ¶ 61,057 at ¶ 25 (Jan. 19, 2021).

¹⁸⁶ EA at 5–6.

¹⁸⁷ *North Carolina v. FERC*, 112 F.3d 1175, 1186 (D.C. Cir. 1997)

have explained previously, Section 401's standard is met here.¹⁸⁸ Indeed, the EA only confirms the potential for new discharges, acknowledging that the requested amendment would require potentially extensive dewatering of bore pits,¹⁸⁹ that there is a "small chance [that] drilling fluids could enter surface waterbodies incidentally as a result of an inadvertent spill at a workspace adjacent to a waterbody,"¹⁹⁰ and that trenchless crossings "could still affect water quality."¹⁹¹

It is irrelevant that the Commission required Section 401 certification at an earlier stage of the project. EPA expressly contemplated the need for a new Section 401 certification process under the circumstances here: "if a federal license or permit is modified *or the underlying project is changed such that the federal license or permit requires modification*, it may trigger the requirement for a new certification, depending on the federal agency's procedures."¹⁹² As Commenters have explained, the potential discharges from Mountain Valley's bore pit dewatering and tunneling operations are different in kind and degree from those associated with the construction of the pipeline as originally certificated. Moreover, any argument that Mountain Valley may have discharged the same total volume of water or pollutants under its original certificate is unpersuasive; an increase in the rate of discharge (for

¹⁸⁸ Accession No. 20210415-5319.

¹⁸⁹ *E.g.*, EA at 35.

¹⁹⁰ *Id.* at 36.

¹⁹¹ *Id.* at 33.

¹⁹² Clean Water Act Section 401 Certification Rule, 85 Fed. Reg. 42,210, 42,279 (July 13, 2020) (emphasis added).

example, from bore pit dewatering) is enough to trigger Section 401 “[g]iven the possibility that even a temporary increase in a discharge could have a negative water quality impact.”¹⁹³ Likewise, any argument that Mountain Valley’s tunneling plan involves only non-point source discharges that do not trigger Section 401 is legally incorrect; just last year, the United States Supreme Court confirmed that the Clean Water Act regulates point source discharges “when a point source directly deposits pollutants into navigable waters” and also “when there is the *functional equivalent of a direct discharge*.”¹⁹⁴ This is a context-specific test that accounts for distance, time, chemistry, hydrology, and more¹⁹⁵—which means categorical statements go too far.

It is also irrelevant for now that the trenchless crossings at issue in the requested amendment may be environmentally preferable if implemented correctly. Whether Mountain Valley can avoid violating water quality standards while it excavates bore pits and drills tunnels is a question for the Section 401 review process, not a reason to short-circuit that process. Many of the Commenters have long encouraged the company and regulators to consider trenchless crossings as an alternative to in-stream work because trenchless crossings can be less

¹⁹³ *Ala. Rivers Alliance v. FERC*, 325 F.3d 290, 300 (D.C. Cir. 2003).

¹⁹⁴ *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1476 (2020) (emphasis in original). *County of Maui* involved a dispute over an unpermitted effluent discharge rather than a Section 401 certification, but its explanation of the scope of point source discharges controls here even assuming Section 401 is limited to point source discharges, which provision we note has been challenged as an unlawful limitation on state authority under Section 401. See Compl. at 16 ¶¶ 5.45–5.48, *State of California et al. v. Wheeler*, No. 3:20-cv-04869 (N.D. Cal. July 21, 2020).

¹⁹⁵ *County of Maui*, 140 S. Ct. at 1476–77.

environmentally damaging. But the potential comparative benefits of trenchless crossings do not mean Mountain Valley enjoys free rein to tunnel as it sees fit. Section 401 review is key to ensuring that trenchless crossings avoid doing more harm than good. And to reiterate, the potential comparative benefits of trenchless crossings versus dry-ditch open cut crossings are not relevant to the threshold question of whether Section 401 certification is required.

Since Section 401 is triggered, the Commission must abide by it, which means (1) requiring Mountain Valley to request state certification from Virginia and West Virginia and (2) not proceeding absent certification (with or without conditions) or waiver. The request process is important because Section 401 certifications are “specific to individual federal authorization applications.”¹⁹⁶ And “[c]ertifying authorities may act on a certification request in one of four ways: granting certification, granting certification with conditions, denying certification, or waiving certification.”¹⁹⁷ Notably absent from this list is a scenario in which a certifying authority issues an advisory opinion about what it might determine in response to a certification request. The Commission cannot satisfy its *current* obligation under Section 401 of the Clean Water Act by relying on agency letters referencing *old* state certification decisions.

¹⁹⁶ *Pacific Connector Gas Pipeline, LP*, 174 FERC ¶ 61,057 at ¶ 25 (Jan. 19, 2021).

¹⁹⁷ Memorandum from Radhika Fox (EPA) and Jaime Pinkham (USACE) to EPA Regional Administrations et al. regarding Clean Water Act Section 401 Certification Implementation (Aug. 19, 2021), Encl. at 7, *available at* https://www.epa.gov/system/files/documents/2021-08/8-19-21-joint-epa-army-memo-on-cwa-401-implementation_508.pdf/.

WVDEP's response to the Commission in its July 20 letter is particularly problematic and invites the Commission to ignore Section 401 at its peril. In 2017, West Virginia issued a waiver of its Section 401 authority that was "specific to the above-referenced MVP project to construct a natural gas pipeline in West Virginia," and the waiver letter's subject line referred to "FERC Docket No. CP-16-10-000."¹⁹⁸ In its July 20, 2021 response to the Commission, WVDEP stated that it "does not believe the [requested amendment] creates a potential for a new discharge not previously considered in the 2017 waiver."¹⁹⁹ But WVDEP's statement here that the requested amendment would not involve "new discharge not previously considered in the 2017 waiver"²⁰⁰ finds no support in the record. On the contrary, the 2017 waiver was expressly limited to the pipeline activities authorized in Docket No. CP16-10, and the amendment request is plainly outside that scope. The Commission cannot credit West Virginia's post-hoc account of what the 2017 waiver purportedly covered when the State's position runs directly contrary to the plain terms of the 2017 waiver itself. The Commission also has a compelling practical reason not to rely on WVDEP's shaky assertion: West Virginia has a demonstrated history of inducing federal

¹⁹⁸ West Virginia Department of Environmental Protection 2017 Waiver (Accession No. 20210329-5300).

¹⁹⁹ Accession No. 20210723-5171.

²⁰⁰ Accession No. 20210723-5171.

agencies to violate Section 401 in its efforts to accommodate this pipeline.²⁰¹ The Commission should not let itself be next.

VIII. IF THE COMMISSION REMEDIES THE DEFICIENCIES IN THE EA AND APPROVES THE AMENDMENT APPLICATION, IT MUST ALSO FURTHER CONDITION THE CERTIFICATE AMENDMENT.

Section D of the EA provides staff conclusions and recommendations, including recommended conditions that should accompany any authorization the Commission may issue to Mountain Valley.²⁰² Although the recommended conditions are a good start, they are not sufficient and should be modified if the Commission were to approve the amendment application after the further environmental review described above.

A. The Commission Must Place More Stringent Conditions on Further Construction by Mountain Valley.

Recommended Condition No. 7 provides that “Mountain Valley must receive written authorization from the Director of OEP or the Director’s designee, **before commencing construction of any Amendment Project facilities.** To obtain

²⁰¹ See *Sierra Club v. U.S. Army Corps of Eng’rs*, 981 F.3d 251, 263 (4th Cir. 2020) (*Sierra Club II*) (entering preliminary injunction against Nationwide Permit 12 verification where “the Verification was likely issued in contravention of applicable law because WVDEP likely did not possess the authority to modify Special Condition A in April of 2019, and the [Army Corps] division engineer likely did not possess authority to rely on or incorporate this modification into NWP 12”); see also *Sierra Club v. U.S. Army Corps of Eng’rs*, 909 F.3d 635, 651–55 (4th Cir. 2018) (vacating NWP 12 verification in part because West Virginia DEP unlawfully purported to waive condition of Section 401 certification without required notice-and-comment procedures); *Sierra Club II*, 981 F.3d at 259–60 (“In *Sierra Club* . . . we concluded that the WVDEP was required to engage in proper notice and comment procedures before it could waive the Section 401 requirement set forth in Special Condition A.”).

²⁰² EA at 99.

such authorization, Mountain Valley must file with the Secretary documentation that it has received all applicable authorizations required under federal law (or evidence of waiver thereof).”²⁰³

A condition of this sort is critically important, but Recommended Condition No. 7 does not go far enough in the context of this pipeline, because this is not an ordinary project. Time and again, Mountain Valley has initiated construction—and its attendant environmental disturbance—only to have to stop. Mountain Valley has repeatedly lost key permits in litigation and other permit challenges remain pending.²⁰⁴ Given Mountain Valley’s pending litigation, its checkered litigation record,²⁰⁵ its history of causing unpermitted environmental harm,²⁰⁶ and the mounting evidence that a Section 404 permit may not lawfully be issued,²⁰⁷ the Commission should not license additional environmental harm while the project remains in doubt.

²⁰³ EA at 102.

²⁰⁴ Those challenges include petitions for judicial review of the project’s Biological Opinion (*Appalachian Voices v. U.S. Dep’t of the Interior*, No. 20-2159 (4th Cir.)); the project’s right-of-way across the Jefferson National Forest (*Wild Virginia v. U.S. Forest Serv.*, No. 21-1039(L) (4th Cir.), and three Commission orders (*Sierra Club v. FERC*, No. 20-1512 (D.C. Cir.)).

²⁰⁵ *See, e.g.*, Mountain Valley Pipeline, LLC: Order Partially Lifting Stop Work Order and Allowing Certain Construction to Resume, 173 FERC ¶ 61,252 at Dissent ¶¶ 1–3 (Dec. 17, 2020) (Glick, Comm’r, dissenting).

²⁰⁶ *See, e.g.*, West Virginia Department of Environmental Protection Consent Order No. 8951 (May 8, 2019), available at <https://dep.wv.gov/pio/Documents/MVP%20LLC%20SIGNED%20ORDER.pdf>.

²⁰⁷ *See, e.g.*, Lapp Letter.

Under these circumstances, the Commission should modify Recommended Condition No. 7 in two ways. **First**, the Commission should require that Mountain Valley must receive written authorization from the Director of OEP or the Director’s designee, before commencing construction of any Amendment Project facilities *or any stream crossings, whether conducted via trenchless crossing or open-cut*. **Second**, the Commission should require that, to obtain such authorization, Mountain Valley must file with the Secretary documentation: (1) that Mountain Valley has received all applicable authorizations required under federal law (or evidence of waiver thereof) necessary for completion of the entire pipeline; (2) that all currently pending permit challenge litigation has reached final judgment upholding such permits; and (3) that either (a) any and all potential judicial challenges brought within 30 days of issuance to permits for which applications are currently pending—including DA permits under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act, as well as approvals from West Virginia and Virginia under Section 401 of the Clean Water Act—have reached final judgment upholding such permits, or (b) one year has elapsed from the date upon which the latest of any such judicial challenges is commenced, whichever is sooner.

B. Rather than Conditioning the Amendment on Endangered Species Act Compliance, the Commission Should Forego Acting on the Pending Application Until Consultation is Complete.

Recommended Condition No. 8 provides that “Mountain Valley shall **not commence construction activities** associated with the Amendment Project **until** Commission staff completes consultation with the U.S. Fish and Wildlife Service

regarding potential impacts on federally listed species.”²⁰⁸ This recommended condition seems prudent at first blush, but it operates to supplant a better approach: rather than conditioning when construction may begin, the Commission should not authorize the Amendment Project until consultation is complete.

C. The Commission Should Not Allow Mountain Valley to Be the Arbiter of Whether It Has Adversely Affected Water Supplies.

Though not listed as a Recommended Condition, the EA includes another requirement that must be altered to adequately protect the public from the impacts of Mountain Valley’s construction activities. Section 2.1 of the EA acknowledges the potential for drilling and pumping activities to adversely impact drinking water supplies.²⁰⁹ The EA rightly places responsibility on Mountain Valley to repair or replace damaged water supplies and to provide suitable potable water while repair or replacement takes place. The EA errs, however, by allowing Mountain Valley itself to determine whether its activities are responsible for water supply damage. Allowing Mountain Valley to self-regulate in this manner creates an impermissible conflict of interest and fails to adequately protect the public. Instead of allowing Mountain Valley to determine whether it will be required to incur the expense associated with water supply repair and replacement, the Commission should include a term in any approved amendment that *presumes* Mountain Valley’s activities are the cause of any water supply impairment, subject to rebuttal by Mountain Valley and a decision by a

²⁰⁸ EA at 102.

²⁰⁹ *Id.* at 28–31.

neutral, third-party hydrogeologic expert—appointed by the Commission at Mountain Valley’s expense.²¹⁰

IX. MOUNTAIN VALLEY MUST OBTAIN NPDES PERMIT COVERAGE FOR CONSTRUCTION STORMWATER DISCHARGES.

Discharges of stormwater runoff from oil and gas pipeline construction generally do not require a National Pollutant Discharge Elimination System (“NPDES”) permit due to an exemption in Section 402(l)(2) of the Clean Water Act.²¹¹ But although this exemption is paraphrased occasionally as being categorical,²¹² in reality the exemption is lost if pipeline construction contributes to a violation of a water quality standard.²¹³ When that occurs, the developer is no longer exempt and must then obtain a NPDES permit. Mountain Valley has been unwilling or unable to prevent construction stormwater runoff from causing or contributing to water quality

²¹⁰ An analog for such a condition can be found in the regulations implementing the Surface Mining Control and Reclamation Act, which also involves regulation of activities that inherently threaten subsurface hydrogeology. See 30 U.S.C. § 1307 (requiring replacement of water rights). Those regulations do not make the regulated entity the arbiter of the cause of water supply impacts; rather they establish a presumption that the regulated activity caused the damage that may be rebutted by the permittee only with convincing evidence of another cause. See 30 C.F.R. § 816.41(h); W. Va. Code, § 22-3-24 (c).

²¹¹ See 33 U.S.C. § 1342(l)(2)

²¹² See, e.g., *Sierra Club v. State Water Control Bd.*, 898 F.3d 383, 391 (4th Cir. 2018) (“[T]he CWA exempts natural gas pipeline construction from regulation.”); Letter from Todd Normane, Mountain Valley, to Melanie Davenport, DEQ, and Donald Anderson, Virginia OAG at 4 (June 9, 2021) (citing Section 402(l)(2) for the proposition that “Mountain Valley is technically exempt” from regulation under Virginia’s construction stormwater general permit “as a matter of federal law”) (Accession No. 20210610-5022).

²¹³ 40 C.F.R. §§ 122.26(a)(2)(ii) & 122.26(c)(1)(iii)(c).

standards violations along the pipeline route.²¹⁴ As a consequence of its own failures, Mountain Valley has lost its eligibility for the Section 402(l)(2) NPDES exemption. Consequently, and consistent with Recommended Condition 7 in the EA, the Commission must require Mountain Valley to demonstrate that it has secured NPDES permit coverage before the company may commence construction.²¹⁵

Section 402(l)(2) provides that no permit is required “for discharges of stormwater runoff from mining operations or oil and gas exploration, production, processing, or treatment operations or transmission facilities, composed entirely of flows which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff,” so long as discharges “are not contaminated by contact with, or do not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operations.”²¹⁶ Although this enumerated list of exempted facilities does not on its face include pipeline construction activities, Congress specified in the Energy Policy Act of 2005 that “[t]he term oil and gas exploration, production, processing, or

²¹⁴ *E.g.*, West Virginia Department of Environmental Protection Consent Order No. 8951 at ¶¶ 3, 5–12, 16–20, 24 (May 8, 2019), *available at* <https://dep.wv.gov/pio/Documents/MVP%20LLC%20SIGNED%20ORDER.pdf> (cataloguing Notices of Violation for violating West Virginia state water quality standards by causing “conditions not allowable in waters of the State”).

²¹⁵ *See* EA at 102; *see also supra* Section VIII.A (proposing modifications to Recommended Condition 7).

²¹⁶ 33 U.S.C. § 1342(l)(2).

treatment operations or transmission facilities” as used in the Clean Water Act means “all field activities or operations associated with exploration, production, processing, or treatment operations, or transmission facilities . . . whether or not such field activities or operations may be considered to be construction activities.”²¹⁷ Section 402(l)(2) is the only place in the Clean Water Act, other than the definitions section, where that term appears.²¹⁸

A pair of EPA regulations implement Section 402(l)(2). **First**, 40 C.F.R. § 122.26(c)(1)(iii) codifies the conditions that EPA considers indicative of “contamination” under Section 402(l)(2), such that the exemption is no longer available.²¹⁹ Section 122.26(c)(1)(iii) provides in relevant part that “the operator of an existing or new discharge composed entirely of storm water from an oil or gas exploration, production, processing, or treatment operation, or transmission facility is not required to submit a permit application . . . unless the facility” causes certain kinds of discharges not relevant here or, under Section 122.26(c)(1)(iii)(C), the facility “contributes to a violation of a water quality standard.”²²⁰

Second, 40 C.F.R. § 122.26(a)(2)(ii) tracks the statutory parameters of the Section 402(l)(2) exemption by providing that a permit is not required “for discharges

²¹⁷ Pub. L. No. 109–58, § 323, 119 Stat. 694, codified as amended at 33 U.S.C. § 1362(24); *see also Nat. Res. Def. Council v. EPA*, 526 F.3d 591, 603 (9th Cir. 2008) (“*NRDC*”).

²¹⁸ *NRDC*, 526 F.3d at 599.

²¹⁹ *Id.* at 595–96 & n.8.

²²⁰ 40 C.F.R. § 122.26(c)(1)(iii)(C) (emphasis added).

of storm water runoff from . . . [a]ll field activities or operations associated with oil and gas exploration, production, processing, or treatment operations or transmission facilities . . . whether or not such field activities or operations may be considered to be construction activities, *except in accordance with paragraph (c)(1)(iii) of this section.*”²²¹ In other words, oil and gas construction activities are exempt from the permit requirement unless they cause one of the conditions indicative of contamination under Section 122.26(c)(1)(iii)—which includes “contribut[ing] to a violation of a water quality standard.”²²² Notably, the final sentence of the current version of Section 122.26(a)(2)(ii) includes a regulatory relic purporting to carve out water quality standards violations based on sediment from construction, nominally providing that such violations do not trigger the permit requirement.²²³ That purported carve-out provides that “[d]ischarges of sediment from construction activities associated with oil and gas exploration, production, processing, or treatment operations or transmission facilities are not subject to the provisions of paragraph (c)(1)(iii)(C) of this section.”²²⁴ But this carve-out language was vacated by a federal appellate court on judicial review, and it has no effect today.²²⁵ As a result, oil and gas construction activities lose their Section 402(l)(2) exemption if they

²²¹ *Id.* § 122.26(a)(2)(ii) (emphasis added).

²²² *Id.* § 122.26(c)(1)(iii)(C).

²²³ *Id.* § 122.26(a)(2)(ii).

²²⁴ *Id.*

²²⁵ *NRDC*, 526 F.3d at 593–94.

contribute to water quality standards violations, including violations based on sediment from construction.²²⁶

Under this regulatory framework, Mountain Valley is no longer eligible for the Section 402(l)(2) exemption. The record before the Commission is replete with instances of the company violating state water quality standards due to sedimentation. For example, West Virginia has cited Mountain Valley over a dozen times for violating state water quality standards codified at W. Va. Code R. § 47-2-3 for causing conditions not allowable in state waters due to sedimentation.²²⁷ Furthermore, Section 122.26(c)(1)(iii) does not require a regulator to make a predicate

²²⁶ One federal district court incorrectly concluded that construction activities cannot trigger the permit requirement because 40 C.F.R. § 122.26(c)(1)(iii) provides that “an oil or gas exploration, production, processing, or treatment operation, or transmission facility is not required to submit a permit application . . . unless the facility” causes certain kinds of discharges, reasoning that a plain language understanding of the term “facility” does not include construction. *See Delaware Riverkeeper v. Sunoco Pipeline L.P.*, Civ. No. 18-2447, 2020 WL 1888954 at *10 (E.D. Pa. Apr. 16, 2020). But it appears the *Delaware Riverkeeper* court was not aware (and in all events did not discuss) that “oil or gas exploration, production, processing, or treatment operation, or transmission facility” is a term of art in the context of Section 402(l)(2) that Congress specifically defined to mean “all field activities or operations associated with exploration, production, processing, or treatment operations or transmission facilities . . . whether or not such field activities or operations may be considered to be construction activities.” 33 U.S.C. § 1362(24) (emphasis added). Indeed, if the term “facility” did not include construction in this context, oil and gas construction activities would not be eligible for an exemption in the first place, which is precisely why Congress specified otherwise, *see NRDC*, 526 F.3d at 599, and EPA would not have needed to undertake its now-vacated effort to carve-out water quality violations based on construction sediment discharges from 40 C.F.R. § 122.26(c)(1)(iii)(C).

²²⁷ WV DEP Consent Order No. 8951 at ¶¶ 3, 5–12, 16–20, 24 (May 8, 2019), *available at* <https://dep.wv.gov/pio/Documents/MVP%20LLC%20SIGNED%20ORDER.pdf> (cataloguing Notices of Violation for violating West Virginia state water quality standards by causing “conditions not allowable in waters of the State”).

finding of a violation before the permit requirement is triggered, so Mountain Valley’s recent failures to control sediment discharges only compound its ineligibility for the Section 402(l)(2) exemption.²²⁸ Consequently, the Commission must require Mountain Valley to obtain Section 402 permit coverage for construction stormwater discharges before authorizing any further construction.

CONCLUSION

For the foregoing reasons, the Commission cannot approve the certificate amendment, and the Corps cannot issue any DA permit, unless and until the deficiencies in the agencies’ NEPA analysis are remedied. Moreover, after that process is complete, the Commission should further condition any certificate amendment before authorizing Mountain Valley’s proposed activities.

Respectfully submitted,

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²²⁸ See, e.g., Letter from Todd Normane, Mountain Valley, to David Paylor, Virginia DEQ (Aug. 20, 2021) (Accession No. 20210820-5217) (conceding that the company’s “controls were overwhelmed” by heavy rain, leading to “sediment issues in Doe Creek”).

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