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**No. 17-1714**

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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SIERRA CLUB, WEST VIRGINIA RIVERS COALITION, INDIAN CREEK  
WATERSHED ASSOCIATION, APPALACHIAN VOICES, and CHESAPEAKE  
CLIMATE ACTION NETWORK  
*Petitioners*

v.

WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION, and  
AUSTIN CAPERTON, Secretary of the West Virginia Department of  
Environmental Protection  
*Respondents*

and

MOUNTAIN VALLEY PIPELINE, LLC  
*Intervenor-Respondent*

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**PETITIONERS' OPENING BRIEF**

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT  
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 17-1714 Caption: Sierra Club et al. v. W. Va. Dep't of Env'tl. Protection et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Sierra Club  
(name of party/amicus)

who is \_\_\_\_\_ petitioner \_\_\_\_\_, makes the following disclosure:  
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity?  YES  NO
  
2. Does party/amicus have any parent corporations?  YES  NO  
If yes, identify all parent corporations, including all generations of parent corporations:
  
3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity?  YES  NO  
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))?  YES  NO  
 If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question)  YES  NO  
 If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding?  YES  NO  
 If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Derek O. Teaney

Date: June 23, 2017

Counsel for: Sierra Club

**CERTIFICATE OF SERVICE**

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I certify that on June 23, 2017 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Derek O. Teaney  
 (signature)

June 23, 2017  
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No. 17-1714 Caption: Sierra Club et al. v. W. Va. Dep't of Env'tl. Protection et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

West Virginia Rivers Coalition  
(name of party/amicus)

who is petitioner, makes the following disclosure:  
(appellant/apellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity?  YES  NO
  
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Signature: /s/ Derek O. Teaney

Date: June 23, 2017

Counsel for: West Virginia Rivers Coalition

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No. 17-1714 Caption: Sierra Club et al. v. W. Va. Dep't of Env'tl. Protection et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Indian Creek Watershed Association  
(name of party/amicus)

who is \_\_\_\_\_ petitioner \_\_\_\_\_, makes the following disclosure:  
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity?  YES  NO
  
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 If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Derek O. Teaney

Date: June 23, 2017

Counsel for: Indian Creek Watershed Association

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No. 17-1714 Caption: Sierra Club et al. v. W. Va. Dep't of Env'tl. Protection et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Appalachian Voices  
(name of party/amicus)

who is \_\_\_\_\_ petitioner \_\_\_\_\_, makes the following disclosure:  
(appellant/apellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity?  YES  NO
  
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Date: June 23, 2017

Counsel for: Appalachian Voices

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No. 17-1714 Caption: Sierra Club et al. v. W. Va. Dep't of Env'tl. Protection et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Chesapeake Climate Action Network  
(name of party/amicus)

who is \_\_\_\_\_ petitioner \_\_\_\_\_, makes the following disclosure:  
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity?  YES  NO
  
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6. Does this case arise out of a bankruptcy proceeding?  YES  NO  
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Derek O. Teaney

Date: June 23, 2017

Counsel for: Chesapeake Climate Action Network

**CERTIFICATE OF SERVICE**

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June 23, 2017  
(date)

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**STATEMENT OF SUBJECT MATTER AND APPELLATE  
JURISDICTION**

On March 23, 2017, Respondent West Virginia Department of Environmental Protection (“WVDEP”) issued a water quality certification under Section 401 of the Clean Water Act (“CWA”), 33 U.S.C. §1341 (hereinafter, the “Section 401 Certification”), to Intervenor-Respondent Mountain Valley Pipeline, LLC (“MVP”) for the proposed Mountain Valley Pipeline project (hereinafter, “the Pipeline”). AR15195-203 (JA \_\_\_ - \_\_\_). On April 7, 2017, Petitioners Sierra Club, West Virginia Rivers Coalition, and Indian Creek Watershed Association (among others) requested a hearing on the Section 401 Certification under W. Va. C.S.R. § 47-5A-7. Respondent Austin Caperton denied all hearing requests on May 10, 2017. Doc. No. 3 at 21. Upon that denial, the Section 401 became a final action by WVDEP. On June 9, 2017, Petitioners Sierra Club, West Virginia Rivers Coalition, Indian Creek Watershed Association, Appalachian Voices, and Chesapeake Climate Action Network (hereinafter, collectively, “Sierra Club”) filed a timely petition for review.

This Court has jurisdiction under Section 19(d)(1) of the Natural Gas Act (“NGA”), 15 U.S.C. § 717r(d)(1). The Pipeline, as an interstate natural gas pipeline, is subject to Section 7 of the NGA, 15 U.S.C. § 717f, and MVP has applied for a Certificate of Public Convenience and Necessity (hereinafter, the “FERC certificate”) under that provision to construct and operate the Pipeline.

AR34 (JA \_\_\_). The Section 401 Certification is a permit, license, concurrence, or approval issued by a State administrative agency and required under Federal law. See, e.g., AES Sparrows Point LNG, LLC v. Wilson, 589 F.3d 721, 726-27 (4th Cir. 2009).

Petitioners have standing under Article III of the United States Constitution to pursue this petition for review. To establish Article III standing, a petitioner must establish (1) injury-in-fact, (2) traceability, and (3) redressability. Amer. Canoe Ass'n v. Murphy Farms, Inc., 326 F.3d 505, 517 (4th Cir. 2003). An organization has representational standing when (1) at least one of its members would have standing to sue in his or her own right, (2) the organization's purpose is germane to the interests that it seeks to protect, and (3) there is no need for the direct participation of the individual members in the action. Id. To establish injury-in-fact in the environmental context, a petitioner "need only show that he used the affected area, and that he is an individual for whom the aesthetic and recreational values of the area [are] lessened" by the challenged activity. Piney Run Preservation Ass'n v. County Com'rs of Carroll County, MD, 268 F.3d 255, 263 (4th Cir. 2002) (internal quotation marks omitted; modification in original).

In the addendum to this brief are the Declarations of Tammy Capaldo, Maury Johnson, and Naomi Cohen. Those declarations establish the judicially cognizable harms to their aesthetic and recreational interests imminently threatened

by the Pipeline's construction and operation. Ms. Capaldo, a Sierra Club member, owns property along the Greenbrier River where the Pipeline is proposed to cross that waterbody. Capaldo Declaration at ¶¶ 1-3, 17 (AD120, AD122). The Pipeline's construction across her property, including the crossing of the Greenbrier River, would affect Ms. Capaldo's aesthetic and recreational enjoyment of living on her property, and may lead her to "abandon [her] dream" of living along the Greenbrier River. Id. at ¶¶ 18-22 (AD122-123). Ms. Capaldo has reasonable concerns about the effects of the Pipeline's operation and construction on the Greenbrier River and her property, and those concerns diminish her recreational and aesthetic enjoyment of the Greenbrier River. Id. at 23-33 (AD123-125).

Mr. Johnson, a member of Sierra Club, West Virginia Rivers Coalition, Indian Creek Watershed Association, and Chesapeake Climate Action Network, also owns property along the Pipeline's proposed route. Johnson Declaration at ¶¶ 1-6 (AD127-128). The Pipeline would cross three streams on Mr. Johnson's property, one of which flows past his house and near his well downstream of the proposed crossing. Id. at ¶ 8 (AD128). Mr. Johnson has reasonable concerns about the effects of the Pipeline on his property's water resources, and his enjoyment of living on his property has been reduced since he learned that the Pipeline would cross his property. Id. at ¶¶ 10-17 (AD129-130). Mr. Johnson also



uses, for recreational and aesthetic purposes, two additional streams in Monroe County, West Virginia, that the Pipeline would cross; those uses would be harmed by the Pipeline's construction and operation. Id. at ¶¶ 19-21 (AD130-131).

Ms. Cohen, a member of Appalachian Voices and Sierra Club, is a long-time resident of Monroe County, West Virginia, and an avid hiker. Cohen Declaration at ¶¶ 1-5 (AD132-133). Ms. Cohen frequently hikes the Allegheny Trail to the Hanging Rock Raptor Observatory and intends to continue doing so for as long as she is able. Id. at ¶ 6 (AD133). Ms. Cohen's aesthetic and recreational enjoyment of those hikes is imminently threatened by the Pipeline's construction because of the effects that the Pipeline's construction and operation will have on that trail's vistas. Id. at ¶ 13 (AD134). She "anticipate[s] that the peace, inspiration, and rejuvenation that [she] find[s] there would be marred by frustration, sadness, and sorrow." Id.

The above-described injuries are fairly traceable to the Section 401 Certification. Without that certification, MVP will not be able to construct and operate the Pipeline, nor will it be able to dig through the streams on Ms. Capaldo's and Mr. Johnson's properties. Capaldo Declaration at ¶ 35 (AD125); Johnson Declaration at ¶ 22 (AD131); Cohen Declaration at ¶ 15 (AD135). Moreover, relief from this Court would redress those injuries. Capaldo Declaration at ¶ 36 (AD125-126); Johnson Declaration at ¶ 23 (AD131); Cohen Declaration at

¶ 16 (AD135); Lujan v. Defenders of Wildlife, 504 U.S. 555, 572 n. 7 (1992); City of Jersey City v. CONRAIL, 668 F.3d 741, 745 (D.C. Cir. 2012).

Because their members have standing in their own right, Petitioners have organizational standing. Their members' interests in protecting the waters and land of West Virginia are germane to their organizational purposes. Johnson Declaration at ¶¶ 2-5 (AD127-128); Cohen Declaration at ¶ 2 (AD132); Amer. Canoe Ass'n v. Murphy Farms, 326 F.3d at 517. Moreover, the members' individual participation is not required because this case seeks only vacatur and remand of agency action, rather than individualized relief. Warth v. Seldin, 422 U.S. 490, 515 (1975). Accordingly, Article III presents no barrier to this Court's jurisdiction.<sup>1</sup>

### **STATEMENT OF ISSUES PRESENTED FOR REVIEW**

1. Whether WVDEP's failure to conduct the antidegradation review required by the CWA renders its issuance of the Section 401 Certification inconsistent with federal law.

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<sup>1</sup> Nor does the Eleventh Amendment present a jurisdictional obstacle. West Virginia has waived its Eleventh Amendment immunity from suit in federal court by electing to regulate the Pipeline under Section 401 of the CWA. Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 686-87 (1999); Delaware Riverkeeper Network v. Sec'y Pennsylvania Dep't of Env'tl. Prot., 833 F.3d 360, 376-77 (3d Cir. 2016); Islander East Pipeline Co., LLC v. Connecticut Dep't of Env'tl. Prot. ("Islander East I"), 482 F.3d 79, 90-91 (2d Cir. 2006).

2. Whether WVDEP arbitrarily and capriciously issued the Section 401 Certification without ensuring that the Pipeline would comply with the CWA's antidegradation policy.

3. Whether WVDEP's unsupported consideration of the effect of the Pipeline on karst terrain and inclusion of an ineffective "Special Condition" related to karst terrain in the Section 401 Certification renders its action arbitrary and capricious.

4. Whether WVDEP's failure to issue a Section 401 Certification for the FERC certificate was inconsistent with federal law.

5. Whether WVDEP's issuance of the Section 401 Certification was arbitrary and capricious because of:

- a. WVDEP's inadequate consideration of the effects of the Pipeline's construction and operation in upland areas on water quality standards;
- b. WVDEP's inadequate consideration of the effects of blasting during construction of the Pipeline; and/or
- c. WVDEP's failure to respond to significant public comments.

## **STATEMENT OF THE CASE**

### **Nature of the Case**

This petition seeks judicial review, pursuant to Section 19(d)(1) of the NGA, 15 U.S.C. § 717r(d)(1), of the Section 401 Certification for the proposed Mountain Valley Pipeline.

### **Legal Framework**

At the heart of this petition for review is Section 401 of the CWA, which provides:

Any applicant for a Federal license or permit to conduct any activity, including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate ... that any such discharge will comply with the applicable provisions of section 1311, 1312, 1313, 1316, and 1317 of this title[.]

33 U.S.C. § 1341(a)(1). Interstate natural gas transportation pipelines frequently require multiple Federal licenses or approvals. Specifically, they require a Certificate of Public Convenience and Necessity from the Federal Energy Regulatory Commission (“FERC”) under Section 7 of the NGA, 15 U.S.C. § 717f(c), and they nearly always require a permit under Section 404 of the CWA from the United States Army Corps of Engineers (“USACOE”) for the discharge of dredged or fill material into navigable waters related to stream and wetland

crossings. 33 U.S.C. § 1344(a). Both of those permits are subject to certification under Section 401 of the CWA.

Although the NGA gives FERC exclusive authority to issue Certificates of Public Convenience and Necessity, it also expressly preserves the rights of states under the CWA, including the right of a state to certify a project under Section 401. 15 U.S.C. § 717b(d)(3). Among other things, a certification under Section 401 must ensure that a federally permitted project complies with Section 303 of the CWA, 33 U.S.C. § 1313. That section “requires each state, subject to federal approval, to institute comprehensive water quality standards establishing water quality goals for all intrastate waters.” PUD No. 1 of Jefferson County v. Washington Dep’t of Ecology, 511 U.S. 700, 704 (1994). State water quality standards “consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based on such uses[,]” 33 U.S.C. § 1313(c)(2)(A), and must “include ‘a statewide antidegradation policy’ to ensure that ‘[e]xisting instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.’” PUD No. 1, 511 U.S. at 705 (quoting 40 C.F.R. § 131.12). Compliance with water quality standards lies at the heart of the certification required under Section 401. Indeed, EPA regulations require that certifications include a “statement that there is a reasonable

assurance that the activity will be conducted in a manner which will not violate applicable water quality standards.” 40 C.F.R. § 121.2(a)(3).

As this Court has explained,

three factors are considered when adopting or evaluating a water quality standard: (1) one or more designated uses of the state waters involved [such as fishing and swimming]; (2) certain water quality criteria, expressed as numeric pollutant concentration levels or narrative statements representing a quality of water that supports a particular designated use; and (3) an antidegradation policy to protect existing uses and high quality waters. [33 U.S.C. § 1313(c)(2)(A)]; 40 C.F.R. § 131.

Nat. Res. Def. Council, Inc. v. U.S.E.P.A., 16 F.3d 1395, 1400 (4th Cir. 1993).

Thus, to certify that there is a reasonable assurance that a federally permitted activity will be conducted in a manner that will not violate applicable water quality standards, a state must consider (1) designated uses, (2) numeric and narrative water quality criteria, and (3) the state’s antidegradation policy. EPA has made clear that States “must apply antidegradation requirements to ... any activity requiring a CWA §401 certification.” 63 Fed. Reg. 36,742, 36,780 (July 7, 1998).

West Virginia has adopted water quality standards, including an antidegradation policy. W. Va. C.S.R. § 47-2-1 et seq. (Requirements Governing Water Quality Standards); W. Va. C.S.R. § 60-5-1 et seq. (Antidegradation Implementation Procedures). EPA has approved most of the provisions of West Virginia’s water quality standards rule and antidegradation procedures, but some portions remain unapproved. See, e.g., Ohio Valley Env’tl. Coalition v. Horinko,

279 F.Supp.2d 732, 757-62, 777 (S.D.W.Va. 2003) (holding EPA approval of certain provisions of the West Virginia Antidegradation Implementation Procedures arbitrary and capricious and vacating that approval). Those that have not been approved are not operative. 40 C.F.R. § 131.21.

### **Statement of Facts**

On October 23, 2015, MVP submitted an application to FERC for a Certificate of Public Convenience and Necessity under 15 U.S.C. § 717f(c) to construct and operate the Pipeline. AR3407 (JA \_\_\_). The Pipeline is a proposed 303-mile long and 42-inch diameter natural gas transportation pipeline originating in Wetzel County, West Virginia, and delivering natural gas to a pool in Pittsylvania County, Virginia. AR2678, AR2680 (JA \_\_\_, \_\_\_). The Pipeline corridor in West Virginia is approximately 196-miles long and would require 147 miles of access roads. AR15195. (JA\_\_\_). Construction of the Pipeline would require 631 stream crossings in West Virginia and 424 wetland crossings. AR15196-197 (JA\_\_\_ - \_\_\_).

As its 196-mile long path snakes up and over West Virginia's mountains and through her forests and streams, the Pipeline will "require a 125-foot wide construction right-of-way and a 50-foot permanent right of way." AR2678 (JA\_\_\_). Construction would disturb approximately 4,259 acres of land in West Virginia. AR111-113 (JA\_\_\_ - \_\_\_). If MVP cannot reach easement agreements

with the owners of the properties on which it intends to build the Pipeline, MVP will seize the easements it needs through the power of eminent domain under 15 U.S.C. § 717f(h). AR550 (JA\_\_\_).

During overland construction, MVP will survey the Pipeline corridor, clear it of vegetation, and grade it. AR127 (JA\_\_\_). Heavy machinery will traverse the corridor, digging a trench up to nine-feet deep in which to bury the 3.5-foot diameter pipe. Id.

At waterbody crossings, MVP will dewater a work area within the stream and dig a trench in the streambed. AR3337 (JA\_\_\_). MVP will bury the Pipeline at a depth of two to four feet below the streambed, depending on whether consolidated rock is encountered. AR2701 (JA\_\_\_).

To construct the Pipeline, MVP will need both a Certificate of Public Convenience and Necessity from FERC and a permit under Section 404 of the CWA from the USACOE to place fill materials in waters of the United States. 15 U.S.C. § 717f(c); 33 U.S.C. § 1344(a). Both of those federal permits trigger Section 401 of the CWA. Delaware Riverkeeper Network, 833 F.3d 360 at 368; Islander East Pipeline Co., LLC v. McCarthy (“Islander East II”), 525 F.3d 141, 144 (2d Cir. 2008). MVP applied for the FERC certificate on October 23, 2015, AR3407 (JA\_\_\_), and for its Section 404 authorizations from the USACOE in February 2016. AR83 (JA\_\_\_).



By public notice in local newspapers, WVDEP and MVP began soliciting comments on MVP's application for the Section 401 Certification on March 31, 2016. AR3442 (JA\_\_\_). WVDEP accepted public comments through March 19, 2017. AR14713-714 (JA\_\_\_-\_\_\_). Petitioners, their members, and others submitted thousands of pages of comments and expert reports documenting threats to water quality from the Pipeline's construction and operation. Although West Virginia regulations require WVDEP to prepare a response to significant comments, W. Va. C.S.R. § 47-5A-5.1.e, WVDEP provided only a cursory, seven-page response that failed to address many significant comments regarding the Pipeline's effects on water quality. AR15188-194 (JA\_\_\_-\_\_\_).

On March 23, 2017, WVDEP issued the Section 401 Certification, AR15195-203 (JA\_\_\_-\_\_\_), which became a final action of WVDEP upon Respondent Austin Caperton's denial of hearing requests on May 10, 2017. Doc. No. 3 at 21. On June 9, 2017, Sierra Club filed a timely petition for review.

### **SUMMARY OF THE ARGUMENT**

WVDEP's issuance of the Section 401 Certification cannot survive judicial review by this Court for at least five reasons: (1) WVDEP failed to perform an antidegradation review, (2) WVDEP failed to adequately consider the effects on water quality from the Pipeline's construction and operation in karst terrain, (3) WVDEP failed to lawfully or adequately consider the effects of all discharges from

the Pipeline's construction and operation, (4) WVDEP failed to adequately consider the effects of blasting from Pipeline construction on water quality, and (5) WVDEP failed to perform its duty to respond to all significant public comments on the Section 401 Certification application. Each of those flaws provides a basis for this Court to remand the Section 401 Certification under 15 U.S.C. § 717r(d).

First, WVDEP's failure to perform an antidegradation review is inconsistent with federal law. Section 401 requires states to certify that federally permitted activities will comply with all water quality standards. 33 U.S.C. § 1341(a); 40 C.F.R. § 121.2(a)(3). Water quality standards include (1) a waterbody's designated uses, (2) numeric and narrative criteria to protect those uses, and (3) an antidegradation policy to protect existing uses and to maintain the existing quality of high-quality waters. Nat. Res. Def. Council, 16 F.3d at 1400; 40 C.F.R. § 131.12(a). EPA regulations require states to develop implementation methods for their antidegradation policies. 40 C.F.R. § 131.12(b).

West Virginia's antidegradation implementation procedures require varying levels of review depending of what "tier" of protection a waterbody should receive. W. Va. C.S.R. § 60-5-1 et seq. The procedures require the determination of (1) existing uses of receiving streams, (2) baseline water quality of receiving streams, and (3) the tier of protection applicable to the particular waterbodies. W. Va. C.S.R. §§ 60-5-3.3, -3.4, -3.5. Under Tier 1 review, the further lowering of water

quality in a stream that is impaired for a particular parameter is prohibited. Id. § 60-5-4.7. Under Tier 2 review, significant degradation of high-quality waters is prohibited without an alternatives analysis and socio-economic review of the activity. Id. § 60-5-5.6 to -5.7. Because West Virginia's antidegradation policy is part of its water quality standards, WVDEP must consider whether a federally permitted activity complies with that policy before certifying that activity under Section 401. 40 C.F.R. § 121.2(a)(3), AR3388 (JA\_\_\_); 63 Fed. Reg. at 36,780.

In this case, WVDEP utterly failed to perform an antidegradation review with regard to the numerous Tier 1 and Tier 2 streams that would receive discharges from the Pipeline's construction and operation. That failure renders WVDEP's issuance of the Section 401 Certification inconsistent with federal law. To the extent that WVDEP conducted any antidegradation review, that review was limited to determining whether any Tier 3 streams would receive discharge from the Pipeline. Such a limited consideration of the antidegradation policy renders the issuance of the Section 401 certification arbitrary and capricious because WVDEP provided no explanation as to why it ignored Tier 1 and Tier 2 streams.

Second, WVDEP's consideration of the effects of the Pipeline's construction in karst terrain on water quality is arbitrary and capricious because (1) it relies on documents that were not in its administrative record to support its conclusion that construction in karst terrain will not result in violations of water quality standards

and (2) it relies on the submission of an “enhanced karst management plan” at some undetermined date after the issuance of the Section 401 Certification to assure that water quality standards in karst terrain will be met. Karst terrain “is characterized by sinkholes, caves, dry valleys ..., sinking streams, spring and seeps, solution valleys, and various forms that are sculpted on the bedrock surface....” AR12114 (JA\_\_\_). Such terrain is “susceptible to a great[] range of environmental impact,” including threats to groundwater and surface water. AR309-310 (JA\_\_\_-\_\_\_).

WVDEP responded to the karst controversy presented by the Pipeline by relying on mitigation plans that are not in the administrative record for the Section 401 Certification and by including a Special Condition in the certification requiring the submission at some later date of an enhanced karst management plan. WVDEP’s reliance on documents it never reviewed is arbitrary and capricious. Moreover, the Special Condition related to karst terrain is inadequate because it does not reasonably assure compliance with water quality standards. The Special Condition risks a bureaucratic steamroller effect and deprives the public of opportunities for participation, does not prescribe acceptable investigation and identification methods for karst features, does not prohibit unacceptable karst mitigation practices, and permits the Pipeline’s construction in incompatible terrain.

Third, WVDEP's inadequate consideration of discharges from the Pipeline's construction and operation in upland areas renders the Section 401 Certification inconsistent with federal law and arbitrary and capricious. WVDEP failed to explicitly certify that activities authorized by the FERC certificate, e.g., the Pipeline's construction and operation in upland areas, would not cause water quality standards violations. Instead, WVDEP myopically focused on the discharges of dredged and fill material at stream crossings that would be authorized by the CWA Section 404 permit sought by MVP. By certifying only one of the two relevant federal permits under Section 401, WVDEP's action is inconsistent with federal law and should be remanded under 15 U.S.C. § 717r(d).

To the extent that WVDEP did consider whether discharges from construction and operation in upland areas authorized by the FERC certificate would violate water quality standards, it arbitrarily and capriciously gave such analysis short shrift. WVDEP failed to identify streams that would receive discharges from upland areas during the Pipeline's construction and operation. Moreover, to discount threats to water quality from such discharges, WVDEP relied on erosion and sediment control practices that the record established were inadequate to prevent increases in turbidity and sedimentation.

Fourth, WVDEP arbitrarily and capriciously addressed threats to water quality presented by blasting during the Pipeline's construction. The record

establishes that much of the Pipeline's corridor—including the Greenbrier River crossing—is in shallow bedrock, increasing the likelihood that blasting will be required to bury the Pipeline. AR275-276, AR12443 (JA\_\_\_-\_\_\_, \_\_\_). In response to that evidence, WVDEP concluded that “[b]lasting is not anticipated” and would be covered by a blasting plan that the agency had never reviewed. AR15189 (JA\_\_\_). Such conclusions are arbitrary and capricious because they are contrary to the record and rely on the terms of a document that WVDEP never reviewed.

Fifth, WVDEP's issuance of the Section 401 Certification was arbitrary and capricious because the agency failed to perform its duty to respond to significant public comments. W. Va. C.S.R. § 47-5A-5.1.e requires WVDEP to respond to significant comments on a Section 401 certification application. An agency's failure to respond to such comments cannot survive arbitrary and capricious review. State of S.C. ex rel. Tindal v. Block, 717 F.2d 874, 886 (4th Cir. 1983) (citing Home Box Office, Inc. v. F.C.C., 567 F.2d 9, 35 n.58 (D.C. Cir. 1977)).

WVDEP received nearly 2,400 pages of written comments and more than 150 pages of transcripts of comments at public hearings, but generated a scant seven-page response to comments. AR15188-194 (JA\_\_\_-\_\_\_). That response ignored significant comments regarding antidegradation, karst terrain, erosion and

sediment from upland areas, and blasting. Accordingly, WVDEP's issuance of the Section 401 Certification was arbitrary and capricious.

## ARGUMENT

### **STANDARD OF REVIEW**

Although 15 U.S.C. § 717r(d) establishes jurisdiction in this Court for judicial review of certain state agency actions related to natural gas facilities, it does not prescribe a standard of review. Islander East I, 482 F.3d at 93. In this Court's only previous review of a Section 401 certification under 15 U.S.C. § 717r(d), the Court applied the standard of review provided in the Federal Administrative Procedures Act ("APA") on agreement of the parties. AES Sparrows, 589 F.3d at 727. That is generally consistent with the standard of review applied by other federal circuits that have reviewed the merits of a challenge to a state issued Section 401 certification under 15 U.S.C. § 717r(d), although those circuits have put a finer point on it. Delaware Riverkeeper Network, 833 F.3d at 37; Islander East II, 525 F.3d at 150, Islander East I, 482 F.3d at 93-95. Relying on the language of 15 U.S.C. § 717r(d)(3) that provides for a remand where a state agency action is "inconsistent with the [governing] Federal law" and on the standard of review applied to state administrative actions under the Telecommunications Act, the Second and Third Circuits concluded that a two-step standard of review applies to state agency actions under 15 U.S.C. § 717r(d):

At step one, we employ de novo review to determine whether the [state agency] complied with the requirements of relevant federal law. ... If no illegality is uncovered during such a review, we proceed to step two to examine [the state agency's] challenged findings and conclusions under the more deferential arbitrary-and-capricious standard of review usually accorded state administrative bodies' assessments of state law principles.

Islander East II, 525 F.3d at 150. See also Delaware Riverkeeper, 833 F.3d at 377; Islander East I, 482 F.3d at 93-95.

This Court's articulation of the second step of its standard of review under the Telecommunications Act differs slightly from the phrasing of the Second and Third Circuits. Under that statute, this Court applies the substantial evidence standard to state agency actions, but notes that the difference in phrasing makes "no meaningful difference." GTE S., Inc. v. Morrision, 199 F.3d 733, 745 n.5 (4th Cir. 1999). The Fourth Circuit's selection of the substantial evidence standard in the Telecommunications Act context probably demonstrates more precision than the use of the arbitrary and capricious standard by other circuits because state agency actions in that context are usually made after an evidentiary hearing required by law, making the substantial evidence standard of the APA most analogous. 5 U.S.C. § 706(2)(E). In contrast, state certifications under Section 401 are not usually issued after a formal hearing, rendering the arbitrary and capricious standard of the APA more analogous. 5 U.S.C. § 706(2)(A). See Ass'n of Data Processing Serv. Orgs. v. Bd. of Governors, 745 F.2d 677, 683-84 (D.C.



Cir. 1984) (discussing similarities and distinctions between “arbitrary and capricious” review and “substantial evidence” review under 5 U.S.C. §§ 706(2)(A) and 706(2)(E)). Accordingly, this Court should review WVDEP’s action here first de novo for compliance with federal law and then apply the arbitrary and capricious standard of the APA to the agency’s action, findings, and conclusions.<sup>2</sup>

To survive review under the arbitrary and capricious standard, an agency decision must show that the agency examined “the relevant data and articulate[d] a satisfactory explanation for its action including a ‘rational connection between the facts found the choice made.’” Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (quoting Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962)). An

agency action is arbitrary and capricious if the agency relies on factors that Congress did not intend for it to consider, entirely ignores important aspects of the problem, explains its decision in a manner contrary to the evidence before it, or reaches a decision that is so implausible that it could not be ascribed to a difference in view.

Bedford Cty. Mem’l Hosp. v. Health & Human Servs., 769 F.2d 1017, 1022 (4th Cir. 1985) (citing Motor Vehicle Mfrs. Ass’n, 463 U.S. at 43).

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<sup>2</sup> That two-step test will not produce a result different from the straight application of the APA standard under 5 U.S.C. § 706(2)(A) in AES Sparrows because, under the APA, agency actions must be set aside that are not made in accordance with law.

## DISCUSSION OF THE ISSUES

### I. WVDEP'S FAILURE TO IMPLEMENT THE ANTIDegradation POLICY IS INCONSISTENT WITH FEDERAL LAW AND ARBITRARY AND CAPRICIOUS

In issuing the Section 401 Certification, WVDEP failed to implement the CWA's antidegradation policy. That failure renders the Section 401 Certification invalid at both steps of the applicable standard of review.

Section 401 requires states to certify that discharges resulting from federally permitted actions will comply with Section 303 of the CWA. 33 U.S.C. § 1341(a)(1). Section 303 establishes an antidegradation policy, "requiring that state standards be sufficient to maintain existing beneficial uses of navigable waters, preventing their further degradation." 33 U.S.C. § 1313(d); PUD No. 1, 511 U.S. at 706. That policy is a fundamental part of state water quality standards. PUD No. 1, 511 U.S. at 706 ("EPA's regulations implementing the Act require that state water quality standards include a 'statewide antidegradation policy' [.]") (quoting 40 C.F.R. § 131.12)); see also Nat. Res. Def. Council, 16 F.3d at 1400 (noting that the antidegradation policy is one of three elements of a state's water quality standards).

State antidegradation policies must be consistent with 40 C.F.R. § 131.12(a), and states must develop implementation methods consistent with that provision, 40 C.F.R. § 131.12(b). The federal regulations require that antidegradation policies protect existing uses, maintain the existing quality of high-quality waters unless

degradation is justified by socio-economic development, and prohibit degradation of outstanding National resource waters. Id. § 131.12(a).

West Virginia's antidegradation policy has been approved by EPA and is set out in W. Va. C.S.R. § 47-2-4. It assigns three tiers of protection to West Virginia's waters, depending on their existing quality and national significance: Tier 1, Tier 2, and Tier 3. W. Va. Code § 41-2-4.1. Existing uses must be maintained in Tier 1 waters; the existing high-quality of Tier 2 waters must be protected absent socio-economic justification; and the degradation of outstanding national resource waters in Tier 3 streams is prohibited. Id.

West Virginia's antidegradation implementation procedures are codified in W. Va. C.S.R. § 60-5-1 et seq. Although EPA has lawfully approved portions of that rule, the United States District Court for the Southern District of West Virginia vacated EPA's approval of certain provisions of that regulation in 2003, and EPA has not taken action on some of those provisions since that time. Horinko, 279 F.Supp.2d at 777. To conduct an antidegradation review to determine an activity's compliance with the antidegradation policy, WVDEP must (1) determine the existing uses of the receiving waterbody associated with the proposed activity, (2) determine the baseline water quality for the receiving waterbody, and (3) determine the tier of protection applicable to the receiving waterbody. W. Va. C.S.R. §§ 60-5-3.3, -3.4, -3.5.

For Tier 1 waters, if the receiving waterbody is impaired for a particular use or pollutant, “there shall be no lowering of the water quality with respect to the parameters of concern that are causing the impairment.” Id. § 60-5-4.7. For Tier 2 waters, WVDEP must determine whether a discharge will result in significant degradation, which is a reduction in the waterbody’s assimilative capacity for particular pollutants of 10% or more for the activity alone, or 20% or more in combination with other activities. Id. § 60-5-5.6.c. The assimilative capacity of a water body is the “difference between the baseline water quality and the water quality criteria.” Id. Thus, a Tier 2 antidegradation review cannot be performed without knowing the baseline water quality of a receiving stream and the pollutant concentration or loads of the discharge at issue.

If a regulated activity would cause a significant degradation of a Tier 2 water, then the proponent of that activity must prepare an alternatives analysis, and reasonable and cost-effective alternatives must be implemented. Id. § 60-5-5.7. If significant degradation would occur even with the application of reasonable and cost-effective alternatives, WVDEP must conduct a review of the social and economic importance of the activity to determine whether to allow or prohibit the activity. Id. §§ 60-5-5.8 to -5.9.

Because it is part of a state’s water quality standards, a state must consider whether a federally permitted activity complies with its antidegradation policy

before issuing a Section 401 certification. 40 C.F.R. § 121.2(a)(3). Indeed, WVDEP recognizes that requirement and states in its application form for a Section 401 Certification:

Included with the Water Quality Standards is the Antidegradation Implementation Rule (§60CSR5) effective July 2, 2001. The Rule includes additional application requirements and public participation procedures. Because there is a potential for lowering of water quality, or impacts to designated uses, associated with every project being reviewed for Section 401 Certification, every applicant must provide the information required of this application.

AR3388 (JA\_\_\_) (emphasis added).

Moreover, “state water quality standards ... are part of the federal law of water pollution control.” Arkansas v. Oklahoma, 503 U.S. 91, 109 (1992). Accordingly, if a state fails to conduct an antidegradation review before issuing a Section 401 certification, it acts inconsistently with federal law. See 63 Fed. Reg. at 36,780 (“[A]t a minimum, States ... must apply antidegradation requirements to activities that are ‘regulated’ under State, Tribal, or federal law (i.e., ... any activity requiring a CWA § 401 certification[.]).”).

**A. WVDEP’s Failure to Perform Tier 1 or Tier 2 Antidegradation Reviews Before Issuing the Section 401 Certification is Inconsistent With Federal Law**

In issuing the Section 401 Certification, WVDEP failed to perform an antidegradation review, notwithstanding public comments calling for one. West Virginia Rivers Coalition, Sierra Club, Appalachian Voices, and Indian Creek

Watershed Association signed on to comments on the Section 401 Certification submitted on West Virginia Rivers Coalition letterhead. AR12605-618 (JA\_\_\_-\_\_\_) (hereinafter, “WVRC Comments”). Those comments expressly called for a “full anti-degradation review” based on inconsistencies between the Section 401 Certification application and the Draft Environmental Impact Statement (“DEIS”) prepared in association with MVP’s application for the FERC certificate. AR12607 (JA\_\_\_). After calling for a full antidegradation review, the WVRC Comments noted that “DEP must obtain sufficient information for it to conduct the anti-degradation review required by §60-5-6.2 for each of the 53 impacted Tier 3 streams and determine whether increases in, among other things, sedimentation, iron, and temperature will result in a long-term lowering of water quality.” Id.

The WVRC Comments also expressly incorporated by reference a report by a licensed professional geologist, Pamela C. Dodds, Ph.D. AR12613 (JA\_\_\_). In her report, Dr. Dodds cites the Antidegradation Implementation Procedures, observes that “Tier 2 and Tier 3 waters must undergo antidegradation review to determine water quality impacts,” and requests that baseline water quality data be required and a determination of potential degradation calculated. AR12681-282 (JA\_\_\_-\_\_\_).

WVDEP all but ignored public comments regarding antidegradation review. Its entire discussion of this crucial element of the state's water quality standards is reproduced in full below:

*Comment: State code §60-5-6 requires that DEP conduct an anti-degradation review for each of the 53 impacted Tier 3 streams:*

DEP Response: According to the WVDEP-DWWM Tier 3 Geographic Information System (GIS) coverage, the Project does not cross any Tier 3 streams.

AR15193-194 (JA \_\_\_ - \_\_\_) (emphasis original). Rather than explaining its view of its duty to review the Pipeline's construction and operation for compliance with the state's antidegradation policy prior to issuing the Section 401 Certification, WVDEP zeroed in on the observation regarding Tier 3 streams in the WVRC Comments (an observation based on assertions in MVP's application that it would cross Tier 3 streams), described it as inaccurate, and then was silent on the topic of antidegradation.<sup>3</sup>

WVDEP did not determine, or require MVP to determine, the existing uses of the hundreds of streams that would receive discharges from the Pipeline's construction and operation. WVDEP did not determine, or require MVP to

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<sup>3</sup> MVP's application identified scores of affected streams as Tier 3. See generally AR3309-18, 3323-24 (JA \_\_\_ - \_\_\_, \_\_\_ - \_\_\_). Indeed, as late as March 22, 2017—the day before WVDEP issued the Section 401 Certification—MVP represented to WVDEP that the Pipeline would affect Tier 3 streams. AR15131 (JA \_\_\_).

determine, the baseline water quality of those streams for parameters of concern.<sup>4</sup> WVDEP did not determine, or require MVP to determine, the assimilative capacity of the hundreds of Tier 2 streams that would receive discharges from the Pipeline's construction and operation. WVDEP did not determine, or require MVP to determine, whether discharges associated with the Pipeline's construction and operation would significantly degrade those Tier 2 waters. At most, WVDEP reviewed MVP's determination of the applicable tier of protection to the receiving streams and concluded that MVP had incorrectly identified some as Tier 3. AR15193-194 (JA\_\_\_ - \_\_\_). Under no circumstances can that be construed as an antidegradation review consistent with federal law.

**1. WVDEP Should Have Performed a Tier 1 Antidegradation Review to Protect Already Impaired Streams**

Had WVDEP conducted an antidegradation review, the agency would have had to consider the effects of the Pipeline's construction and operation on West Virginia streams that are not currently meeting their designated uses. Under West Virginia's antidegradation procedures, "Tier 1 protection applies to all waters of the state. A water segment shall be afforded Tier 1 protection where the level of water quality is not sufficient to support recreation and wildlife and the

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<sup>4</sup> The only water quality data in the record for the receiving streams is limited to three parameters and one biological assessment performed for mitigation calculation purposes on a limited subset of the streams that would be affected by the Pipeline's construction and operation. See, e.g., AR10962 (JA\_\_\_).



propagation and maintenance of fish and other aquatic life.” W. Va. C.S.R. § 60-5-4.2. State regulations further provide that, “[w]here existing uses of the water body are impaired, there shall be no lowering of the water quality with respect to the parameters of concern that are causing the impairment.” Id. § 60-5-4.7. In other words, the antidegradation policy prohibits any further degradation when a stream is already impaired.

In accordance with Section 303(d) of the CWA, West Virginia maintains a list of impaired streams. Ohio Valley Env'tl. Coalition v. Fola Coal Co., LLC, 845 F.3d 133, 146 n.11 (4th Cir. 2017). According to the DEIS, the Pipeline will cross 26 streams on West Virginia's impaired streams list. AR331 (JA\_\_\_). The DEIS states that five of those streams are impaired for sedimentation: Price Run, Little Tenmile Creek, Oil Creek, and Little Sewell Creek. AR1498 (JA\_\_\_). Two of the 26 streams are biologically impaired as a result of an unknown cause: Little Tenmile Creek and Sand Fork. Id. Moreover, what limited water quality data MVP provided to WVDEP in its Section 401 Certification application showed that three additional streams are biologically impaired based on their stream condition index scores of less than 68: Stout Run, Lick Creek, and an unnamed tributary to Buffalo Creek. AR10962, AR11264, AR11386 (JA\_\_\_, \_\_\_, \_\_\_); Fola Coal Co., 845 F.3d at 144 (“When a stream's index score falls below 68, EPA considers the stream impaired under 33 U.S.C. § 1313(d).”).

Construction and operation of the Pipeline will result in increased sedimentation in streams. The DEIS explains that “[c]learing and grading of stream banks, in-stream trenching, trench dewatering, and backfilling could each cause temporary, local modifications of aquatic habitat involving sedimentation [and] increased turbidity[.]” AR345 (JA\_\_\_). Additionally, “[s]edimentation could smother fish eggs and other benthic biota ... and reduce benthic community diversity and health.” AR413 (JA\_\_\_). Indeed, MVP’s own consultant acknowledged that, “[a]lthough MVP will implement specific conservation measures (i.e., erosion and sediment controls) to minimize the impacts to waterways, these measures are unlikely to prevent all sediment inputs.” AR12873 (JA\_\_\_).<sup>5</sup> Without doubt, therefore, sedimentation is a parameter of concern related to the Pipeline. See W. Va. C.S.R. § 60-5-2.7 (defining “parameter of concern” for purposes of antidegradation review); 75 Fed. Reg. 58,374 (Sept. 24, 2010) (identifying sedimentation as one potential cause when a stream is listed as biologically impaired and the cause is reported as unknown).

For the streams discussed above that have been identified as impaired because of sedimentation or biologically impaired for an unknown cause, the

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<sup>5</sup> MVP retained an environmental consultant to quantify, through erosion modeling, increased sedimentation in the Jefferson National Forest at the request of the United States Forest Service. AR12875 (JA\_\_\_). Indian Creek Watershed Association presented the analysis to WVDEP in its public comments on the Section 401 Certification. AR12864 (JA\_\_\_). WVDEP did not respond to those comments or the sedimentation quantification.

antidegradation policy prohibits additional lowering of the water quality for the parameter of concern—including sedimentation. W. Va. C.S.R. § 60-5-4.7. Because of that strict prohibition, additional sedimentation in those streams caused by the Pipeline's construction and operation is prohibited. Had WVDEP conducted an antidegradation analysis, it would have been required to reach that conclusion. Its failure to do that analysis means that it failed to ensure that the proposed activity would comply with all water quality standards.

## **2. WVDEP Should Have Performed a Tier 2 Antidegradation Review to Protect High-Quality Streams**

WVDEP's failure to perform an antidegradation analysis also means that the Pipeline may violate the antidegradation policy, and hence applicable water quality standards, with regard to Tier 2 streams. MVP identified 489 crossings of Tier 2 streams in the Section 401 Certification application. AR3309-18, 3323-24 (JA \_\_\_ - \_\_\_, \_\_\_ - \_\_\_). The antidegradation policy prohibits significant degradation of Tier 2 streams without conducting an alternatives analysis and a socio-economic evaluation. W. Va. C.S.R. § 47-2-4.1.b; 40 C.F.R. § 131.12; W. Va. C.S.R. § 60-5-5. Whether significant degradation will occur cannot be determined without two important quantifications that are entirely absent from the record of the Section 401 Certification: (1) baseline water quality for parameters of concern and (2) the amount of additional loads of parameters of concern that will result from the

proposed activity. Those data are necessary to determine the effect of discharges on the assimilative capacity of a high-quality Tier 2 water. 47 C.S.R. § 60-5-5.6.c.

Neither WVDEP nor MVP reviewed or provided baseline water quality data for sedimentation, turbidity, or any other parameter of concern for the streams that will receive discharges from the Pipeline's construction and operation. Nor did WVDEP or MVP quantify the increased sediments that would reach the receiving streams as a result of the Pipeline's construction and operation. Indian Creek Watershed Association specifically asked for the latter data in a comment letter, in which it pointed out that such quantification was possible through the use of the Universal Soil Loss Equation ("USLE") or the Revised Universal Soil Loss Equation ("RUSLE"). AR12865 (JA\_\_\_). MVP retained a consultant to use the latter equation to quantify sedimentation in streams in the Jefferson National Forest, a small subset of streams in the Pipeline's path. AR12875 (JA\_\_\_). That quantification concluded that many miles of stream segments in the Jefferson National Forest would "be expected to have a 10 percent increase in sediment loads or more." AR12893 (JA\_\_\_). Moreover, the WVRC Comments included a quantification by a consulting firm of increased sedimentation in one high-risk watershed using a model similar to the USLE, which concluded that the sediment load in the Laurel Run watershed would increase by 15% post-pipeline construction. AR12720 (JA\_\_\_). Based on that report, the WVRC Comments

requested that WVDEP not act on MVP's application without a full quantification of increased sedimentation. AR12616 (JA\_\_\_). Neither WVDEP nor MVP responded to those comments.

Without baseline water quality data for sedimentation and quantification of increased sedimentation from the Pipeline's construction and operation, WVDEP could not and did not perform an antidegradation review for the 489 crossings of Tier 2 streams. As a result, WVDEP failed to analyze whether the Pipeline's construction and operation would violate the antidegradation policy, which in turn violated a fundamental element of federal law.

**B. To the Extent that WVDEP Performed an Antidegradation Review, That Review Was Arbitrary and Capricious**

Alternatively, WVDEP's issuance of the Section 401 Certification without ensuring that the Pipeline would comply with the antidegradation policy was arbitrary and capricious. WVDEP offered no explanation for why it ignored multiple comments about the antidegradation policy and did nothing more than determine whether the Pipeline would affect any Tier 3 streams. Without that explanation, WVDEP has failed to include the "requisite connection between the facts found and the choice made," Burlington Truck Lines, 371 U.S. at 168, and "entirely ignores important aspects of the problem." Bedford Cty. Mem'l Hosp., 769 F.3d at 1022.

## II. WVDEP ARBITRARILY AND CAPRICIOUSLY FAILED TO REASONABLY ASSURE COMPLIANCE WITH WATER QUALITY STANDARDS IN KARST TERRAIN

The proposed route of the Pipeline would encounter a fragile terrain known as *karst* in Summers and Monroe Counties in West Virginia. AR272 (JA\_\_\_). Reports by Appalachian karst expert and professional geologist, Ernst H. Kastning, Ph.D., were submitted to WVDEP during the public comment period on the Section 401 Certification. AR12102-189, AR12222-233 (JA\_\_\_-\_\_\_, \_\_\_-\_\_\_). Dr. Kastning concisely defines this unique terrain this way: “Karst is a landscape that is principally formed by the dissolving of bedrock.” AR12114 (JA\_\_\_). More elaborately, Dr. Kastning describes it this way:

[K]arst is characterized by sinkholes, caves, dry valleys (with little or no surficial drainage), sinking streams, springs and seeps, solution valleys, and various forms that are sculpted on the bedrock surface.... Hydrologically, groundwater in karst terrains flows efficiently through openings in the bedrock that have been enlarged by the dissolution process. Surface water is rapidly conveyed underground at zones of *recharge* (typically where water enters sinkholes, soil, and vertical fractures in the bedrock) and then passes through a network of conduits (fractures, partings between beds of rock, and caves). The water eventually emerges at the surface in zones of *discharge* (springs, seeps, and wells). Karst forms in rocks that are soluble to various degrees when in contact with slightly acidic natural water. ... Limestone and dolostone are the principle karst formers in the area under consideration in this report.

### Id.

Dr. Kastning’s reports were submitted to WVDEP to alert the agency to the extreme hazards posed by MVP’s plan to construct the Pipeline through karst

terrain in Summers and Monroe Counties, West Virginia, including “contamination of groundwater aquifers in karst,” and “derangement of surface and subsurface drainage patterns owing to surficial modifications.” AR12224-225 (JA \_\_-\_\_). See also AR12129 (JA\_\_) (“If there is one single environmental issue that stands out in the karst of the Appalachians, it would have to be the sensitivity of the karstic aquifers to groundwater contamination.”). FERC acknowledged those risks and hazards in its DEIS. AR309-10 (JA\_\_-\_\_).

The threats to water resources from the Pipeline’s construction and operation in karst terrain are not limited to threats to groundwater. As Dr. Kastning and FERC both explain, groundwater and surface waters are inextricably intertwined in karst terrain, with streams sinking into subterranean features and then reemerging in springs and streams. AR309-10 (JA\_\_-\_\_); AR12114 (JA\_\_). Dr. Kastning’s reports alerted WVDEP to two streams of particular concern in Monroe County, West Virginia, whose surface water quality is at risk because of their proximity to karst features: Indian Creek and Hans Creek. AR12151 (JA\_\_).

Although MVP conducted limited field surveys to identify karst features near the Pipeline’s corridor, it relied heavily on a “desktop review” for its analysis of karst terrain in Summers and Monroe Counties, West Virginia. AR271 (JA\_\_); AR12192-193 (JA\_\_-\_\_) (comment letter from the Monroe County Commission criticizing inaccurate “‘desktop’ analysis” of karst terrain). In

response to criticism of such review by the Monroe County Commission, MVP blamed property owners in Monroe County who did not want MVP to enter their properties. AR14996 (JA\_\_\_). See generally Mountain Valley Pipeline, LLC v. McCurdy, 793 S.E.2d 850 (W. Va. 2016).

Dr. Kastning's reports informed WVDEP that MVP's analysis of karst terrain along the Pipeline's corridor was wholly inadequate to identify sensitive features that could affect water quality. Dr. Kastning stated that MVP's analysis had "barely 'scratched the surface'" because "merely mapping sinkholes that appear on topographic maps and aerial imagery not only misses subtle karst features on the surface, but totally ignores the complex, well-integrated, efficient networks of groundwater flow through extensive karst aquifers." AR12158 (JA\_\_\_). To remedy that deficiency, Dr. Kastning recommended the only three general approaches recognized by karst researchers: "(1) a high-resolution surveying and mapping of surficial features ..., (2) extensive and detailed geotechnical methods such as dye tracing and a variety of established geophysical techniques (*e.g.* seismic exploration, electrical resistivity, microgravity measurements, and ground-penetrating radar), and (3) exploration and surveying of enterable caves." AR12228 (JA\_\_\_). In short, the record before WVDEP was replete with criticism about the lack of information about the Pipeline's potential effects on karst terrain in Summers and Monroe Counties, West Virginia.



To counter that criticism, MVP pointed to its (1) Karst Hazard Assessment, (2) its Karst Mitigation Plan, (3) its General Blasting Plan, (4) best management practices in its Spill Prevention Control and Countermeasures Plan, and (5) best management practices in its Erosion and Sediment Control Plan. AR14993, AR14995 (JA\_\_\_, \_\_\_). Amazingly, only the latter is in the administrative record for WVDEP's consideration of the Section 401 certification (AR10108-110 (JA\_\_\_ - \_\_\_)); the remaining four sources of information about MVP's efforts to mitigate impacts to water resources in karst terrain were not before WVDEP when it issued the Section 401 certification, except to the extent that they might be briefly summarized in Appendix L to the DEIS. AR1743-1768 (JA\_\_\_ - \_\_\_).<sup>6</sup>

As with MVP's identification of karst terrain, Dr. Kastning found MVP's mitigation methods lacking, describing them as "unacceptable and deemed to be improper by experts and scientists who work with karst." AR12223 (JA\_\_\_). Specifically, Dr. Kastning emphasized "that filling a sinkhole with anything is highly undesirable" and can lead to "groundwater contamination, clogging of natural conduits in the underlying bedrock, flooding on the surface after storms[,] and ... subsidence or collapse." AR12129 (JA\_\_\_). Dr. Kastning reviewed MVP's Karst Mitigation Plan (which, again, is not in the Section 401 Certification

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<sup>6</sup> Appendix L to the DEIS is a table entitled "Karst Features Identified Within 0.25 Mile of the Mountain Valley Project" and includes a column labeled "Construction Recommendations"—the source of which is unclear. AR1743-1768 (JA\_\_\_ - \_\_\_).

record), and was concerned that its call for the “stabilization” of sinkholes “may suggest filling,” because the term is undefined in the plan. AR12130 (JA\_\_\_). Indeed, the best management practices in MVP’s Erosion and Sediment Control Plan (which is in the Section 401 Certification record) expressly called for excavating sinkholes, exposing their throats, and plugging the throats with rock or sand. AR10109 (JA\_\_\_). As alternatives to MVP’s proposed treatment of karst features, Dr. Kastning referred WVDEP to four published papers and reports on appropriate best management practices for karst terrain. AR12231 (JA\_\_\_).

Confronted with detailed criticisms in the comments about the Pipeline’s effect on water quality in karst terrain, and MVP’s relatively general response, WVDEP acknowledged the karst controversy in its response to comments. Its response, however, was so inadequate as to render its Section 401 certification arbitrary and capricious. WVDEP’s consideration of the karst threat is deficient in two respects. As an initial matter, it arbitrarily and capriciously relies on documents that were not presented to it in the course of its consideration of the Section 401 Certification. AR15189 (JA\_\_\_). An agency cannot rely on the mere existence of plans to justify its decision; it must consider their substance. Otherwise, the record lacks the requisite rational basis to sustain an agency’s action. Nat. Res. Def. Council, 16 F.3d at 1400.

Additionally, WVDEP arbitrarily and capriciously relied on the submission of an “enhanced karst management plan” after the issuance of the certification to assure that water quality standards in karst terrain will be met. WVDEP agreed with criticisms that MVP’s identification of karst features in Table 4.3.1-2 in the DEIS was deficient, and in an effort to remedy that deficiency included Special Condition 16 in the Section 401 Certification. AR15193 (JA\_\_\_).

That condition provides:

In advance of pipeline construction in karst area, the applicant must submit for review and concurrence an enhanced karst management plan. At a minimum, the plan shall include provisions for:

- A preplan development meeting with agency staff to discuss the approach for, and agency expectations of, the plan
- Ability to physically access all final Right-of-Way (ROW) and access road areas
- Field reviews with WVDEP-DWWM staff
- Identification of all karst features in, and receiving drainage from, the ROW and access roads
- Predictions and/or depictions of karst drainage patterns and springs receiving, or potentially receiving, ROW and access road drainage
- Construction designs to minimize disturbed areas
- Construction designs to minimize temporal disturbance
- Construction schedule to avoid typically wetter periods of the year
- Typical construction designs for mitigating encountered, unanticipated, karst openings
- Mitigation measures to be deployed if a water supply’s quality is affected
- Mitigation measures to be deployed if a water supply’s quantity is diminished or the supply is lost

- Reexamination of setback distances for equipment storage/fueling areas

AR15199 (JA\_\_\_) (emphasis added). For at least four reasons, Special Condition 16 does not provide the requisite reasonable assurance of compliance with all water quality standards in karst terrain.<sup>7</sup> 40 C.F.R. § 121.2(a)(3).

First, WVDEP cannot rely on the submission of a plan, the details of which are presently unknown, to constitute reasonable assurance of compliance with water quality standards. As a threshold matter, such reliance violates the public participation requirements in 33 U.S.C. § 1341(a). Moreover, there is no reason to believe that the implementation and outcome of an enhanced karst mitigation plan submitted in the future will result in compliance with water quality standards in karst terrain because so little is presently known about the karst features in the Pipeline's corridor. Special Condition 16 only prohibits MVP from commencing construction in karst areas; nothing prohibits MVP from initiating construction of

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<sup>7</sup> The applicable water quality standards include the narrative water quality criteria in W. Va. C.S.R. § 47-2-3, which set out conditions not allowable in waters of the state—specifically, Section 3.2.a, which prohibits distinctly visible floating or settleable or suspended solids, and Section 3.2.b, which prohibits deposits on the bottom of waterbodies. *Id.* §§ 47-2-3.2.a & -3.2.b. Those water quality standards are applicable to surface and ground waters in karst terrain because they are applicable to “all waters of the state.” *Id.* § 47-2-3.1. The Requirements Governing Water Quality Standards incorporate by reference the definitions in W. Va. Code § 22-11-3, which define “waters” to mean any and all water on or beneath the surface of the ground, whether percolating, standing, diffused or flowing ....” W. Va. Code § 22-11-3(23). *See also* W. Va. Code 22-11-7b(c) (directing the Secretary of WVDEP to promulgate rules “setting standards of water quality applicable to both the surface waters and groundwaters of this state”).

the Pipeline's other segments. By the time that MVP submits the required enhanced karst mitigation plan, MVP may well have invested tremendous resources in constructing the Pipeline's other segments and in acquiring the property rights to the easements necessary for construction, including property rights in the karst terrain areas—perhaps even by eminent domain.

In that way, WVDEP may face overwhelming bureaucratic momentum and pressure to approve the enhanced karst management plan, no matter its terms—the phenomenon then-Judge Breyer called a “bureaucratic steam roller.” Sierra Club v. Marsh, 872 F.2d 497, 504 (1st Cir. 1989). “The difficulty of stopping a bureaucratic steam roller, once started,” is a legitimate judicial consideration in administrative review. Id. See also Davis v. Mineta, 302 F.3d 1104, 1115 n.7 (10th Cir. 2002) (noting that any construction on a proposed project presents a serious risk that administrative decisionmakers will allow the construction of the entire project); N. Cheyenne Tribe v. Hodel, 851 F.2d 1152, 1157 (9th Cir. 1988) (“Bureaucratic rationalization and bureaucratic momentum are real dangers[.]”). This Court has recognized the phenomenon in the National Environmental Policy Act context and has “committed to the proposition that when a major federal action is undertaken, no part may be constructed without an [Environmental Impact Statement.]” Maryland Conservation Council, Inc. v. Gilchrist, 808 F.2d 1038, 1042 (4th Cir. 1986).

If MVP proceeds with construction of the Pipeline outside of karst terrain, with its Section 401 Certification in hand, and then later presents a proposed enhanced karst management plan to WVDEP under Special Condition 16, “the options open to [WVDEP] would diminish, and at some point [its] consideration would become a meaningless formality.” Arlington Coalition on Transp. v. Volpe, 458 F.2d 1323, 1333 (4th Cir. 1972). The “sheer momentum of [the Pipeline] project dooms the favorable consideration” of concerns about the Pipeline’s effects on water resources in karst terrain. Jersey Heights Neighborhood Ass’n v. Glendening, 174 F.3d 180, 188 (4th Cir. 1999). In other words, it was arbitrary and capricious for WVDEP to conclude that it can reasonably assure compliance with water quality standards in karst terrain on the basis of avoidance techniques to be named later.

The second reason that Special Condition 16 is inadequate to reasonably assure compliance with water quality standards is that it does not prescribe acceptable ways for MVP to investigate and identify karst features. Special Condition 16 merely requires MVP provide for the “[a]bility to physically access all final Right-of-Way (ROW) and access road areas” and the “[i]dentification of all karst features in, and receiving drainage from,” those areas. AR15199 (JA\_\_\_). It does not specify how MVP is to conduct its investigation. Although WVDEP apparently agreed with Dr. Kastning’s assessment that MVP’s existing

investigation was inadequate, it failed to take the next logical step and require MVP to use his identified, proven approaches to conduct a valid investigation. AR12228 (JA\_\_\_). WVDEP did not even address Dr. Kastning's suggestions in its response to comments. AR15188-194 (JA\_\_\_). In that way, WVDEP has failed to fully consider an important aspect of the problem and to articulate a rational connection between the facts in the record and the choice it made. Burlington Truck Lines, 371 U.S. at 168; Bedford Cty. Mem'l Hosp., 769 F.2d at 122.

The third way in which WVDEP's reliance on Special Condition 16 is arbitrary and capricious is that it does not require MVP to avoid karst features, it merely requires MVP to identify them. AR15199 (JA\_\_\_). It neither prohibits unacceptable mitigation practices nor prescribes acceptable ones, instead allowing MVP free rein to determine how it will handle karst features within the Pipeline's corridor or in its workspaces. See AR12129-130 (JA\_\_\_ - \_\_\_); AR10109 (JA\_\_\_); AR12231 (JA\_\_\_). The only mitigation measures required of the enhanced karst management plan under Special Condition 16 are measures to be employed if the quantity or quality of water resources are affected and measures to employed if unanticipated karst features are encountered. Id. Those after-the-fact measures are inadequate to assure compliance with water quality standards, rendering Special

Condition 16 arbitrary and capricious because it is contrary to the evidence in the record.

Fourth, WVDEP's reliance on Special Condition 16 to conclude that compliance with water quality standards in karst terrain is reasonably assured is arbitrary and capricious because, rather than prohibiting the Pipeline from being constructed in karst terrain at all, it permits such construction. AR15199 (JA \_\_\_). WVDEP completely ignored evidence in the record that the Pipeline's construction and operation is incompatible with the risks and hazards of karst terrain, including the threats to ground and surface waters in such terrain. See, e.g., AR12129 (JA\_\_\_); AR309-10 (JA\_\_\_ - \_\_\_); AR12114 (JA\_\_\_); AR13141 (JA\_\_\_).

As Dr. Kastning's report informed WVDEP, karst terrain is incompatible with the Pipeline because of environmental hazards that render "this region ... a 'no-build' zone for the project." AR12223 (JA\_\_\_). Rather than engage with those comments and others like it, WVDEP accepted bare assertions from MVP about its best management practices and imposed a toothless Special Condition applicable to karst. But WVDEP's Section 401 Certification cannot survive arbitrary and capricious review on the basis of such weak tea. Neither Special Condition 16 nor WVDEP's response to comments (or lack thereof) about the incompatibility of the Pipeline and karst terrain show that WVDEP examined "the relevant data and articulate[d] a satisfactory explanation for its action including a



‘rational connection between the facts found and the choice made.’” Motor Vehicle Mfrs. Ass’n, 463 U.S. at 43 (quoting Burlington Truck Lines, 371 at 168). To the extent that an explanation for WVDEP’s decision can be discerned from its response to comments and decision, that explanation is “contrary to the evidence before it” and, hence, is arbitrary and capricious under this Court’s rule in Bedford Cty. Mem’l Hosp., 769 F.2d at 122. As Dr. Kastning explained, trying to “zig and zag[ the Pipeline] through a plain of sinkholes” is analogous to an army “tip-toe[ing] through” a mine field rather than “skirt[ing] the area completely.” AR12228 (JA\_\_\_). WVDEP provided no explanation as to why that analogy does not hold true, and, therefore, acted arbitrarily and capriciously.

### **III. WVDEP UNLAWFULLY AND UNREASONABLY FAILED TO CONSIDER ALL DISCHARGES THAT WOULD RESULT FROM THE PIPELINE’S CONSTRUCTION AND OPERATION**

Under Section 401, WVDEP must certify not only that the Section 404 permit that MVP seeks from the USACOE will comply with all water quality standards, it must also certify that the FERC certificate sought by MVP under the NGA will comply with all water quality standards. 33 U.S.C. § 1341(a)(1); Millenium Pipeline Co., LLC v. Seggos, 860 F.3d 696, 698 (D.C. Cir. 2017); Berkshire Env’tl. Action Team, Inc. v. Tenn. Gas Pipeline Co., 851 F.3d 105, 107 (1st Cir. 2017); Delaware Riverkeeper Network, 833 F.3d at 368; Islander East II, 525 F.3d at 144; Islander East I, 482 F.3d at 86-87. Under Section 401, WVDEP

must examine “any discharge” that may result from the permitted activity. 33 U.S.C. § 1341(a)(1); AES Sparrows, 589 F.3d at 731-32 (holding that, under Supreme Court precedent, “discharge” under Section 401 means “a ‘flowing or issuing out’ into navigable waters” (quoting S.D. Warren Co. v. Maine Bd. of Env’tl. Prot., 547 U.S. 371, 376 (2006))).

That the Section 401 Certificate must examine both the FERC certificate and the USACOE permit is important because the discharges related to the USACOE permit could be construed to be limited to the dredged and fill material that will be placed in streams and wetlands at crossings. 33 U.S.C. § 1344(a). In contrast, the FERC certificate sought by MVP authorizes the construction and operation of the entire Pipeline facility, 15 U.S.C. § 717f(e), which will result not only in discharges to West Virginia’s streams at the stream crossings, but also in discharges of runoff from the Pipeline right-of-way during both construction and operation. See AES Sparrow, 589 F.3d at 731-32 (broadly defining discharges subject to Section 401 as the flowing or issuing out into navigable waters). In other words, focusing only on discharges authorized by the USACOE’s Section 404 permit would overlook discharges into West Virginia’s streams from upland areas that would result from FERC’s authorization of the Pipeline’s construction and operation.

**A. WVDEP's Failure to Certify the FERC Certificate is Inconsistent With Federal Law**

The problem for WVDEP here is that it never explicitly certified the FERC certificate. In its response to comments, WVDEP stated that that “[a]n Individual 401 Water Quality Certification (401 WQC) is being issued for the above-referenced activity, which certifies that it is consistent with the State’s water quality standards to discharge dredged or fill materials into waters of the State.” AR15188 (JA\_\_\_) (emphasis added). By limiting its certification to dredged or fill materials, WVDEP indicated that it was not certifying discharges into West Virginia’s waters from upland areas—discharges that will be authorized if MVP obtains the FERC certificate. WVDEP also states in its response to comments that the Section 401 Certification application “includes only stream crossings that will have either permanent or temporary fill material (culverts, cofferdams, etc.) placed into the streams,” AR15193 (JA\_\_\_), indicating that it was not considering water quality impacts from the Pipeline’s construction on streams or wetlands that would not be crossed. The record further demonstrates that WVDEP sent its final certification decision to the USACOE, but did not send a copy to FERC. AR15195-203 (JA\_\_\_-\_\_\_). WVDEP’s failure to explicitly certify the FERC certificate is particularly strange considering that MVP responded that it was seeking both a Section 404 permit and a FERC certificate on its Section 401

Certification application when asked to “[s]tate the type of federal permit applicant is applying for.” AR3389 (JA\_\_\_).

Because it fails to certify that the discharges authorized by the FERC certificate will comply with water quality standards, the Section 401 Certification is inconsistent with federal law and should be vacated. 15 U.S.C. § 717r(d); 33 U.S.C. § 1341(a). WVDEP’s myopic focus on the Section 404 permit violates Section 401 and its implementing regulations. 33 U.S.C. § 1341(a); 40 C.F.R. § 121.2(a)(3).

**B. WVDEP Arbitrarily and Capriciously Discounted Water Quality Threats From the Pipeline’s Construction and Operation in Upland Areas**

To the extent that WVDEP considered whether discharges from construction and operation in upland areas authorized by the FERC certificate would violate water quality standards, it gave such analysis short shrift. Consequently, WVDEP arbitrarily and capriciously certified the Pipeline.

As WVDEP learned from the WVRC Comments, “[a] 42-inch diameter pipeline has never been constructed through the steep, rugged, highly erodible terrain of the region of the Appalachian Mountains that would be traversed by the [Pipeline].” AR12611 (JA\_\_\_). As FERC acknowledged in its DEIS, “[c]onstruction of the [Pipeline] would disturb about 4,189 acres of soils that are classified as having the potential for severe water erosion.” AR37 (JA\_\_\_). FERC

also recognized that “[a]bout 151.7 miles (78 percent) of the [Pipeline] route in West Virginia is considered to have a high incidence of and high susceptibility to landslides.” AR266 (JA\_\_\_). FERC further concluded that soil compaction from construction could “increase[] surface runoff into surface waters in the immediate vicinity of the proposed construction right-of way ... resulting in increased turbidity levels and increased sedimentation rates in the receiving waterbody.” AR345 (JA\_\_\_). Numerous commentators echoed FERC’s observations about the threat to turbidity and sedimentation water quality standards. See, e.g., AR12610 (JA\_\_\_) (WVRC Comments: “The proposed project would impact aquatic life due to increased sedimentation not just from the stream crossings themselves, but also from the runoff from the significant land disturbance that would occur in the watersheds upstream from the crossings during construction.”); AR12682-685 (JA\_\_\_ - \_\_\_) (Dodd Report, concluding that upland construction will increase turbidity and sedimentation); AR12170 (JA\_\_\_) (Appendix A to Kastning Report: “Erosion and sedimentation caused by the construction and operation of the MVP would have severe impacts on water quality.... Erosion from the mountain slopes crossed by the MVP is inevitable.”).

Notwithstanding the clear and present threat to water quality from construction of the Pipeline in the steep mountains of West Virginia, WVDEP failed to adequately consider that threat. Its handling of water quality threats from

upland construction is arbitrary and capricious for two reasons. First, WVDEP did not even bother to require MVP to identify the streams that would receive discharges from upland areas during the Pipeline's construction and operation. Second, WVDEP relied on erosion and sediment control procedures that are demonstrably inadequate based on the record.

**1. WVDEP Arbitrarily and Capriciously Failed to Identify Streams That Would Receive Discharges From Upland Pipeline Construction and Operation**

MVP's Section 401 Certification application identifies only the streams that will receive dredged or fill material from crossings; it does not identify any streams that will receive discharges as a result of runoff from the corridor during construction or operation in upland areas. AR15192 JA (\_\_\_). Commenters noted that glaring omission, and WVDEP and MVP conceded its existence. AR13139 (JA\_\_\_); AR15192 (JA\_\_\_); AR15124 (JA\_\_\_).

WVDEP's issuance of a Section 401 Certification for the FERC certificate without even identifying streams that will receive discharges as a result of upland construction and operation of the Pipeline is the epitome of arbitrary and capricious agency action. WVDEP could not possibly conclude that compliance with water quality standards is reasonably assured if it did not even know what water resources are implicated. By failing to identify the streams that will receive discharges from upland areas, WVDEP "entirely ignores important aspects of the

problem,” rendering the Section 401 Certification arbitrary and capricious under Bedford Cty. Mem’l Hosp., 769 F.2d at 122.

**2. WVDEP Arbitrarily and Capriciously Relied on Inadequate Erosion and Sediment Control Plans to Ensure Discharges From Upland Areas Would Comply With Water Quality Standards**

To the extent that WVDEP gave any consideration to effects on water quality from the Pipeline’s construction and operation in upland areas, it relied on unproven erosion control plans and procedures. AR15189 (JA\_\_\_). In its response to comments, WVDEP stated:

Several comments referenced increase in runoff, sedimentation, and flooding due to the construction of the pipeline. The applicant will utilize [FERC] Plan and Procedures with variations approved by FERC. Additionally, project specific Erosion and Sediment Pollution Control Plans and site-specific Erosion and Sediment Control Drawings are currently being reviewed in the Oil and Gas Stormwater Construction General Permit by the WVDEP-DWWM, which are designed to minimize impacts to wetlands and streams.

Id.

Addressing WVDEP’s statements in reverse order, WVDEP’s reliance on the Oil and Gas Stormwater General Construction Permit is misplaced for three reasons. First, Congress did not authorize a state to satisfy its duties under Section 401 by relying a different state agency action. 33 U.S.C. § 1341; 40 C.F.R. § 121.2. Second, WVDEP had not issued the stormwater permit at the time it issued the Section 401 Certification, so it was premature to conclude that the plans

submitted along with the stormwater permit application would be approved, let alone be sufficient to reasonably assure compliance with water quality standards. Third, WVDEP did not condition the issuance of its Section 401 Certification on the issuance of and compliance with the stormwater permit. AR15195-203 (JA\_\_\_-\_\_\_). Accordingly, WVDEP cannot rely on the stormwater permit to provide a rational basis for its Section 401 Certification.

With regard to the FERC Plan and Procedures and the Erosion and Sediment Control Plans cited by WVDEP, although those documents were before WVDEP at the time of the Section 401 Certification, they do not support its issuance. AR3342-62 (JA\_\_\_-\_\_\_) (FERC Upland Erosion Control, Revegetation, and Maintenance Plan); AR3363-85 (JA\_\_\_-\_\_\_) (FERC Wetland and Waterbody Construction and Mitigation Procedures); AR10097-122 (JA\_\_\_-\_\_\_) (MVP Erosion and Sediment Control Plan). As a threshold matter, whatever protection those practices may provide at stream crossings, WVDEP cannot rely on them to conclude that they will protect water quality standards from discharges from upland areas because WVDEP did not require their implementation in upland construction; rather, the agency only required their implementation at “[a]ll stream and wetland crossings.” AR15198 (JA\_\_\_) (Special Condition 6).

More fundamentally, however, WVDEP’s reliance on those plans was arbitrary and capricious because the record showed definitively that the best



management practices set out in those plans are insufficient to protect water quality from discharges related to upland construction and operation of the Pipeline. That is, the comments establish conclusively that MVP's proposals would not prevent sedimentation-laden runoff from upland areas, and WVDEP never explained why or even if it felt the critiques in the comments were wrong.

As discussed above, Indian Creek Watershed Association submitted to WVDEP a report prepared by MVP's consultant quantifying sedimentation impacts to streams from the Pipeline's construction in the Jefferson National Forest. AR12864-901 (JA\_\_\_-\_\_\_). In that report, MVP's own consultant determined that many miles of stream segments downstream of the Pipeline's construction would experience an increase in sediment loads of 10 percent or greater, AR12893 (JA\_\_\_), even "assum[ing] strict adherence to the FERC 2013 Upland Erosion Control, Revegetation, and Maintenance Plan and the Project Erosion and Sediment Control Plan during construction." AR12897 (JA\_\_\_) (emphasis added). That is, even if MVP strictly follows the plans on which WVDEP relied, sediment loads in some streams would increase 10 percent or more as a result of discharges from upland areas.

As MVP's consultant explained, "[a]lthough MVP will implement specific conservation measures (i.e., erosion and sediment controls) to minimize impacts to waterways, these measures are unlikely to prevent all sediment inputs." AR12873

(JA\_\_\_). To run its model, MVP's consultant had to determine a variable known as the "support practice factor" that quantifies the predicted efficiency of erosion control practices. AR12884-885 (JA\_\_\_-\_\_\_). MVP's consultant acknowledged that "[r]eported estimates of the effectiveness of erosion and sediment controls vary widely among studies and have been reported to be between 10 and 90 percent." AR12884 (JA\_\_\_). To quantify sedimentation effects in the Jefferson National Forest, MVP's consultant selected an erosion and sediment control efficiency of 79%. AR12885 (JA\_\_\_). In other words, MVP's own consultant admitted that at least 21% of sediment running off of upland areas affected by the Pipeline's construction and operation would not be contained even with strict adherence to the plans on which WVDEP relied.<sup>8</sup>

The record before WVDEP was also replete with evidence that industry-standard erosion and sediment control practices had failed spectacularly in the Appalachian region in recent history. For example, the WVRC Comments documented at least five instances between 2006 and 2014 in which natural gas pipeline construction resulted in violations of sedimentation water quality standards due to slope failures, notwithstanding reliance on and compliance with state-of-the-art sediment and erosion controls. AR12610-613, AR12726-727

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<sup>8</sup> Another consultant calculated that, if best management practices were 75% effective, sediment loads in one high-risk watershed would increase 16-fold during construction and average 15% higher after construction of the Pipeline. AR12720 (JA\_\_\_).

(JA\_\_\_ - \_\_\_, JA\_\_\_ - \_\_\_) (including photographs). When it issued the Section 401 Certification, WVDEP did not respond to any comments on past failures of upland erosion and sediment controls. AR15188-203 (JA\_\_\_ - \_\_\_).

Based on the foregoing, WVDEP's reliance on MVP's proposed erosion and sediment controls was unreasonable. Despite being confronted with evidence that sedimentation would occur even with strict implementation of those controls and despite calls for it to do so, WVDEP made no effort to quantify sedimentation that would result from the Pipeline's construction and operation in upland areas. AR12965 (JA\_\_\_). Moreover, WVDEP conducted no independent evaluation of documented instances in which state-of-the-art erosion and sediment controls had failed to prevent water quality standards violations related to natural gas pipeline construction. In that way, WVDEP arbitrarily and capriciously ignored important aspects of the question presented to it and explained its decision in a manner contrary to the evidence before it. Bedford Cty. Mem'l Hosp., 769 F.2d at 122.

#### **IV. WVDEP ARBITRARILY AND CAPRICIOUSLY CONCLUDED THAT BLASTING WOULD NOT VIOLATE WATER QUALITY STANDARDS**

WVDEP's treatment of the potential for blasting in West Virginia's streams to cause water quality standards violations renders its Section 401 Certification arbitrary and capricious. Its conclusions were contrary to the evidence in the record

and it relied on the existence of a document it had never seen to downplay the effects of blasting.

The DEIS establishes that 88.8 miles of the Pipeline's corridor lie in areas of shallow bedrock. AR275 (JA\_\_\_). FERC concluded that "[t]he potential for blasting exists at all locations where shallow bedrock may be encountered." AR276 (JA\_\_\_). FERC also recognized that such blasting "may be required" in stream crossings and that in-stream blasting could injure or kill aquatic life, increase stream turbidity, and contaminate the water with chemicals. AR347 (JA\_\_\_). Licensed Professional Geologist Pamela Dodds, Ph.D., concluded that shallow bedrock in the Greenbrier River at the point of the Pipeline's crossing would require blasting in the riverbed. AR12443 (JA\_\_\_).

For its part, MVP tried to obfuscate on the question of blasting. With regard to the Greenbrier River crossing, MVP stated that blasting was "not anticipated," but acknowledged that it could be necessary and that, if so, it would follow a blasting plan that it had submitted to FERC. AR14977 (JA\_\_\_). That obfuscation led to confusion on WVDEP's part; as late as six days before it issued the Section 401 Certification the agency was still unsure whether MVP intended to use blasting. AR15098 (JA\_\_\_) (Email from WVDEP to MVP stating, "Will blasting occur for the project? I've seen yes and no in different places."). MVP again

insisted that “[b]lasting is anticipated along the project but not at any stream or wetland crossings.” Id.

Without any independent evaluation of the record evidence that much of the Pipeline’s corridor ran through shallow bedrock and that the Greenbrier River crossing would require blasting, WVDEP acquiesced to MVP’s obfuscation. WVDEP stated in its response to comments that “[b]lasting is not anticipated for this project; however, a blasting plan was requested by FERC and will be included in the final Environmental Impact Statement[.]” AR15189 (JA\_\_\_).

WVDEP’s treatment of the potential for blasting was arbitrary and capricious in two ways. First, it was contrary to the evidence in the record that blasting may be required in streams, and in the Greenbrier River in particular. Rather than considering that evidence, WVDEP accepted MVP’s bare assertion regarding blasting and conducted no analysis. Second, its reliance on MVP’s blasting plan lacks a rational basis because that blasting plan was never presented to WVDEP, so the agency had no idea whether its terms would be adequate to prevent water quality standards violations should blasting occur.

#### **V. WVDEP UNLAWFULLY FAILED TO RESPOND TO SIGNIFICANT COMMENTS**

WVDEP’s issuance of the Section 401 Certification was arbitrary and capricious because it failed to respond to significant comments. As this Court has held, an administrative agency is “obligated to identify and comment on ... the

relevant and significant issues raised during the proceeding.” Block, 717 F.2d at 886 (citing Home Box Office, 567 F.2d at 35 n.58); see also Perez v. Mortg. Bankers Ass’n, \_\_\_ U.S. \_\_\_, 135 S.Ct. 1199, 1203 (2015) (“An agency must consider and respond to significant comments received during the period for public comment.”).

The obligation under federal law to respond to comments originates in 5 U.S.C. § 553(c), which requires federal agencies to allow the opportunity for public comment. As the D.C. Circuit explained in Home Box Office, “the opportunity to comment is meaningless unless the agency responds to significant points raised by the public.” 567 F.2d at 35-36.

Although WVDEP is not bound by the APA, it must allow public participation and respond to comments. Section 401 of the CWA requires states to establish procedures for public participation in the consideration of certification applications. 33 U.S.C. § 1341(a)(1). By legislative rule, West Virginia has established a public comment period for Section 401 determinations and has expressly required WVDEP to “prepare a response to significant comments.” W. Va. C.S.R. §§ 47-5A-5.1.a through -5.1.e.

Here, WVDEP has failed to perform its duty to respond to significant comments. As described above, WVDEP failed to address relevant and significant comments regarding antidegradation review, karst terrain, erosion and

sedimentation from upland areas, and blasting. Moreover, a quantitative consideration demonstrates that WVDEP's response to comments was arbitrary and capricious. WVDEP issued a scant seven-page letter in response to nearly 2,400 pages of written public comments and over 150 pages of transcripts of comments from public hearings. When the complexity of a Section 401 certification decision does "not lend itself easily to brief analysis," an agency decision of "surprising brevity" can reinforce a conclusion that the decision is arbitrary and capricious. Islander East I, 482 F.2d at 104-05.

### **CONCLUSION**

For the foregoing reasons, Sierra Club respectfully requests that this Court vacate the Section 401 Certification and remand the matter to WVDEP with a reasonable schedule and deadline to act on remand.

### **REQUEST FOR ORAL ARGUMENT**

Sierra Club respectfully requests that this Court permit oral argument on this petition for review because it presents questions of continuing and important public interest in the state of West Virginia, the dispositive issues have not been authoritatively decided by the Courts of the United States, and the decisional process would be aided by oral argument.

Respectfully submitted,

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**UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**  
**Effective 12/01/2016**

No. 17-1714 Caption: Sierra Club et al. v. W. Va. Dep't of Env'tl. Prot., et al.

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(s) Derek O. Teaney

Party Name Petitioners

Dated: August 15, 2017

**CERTIFICATE OF SERVICE**

I hereby certify that on August 15, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Derek O. Teaney

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