UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Mountain Valley Pipeline, LLC	**)**	**Docket No. CP16-10-000**

MOTION TO ANSWER AND ANSWER OF MOUNTAIN VALLEY PIPELINE, LLC TO REQUESTS FOR REHEARING

Pursuant to Rules 212 and 213 of the Federal Energy Regulatory Commission's Rules of Practice and Procedure,[1] Mountain Valley Pipeline, LLC ("Mountain Valley") files this Motion to Answer and Answer ("Answer") in opposition to the requests for rehearing[2] of the Commission's Order Issuing Certificates and Granting Abandonment Authority, issued October 13, 2017.[3] As explained below, the Commission should deny the requests for rehearing.

The Mountain Valley Pipeline Project is a new pipeline system designed to transport up to 2.0 million dekatherms per day of natural gas to growing markets in the Appalachian, Mid-Atlantic, and Southeast United States regions. The Project includes approximately 303 miles of 42-inch diameter pipeline, three compressor stations,

[1] 18 C.F.R. §§ 385.212 & 385.213 (2017).

[2] *See* Request for Rehearing and Recision [*sic*] of Certificates and Motion for Stay of Appalachian Mountain Advocates, *et al.* (Nov. 13, 2017) ("AMA Rehearing Request"); Montgomery County, Virginia Request for Rehearing of Commission Order Granting a Certificate for the Mountain Valley Pipeline and Request for Stay (Nov. 13, 2017) ("Montgomery County Rehearing Request"); Request for Rehearing and Motion for Stay of the New River Conservancy (Nov. 13, 2017) ("NRC Rehearing Request"); Request for Rehearing of Conditional Order Issuing Certificates and Granting Abandonment Authority and Stay by Preserve Craig *et al.* (Nov. 13, 2017) ("Preserve Craig Rehearing Request"); Request for Rehearing and Stay of the Certificate Order for the Mountain Valley Pipeline by Carolyn Reilly and Four Corners Farm (Nov. 13, 2017) ("Reilly Rehearing Request"); Roanoke, Giles, and Craig Counties' Request for Rehearing and Stay of Order Issuing Certificates and Granting Abandonment Authority (Nov. 13, 2017) ("Counties' Rehearing Request"); Request for Rehearing and Clarification by Helena Teekell of the Certificate Order for the Mountain Valley Pipeline (Nov. 13, 2017) ("Teekell Rehearing Request"). Mountain Valley does not oppose the Request for Clarification or, in the Alternative, Rehearing submitted by Equitrans, L.P. on Nov. 13, 2017.

[3] *Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043 (2017) ("Certificate Order").

interconnection facilities, metering and regulation facilities, and other associated ancillary facilities located in West Virginia and Virginia. Mountain Valley is a joint venture between EQT Midstream Partners, LP; NextEra Energy US Gas Assets, LLC; Con Edison Gas Midstream, LLC; WGL Midstream, Inc.; and RGC Midstream, LLC. The Commission found that the public convenience and necessity requires approval of the MVP Project, subject to conditions set forth in the Certificate Order, and issued Mountain Valley a certificate of public convenience and necessity on October 13, 2017.[4] Mountain Valley hereby submits the following Answer to the requests for rehearing.

I.
EXECUTIVE SUMMARY

The Commission issued a certificate of public convenience and necessity for the MVP Project finding that Mountain Valley fully demonstrated the need for the MVP Project. Mountain Valley conducted its open season process consistent with Commission requirements and signed precedent agreements with five shippers for the full 2.0 million dekatherms per day of capacity for the Project. The Project is designed to and will support growing demand for natural gas supplies in the Appalachian, Southeast, and Mid-Atlantic markets. Moreover, the construction and operation of the Project will produce economic benefits for the states in which it is located. Mountain Valley has submitted detailed reports developed by Wood Mackenzie, Inc., a well-known and highly regarded national and international energy research firm, analyzing the long-term natural gas supply and demand in the Southeast and Mid-Atlantic markets. Wood Mackenzie concluded that demand for natural gas in these markets is expected to grow substantially through 2030. Its reports demonstrate that there is more than enough demand for pipeline

[4] Certificate Order at P 64.

transportation capacity in the Mid-Atlantic and Southeast regions to support the MVP Project and other planned natural gas pipeline expansions designed to serve those markets. Having concluded that the precedent agreements for 100 percent of the Project's capacity adequately demonstrate need, the Commission further appropriately found, consistent with long-standing Commission precedent, policy, and practice, that there is no meaningful distinction between agreements signed with producers and end users.

Parties have raised issues related to the Fifth Amendment throughout this proceeding, arguing without support that the Commission violates the Constitution by issuing conditional certificates or failing to properly make a finding that the Project would not serve a public use or service. However, parties seeking rehearing have ignored the plain language of the Natural Gas Act that allows the Commission to condition its certificate authorizations. The Commission's long-standing practice of issuing conditional certificates has been upheld by courts. Furthermore, the Commission explicitly addressed arguments related to the constitutionality of eminent domain. The Commission correctly explained that the Commission does not confer eminent domain rights. The Natural Gas Act conveys those rights only after the Commission makes a finding that the proposed project is required by the public convenience and necessity—which the Commission has done here.

The Commission also properly analyzed alternatives to the Project, including a so-called "one-pipe" alternative that combined the MVP Project with the separate Atlantic Coast Pipeline Project ("ACP") for the purposes of analysis under the National Environmental Policy Act ("NEPA"). The Commission appropriately found that the

"one-pipe" alternative would not serve the purposes of either project, was not technically feasible or practical, and would result in adverse environmental impacts of its own.

In addition, the Commission's analysis of potential downstream greenhouse gas ("GHG") emissions fully complies with the recent United States Court of Appeals for the District of Columbia's decision in *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017), in which the court required the Commission to quantify the downstream GHG emissions from the power plants directly tied to a trio of new pipeline projects. Finally, the Commission adequately analyzed impacts of the Project on aquatic resources in accordance with NEPA, and reasonably concluded that there would be no long-term or significant impacts on aquatic resources as a result of the Project and that any temporary impacts would be adequately avoided or minimized. As such, and as explained in further detail below, the rehearing requests are without merit and should be denied by the Commission.

II.
MOTION TO ANSWER

Pursuant to Rules 212 and 213 of the Commission's Rules of Practice and Procedure,[5] Mountain Valley respectfully moves to answer and requests that the Commission accept this Answer to the requests for rehearing.[6] Although the

[5] 18 C.F.R. §§ 385.212 & 385.213.

[6] Requests for rehearing were due Monday, November 13, 2017. *See* 18 C.F.R. § 385.713(b). Mountain Valley is not answering the following late-filed rehearing requests: Mary Beth Coffey Requests Rehearing of Order Issuing Certificates and Granting Abandonment Authority and Request for (Nov. 13, 2017, 10:46 PM); Martin Morrison Request Rehearing of Order Issuing Certificates and Granting Abandonment Authority and Request for Stay (Nov. 13, 2017, 5:19 PM); and Request for Rehearing on Order Issuing Certificates and Granting Abandonment Authority and Request for Stay of Preserve Bent Mountain (Nov. 14, 2017, 12:04 AM). The Commission is statutorily barred from considering late-filed requests for rehearing. 15 U.S.C. § 717r(a) (2012); *Millennium Pipeline Co.*, 161 FERC ¶ 61,194, at P 11 (2017) (late-filed rehearing requests "are jurisdictionally barred and must be rejected as untimely").

Commission's procedural rules generally do not allow for answers to rehearing requests,[7] the Commission may, for good cause, permit such an answer. The Commission has accepted answers for good cause when an answer will facilitate the decisional process or aid in the explication of issues. The Commission has explained that it will accept answers to requests for rehearing in order to "assist[] in our decision-making process."[8] Mountain Valley's Answer will ensure a complete and accurate record and will aid the Commission in its disposition of issues raised in this proceeding. Mountain Valley therefore requests that the Commission (1) accept Mountain Valley's Answer, and (2) deny the requests for rehearing.

III.
ANSWER

A. Mountain Valley Has Fully Demonstrated the Need and Demand for the Project.

Appalachian Mountain Advocates ("AMA") ignores the significant record evidence demonstrating the need for the MVP Project. Based on the record evidence, including the fact that Mountain Valley has executed "[p]recedent agreements signed by multiple shippers for 100 percent of the project's capacity" the Commission found that Mountain Valley had demonstrated, and that there clearly is, sufficient need for the Project.[9] Despite the significant evidence, AMA and others erroneously assert that the

[7] 18 C.F.R. §§ 385.213(a)(2) & 385.713(d)(1).

[8] *Columbia Gas Transmission, LLC*, 146 FERC ¶ 61,116, at P 1 n.3 (2014), *pet. for review denied, Gunpowder Riverkeeper v. FERC*, 807 F.3d 267 (D.C. Cir. 2015); *see also Algonquin Gas Transmission Co.*, 83 FERC ¶ 61,200, at p. 61,893 n.2 (1998) (accepting an answer in order to ensure "a complete and accurate record"), *order amending certificate*, 94 FERC ¶ 61,183 (2001); *Transwestern Pipeline Co.*, 50 FERC ¶ 61,211, at p. 61,672 n.5 (1990) (citing *Buckeye Pipe Line Co.*, 45 FERC ¶ 61,046 (1988)) (accepting an answer "where consideration of matters sought [will be] addressed in the answer will facilitate the decisional process or aid in the explication of issues.").

[9] Certificate Order at P 55 (observing that the "MVP Project will make reliable natural gas service available to end use customers and the market").

Commission violated the Natural Gas Act, stating that precedent agreements are "not sufficient to establish that the Project is required by the present or future public convenience and necessity."[10] Contrary to AMA's assertion, the Commission relied on ample evidence fully demonstrating need for the MVP Project in accordance with the Commission's Certificate Policy Statement[11] and the Natural Gas Act.

1. The Commission Properly Found That Mountain Valley Demonstrated Project Need Through Precedent Agreements.

Mountain Valley explained in its Application and other filings during this proceeding that the MVP Project is needed to provide up to 2.0 million dekatherms per day of new pipeline capacity necessary to meet the firm transportation service requirements for the growing demand for natural gas by local distribution companies, industrial users, and power generation facilities in the Mid-Atlantic and Southeast U.S. markets, as well as markets in the Appalachian region.[12] The MVP Project will supply natural gas to the Mid-Atlantic and Southeast markets through its interconnection with Transcontinental Gas Pipe Line LLC's Zone 5 compressor Station 165 in Pittsylvania County, Virginia. The entire capacity created by the MVP Project is fully subscribed by five Project shippers—EQT Energy, LLC; Roanoke Gas Company, LLC; USG Properties Marcellus Holdings, LLC; WGL Midstream, Inc.; and Con Edison—each of which signed binding long-term, 20-year agreements supporting the Project.

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[10] AMA Rehearing Request at 13.

[11] *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999) ("Certificate Policy Statement"), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000).

[12] Application for Certificate of Public Convenience and Necessity and Related Authorizations of Mountain Valley Pipeline, LLC, at 2, 5 (Oct. 23, 2015) ("Application"); Motion to Answer and Answer of Mountain Valley Pipeline, LLC to Comments on the Draft Environmental Impact Statement, at 7 (Feb. 3, 2017) ("Answer to DEIS Comments").

The Commission properly relied on and applied its Certificate Policy Statement for its determination. The Certificate Policy Statement "establishes criteria for determining whether there is a need for a proposed project and whether the proposed project will serve the public interest."[13] Public benefits include "meeting unserved demand, eliminating bottlenecks, access to new supplies, lower costs to consumers, providing new interconnects that improve the interstate grid, providing competitive alternatives, increasing electric reliability, or advancing clean air objectives."[14] An applicant may demonstrate that a project achieves public benefits through the presentation of "[a]ny relevant evidence . . . to support any public benefit the applicant may identify."[15] Relevant evidence includes "contracts, precedent agreements, [and] studies of projected demand in the market."[16] The Commission considers precedent agreements, such as those associated with the MVP Project, to be "significant evidence of need or demand for a project."[17] In addition, courts have upheld the Commission's finding that precedent agreements constitute the determination of need.[18]

AMA and others argue that the Commission erred by relying "exclusively on the existence of precedent agreements" to establish need, and by failing to consider "the

[13] Certificate Order at P 30.

[14] Certificate Policy Statement at p. 61,748.

[15] *Id.*

[16] *Id.* at p. 61,750.

[17] *Arlington Storage Co.*, 128 FERC ¶ 61,261, at P 8 (2009); *see also Algonquin Gas Transmission, LLC*, 150 FERC ¶ 61,163, at P 23 (2015) (long-term commitments for capacity "constitute strong evidence that there is market demand for the project"), *reh'g denied*, 154 FERC ¶ 61,048 (2016).

[18] *See Minisink Residents for Envtl. Pres. & Safety v. FERC*, 762 F.3d 97, 111 n.10 (D.C. Cir. 2014) (observing that "Petitioners identify nothing in the policy statement or in any precedent construing it to suggest that it requires, rather than permits, the Commission to assess a project's benefits by looking beyond the market need reflected by the applicant's existing contracts with shippers"); *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1311 (D.C. Cir. 2015) (same).

affiliate nature" of the precedent agreements.[19] According to AMA, a purpose of the Commission's Certificate Policy Statement was to "reduce . . . sole reliance on precedent agreements."[20] However, AMA misconstrues the Certificate Policy Statement and the Commission's statements regarding precedent agreements. Rather than stating that precedent agreements are unreliable evidence of market demand, as AMA contends, the Certificate Policy Statement "broadened the types of evidence certificate applicants may present to show the public benefits of a project."[21] Although the Certificate Policy Statement no longer requires applicants to put forth contracts to demonstrate need, it makes clear that "contracts or precedent agreements always will be important evidence of demand for a project."[22] Indeed, the policy specifically states that "if an applicant has entered into contracts or precedent agreements for the capacity, it will be expected to file the agreements in support of the project, and they would constitute significant evidence of demand for the project."[23]

As Mountain Valley previously explained, the practical realities of pipeline investment and construction further demonstrate that precedent agreements are the best evidence of need.[24] This is because investors in major pipeline projects would not spend large amounts of capital for projects that lack a genuine market. Like the Commission, investors rely on the existence of precedent agreements as objective evidence of market

[19] AMA Rehearing Request at 14-15; Teekell Rehearing Request at 6; Reilly Rehearing Request at 5-6; NRC Rehearing Request ¶ 8.

[20] AMA Rehearing Request at 14.

[21] Certificate Order at P 40 (citing Certificate Policy Statement at pp. 61,747-48).

[22] Certificate Policy Statement at p. 61,748.

[23] *Id.*; *see also* Certificate Order at P 40 (precedent agreements no longer required, but are "still significant evidence of project need or demand").

[24] Answer to DEIS Comments at 24.

demand for pipeline projects. Mountain Valley accordingly demonstrated that the entire capacity created by the MVP Project is subscribed by five Project shippers under binding long-term, 20-year agreements.[25] Consistent with the Certificate Policy Statement, the Commission appropriately found that these agreements "are the best evidence that additional gas will be needed."[26]

AMA also argues that the Commission should have applied "heightened scrutiny" to the precedent agreements because shippers are affiliated with Mountain Valley.[27] The Commission properly declined to do so. The affiliate nature of the shippers "does not require the Commission to look behind the precedent agreements to evaluate need."[28] As explained by the Commission, "[a]n affiliated shipper's need for new capacity and its obligation to pay for such service under a binding contract are not lessened just because it is affiliated with the project sponsor."[29] There is no need to distinguish precedent agreements with affiliates "[as] long as the precedent agreements are binding,"[30] which is the case with each of Mountain Valley's precedent agreements. The Commission correctly explained that the "primary concern regarding affiliates of the pipeline as shippers is whether there may have been undue discrimination against a non-affiliate shipper."[31] As the Commission properly observed, no such discrimination took place

[25] Certificate Order at P 41.

[26] *Id.* at PP 41-42 (noting that "where an applicant has precedent agreements for long-term firm service, the Commission deems the precedent agreements to be the better evidence of demand").

[27] AMA Rehearing Request at 20. *See also* Montgomery County Rehearing Request at 11.

[28] Certificate Order at P 45.

[29] *Id.* (citing *Greenbrier Pipeline Co.*, 101 FERC ¶ 61,122, at P 59 (2002), *reh'g denied*, 103 FERC ¶ 61,024 (2003)).

[30] *Greenbrier Pipeline*, 101 FERC ¶ 61,122 at P 59.

[31] Certificate Order at P 45.

here, where Mountain Valley conducted an orderly open season process in full compliance with Commission policy.[32]

Nor does the affiliated nature of the shippers warrant heightened scrutiny to prevent shifting costs to captive ratepayers. The Commission has explained that state utility regulators have jurisdiction over the approval of regulated utility expenditures, and any attempt by the Commission to usurp this role would be improper.[33] The acceptance of precedent agreements with affiliates as evidence of market demand is also supported by the Certificate Policy Statement, the focus of which is not on the affiliated nature of the shippers, but on the "impact of the project on the relevant interests balanced against the benefits to be gained from the project."[34] In this case, Project shippers have made a determination that there is a growing demand for pipeline capacity to provide access to new supplies and eliminate bottlenecks, two benefits specifically recognized by the Certificate Policy Statement.[35] The Commission found that these benefits gained from the MVP Project—serving the growing market demand for additional pipeline capacity—outweigh adverse effects. Thus, arguments to simply ignore the binding precedent agreements as evidence of need are unavailing.

2. Mountain Valley Further Demonstrated Project Need by Submitting Market Demand Studies for the Southeast and Mid-Atlantic Regions.

AMA argues that the Commission "needed to assess other indicators of market demand,"[36] highlighting Commissioner LaFleur's dissent which suggests that the

[32] *Id.* (observing that the Commission had no evidence of anticompetitive behavior).

[33] *Id.* at P 53; *see also id.* at P 51 (Con Edison has filed its precedent agreement with the New York State Public Service Commission).

[34] Certificate Policy Statement at p. 61,748.

[35] *Id.*

[36] AMA Rehearing Request at 19.

Commission consider "evidence other than precedent agreements."[37] Although, as explained above, precedent agreements are the best evidence of need, the Commission's Certificate Policy Statement also permits applicants to demonstrate need for their projects with a variety of relevant factors, including market studies with demand projections.[38] Mountain Valley did precisely just that. Mountain Valley further demonstrated the need for the MVP Project by submitting two detailed market reports by Wood Mackenzie that analyzed the long-term natural gas supply and demand in the Southeast and Mid-Atlantic regions.[39] The Commission noted that the Southeast Report concludes that by 2030, demand for natural gas capacity in the Southeast will reach 8.3 billion cubic feet ("Bcf") per day.[40] Much of this demand will be supplied from lower-priced Appalachian Basin gas in the Marcellus and Utica Shale regions, which requires additional pipeline capacity.[41]

Even though the Southeast market alone has more than enough natural gas demand to support the MVP Project's 2.0 million dekatherms per day of capacity, Mountain Valley submitted an additional demand study for the Mid-Atlantic market.[42]

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[37] Certificate Order at p. 61,349 (LaFleur, C. dissenting).

[38] *See Arlington Storage*, 128 FERC ¶ 61,261 at P 8 (citing Certificate Policy Statement at p. 61,749).

[39] *See* Wood Mackenzie, Inc., "Southeast U.S. Natural Gas Market Demand in Support of the Mountain Valley Pipeline Project" (Jan. 2016) ("Southeast Report"); Wood Mackenzie, Inc., "Mid-Atlantic Natural Gas Demand in Support of the Mountain Valley Pipeline Project" (Jan. 2017) ("Mid-Atlantic Report"). The Southeast Report was previously filed as Attachment A with Mountain Valley's January 27, 2016 Motion to Answer and Answer Protests and Comments, and was attached as Exhibit A to Mountain Valley's Answer to DEIS Comments. The Mid-Atlantic Report was attached as Exhibit B to Mountain Valley's Answer to DEIS Comments. Although the Certificate Order cites to only one of the two reports, both reports are in the record and were properly before the Commission prior to issuance of the Certificate Order. Notably, Commissioner LaFleur does not cite either report, despite urging the Commission to consider other indicators of market demand. Certificate Order at p. 61,349 (LaFleur, C. dissenting).

[40] Certificate Order at P 39; Southeast Report at 5, 21.

[41] Certificate Order at P 39; Southeast Report at 20-21.

[42] *See generally* Mid-Atlantic Report.

The Mid-Atlantic Report provides further support for the Commission's finding of sufficient market demand for the MVP Project.[43] The Mid-Atlantic Report concludes that the MVP Project will help satisfy a large and growing demand for pipeline capacity and gas supply in the Mid-Atlantic region over the near and long terms.[44] Immediately upon entering service, the MVP Project will help mitigate supply constraints and price volatility by serving current market demand of 2.2 Bcf per day; demand which by itself exceeds the Project's capacity.[45] Further, the Mid-Atlantic Report concludes that average daily demand for natural gas in the Mid-Atlantic region, which represents one of the largest regional gas markets, is expected to grow by 3.9 Bcf per day through 2035.[46] By 2035, the MVP Project will be necessary to serve as much as 6.1 Bcf per day of new demand for pipeline capacity in the Mid-Atlantic region.[47] This growth is, in part, attributable to the increased consumption of electricity fueled by natural gas,[48] as the region is phasing out coal and nuclear power plants and oil-fired peak shaving in favor of gas-fired generation, which is expected to be the predominant source for power generation.[49] The Mid-Atlantic Report notes that the switch to gas-fired generation in the winter season will shift a significant portion of demand to natural gas, resulting in a need

[43] *See* Certificate Order at P 39 (noting that Mountain Valley submitted a market demand study for the Southeast region). The Mid-Atlantic Report further buttresses this conclusion.

[44] Mid-Atlantic Report at 16-17.

[45] *Id.* at 16.

[46] *Id.* at 3-5 (noting that over 15 percent of the U.S. population resides in the Mid-Atlantic region, and that annual has consumption has grown from 2.9 trillion cubic feet ("Tcf") in 2010 to over 3.5 Tcf in 2015).

[47] *Id.* at 4, 17.

[48] *Id.* at 3-4.

[49] *Id.* at 5-6, 13. The Mid-Atlantic Report specifically projects that electricity consumption will increase 12 percent by 2035, with natural gas expected to supply more than approximately 54 percent of this total electricity consumption. *Id.* at 12, fig. 8. *See also* Application at 10-11 (citing United States Energy Information Administration Annual Energy Outlook 2015 with Projections to 2040 (Apr. 2015), www.eia.gov/forecasts/aeo) (summarizing EIA estimation that increase in natural gas consumption in large part attributable to retirement of coal-fired electric generation).

for gas supply certainty during times of peak demand.[50] The Southeast Report and the Mid-Atlantic Report provide the Commission with more than sufficient evidence of market demand for transportation capacity in the region to support the MVP Project. The Commission should use these studies as additional support for its determination of need consistent with the Certificate Policy Statement.[51]

AMA's reliance on flawed studies further undermines its arguments. AMA relies on a report prepared by Synapse Energy Economics, Inc. entitled "Are the Atlantic Coast Pipeline and the Mountain Valley Pipeline Necessary?" ("Synapse Report") to support its assertion that capacity of existing infrastructure in the Virginia-Carolinas' region is sufficient to meet future demand.[52] Mountain Valley previously explained[53] that the Synapse Report includes a number of critical flaws in estimating capacity and demand that render the report fundamentally unreliable and certainly ill-suited for assessing the need for critical energy infrastructure and demand for crucial natural gas transportation capacity. In particular, the Synapse Report improperly limits the region in which the MVP Project will satisfy demand to Virginia and the Carolinas, when Mountain Valley has consistently stated that the Project is intended to meet existing and growing demand in the Southeast and Mid-Atlantic markets, which is far broader than Virginia and North Carolina.[54] The Commission properly noted the Synapse Report's deficiency, stating that the report makes an "unlikely assumption that all gas is flowed by primary customers

[50] Mid-Atlantic Report at 12.

[51] Certificate Policy Statement at p. 61,748 (noting that "evidence necessary to establish the need for the project will usually include a market study").

[52] AMA Rehearing Request at 18.

[53] Mountain Valley's Answer to DEIS Comments at 15-18.

[54] *See* Application at 2, 5, 10-15, 23-24.

along their contracted paths, failing to take into consideration the use of regional pipeline capacity by shippers outside of Virginia and the Carolinas by means of interruptible service or capacity release."[55]

AMA seizes on Commissioner LaFleur's dissent to argue that Mountain Valley has not fully demonstrated need because it has only entered into agreements with end users for 13 percent of the MVP Project's capacity.[56] This argument is a red herring. The Commission has approved numerous pipeline projects that are supported substantially or entirely by contracts with producers—and Commissioner LaFleur voted to approve many of those projects.[57] Neither AMA nor Commissioner LaFleur has explained why the MVP Project should be treated differently.

AMA argues that the "specific need" for the remaining 87 percent "is unknown and based purely on speculation that the project shippers will be able to take advantage of 'price differentials in the Northeast, Mid-Atlantic, and Southeast markets.'"[58] AMA misstates Commissioner LaFleur's concern. Commissioner LaFleur observed that the "ultimate destination for the remaining gas will be determined by price differentials."[59] Regardless of whether the ultimate destination is pre-determined, the need for the

[55] Certificate Order at P 41, n.47.

[56] AMA Rehearing Request at 18-19.

[57] *See Transcon. Gas Pipe Line Co.*, 158 FERC ¶ 61,125, at P 11 (2017) (Chairman LaFleur); *Rover Pipeline LLC*, 158 FERC ¶ 61,109, at P 44 (2017) (Chairman LaFleur); *Rockies Express Pipeline LLC*, 150 FERC ¶ 61,161 (2015), *order denying reh'g*, 155 FERC ¶ 61,018 (2017) (Chairman LaFleur); *Nat'l Fuel Gas Supply Corp*., 150 FERC ¶ 61,162 (2015). *See also Rockies Express Pipeline LLC*, 116 FERC ¶ 61,272, at P 7 (2006), *order issuing certificates*, 119 FERC ¶ 61,069 (2007); *Maritimes & Ne. Pipeline, L.L.C*., 87 FERC ¶ 61,061 (1999).

[58] AMA Rehearing Request at 18-19 (quoting Certificate Order at p. 61,349 (LaFleur, C. dissenting)); Montgomery County Rehearing Request at 12.

[59] Certificate Order at p. 61,349 (LaFleur, C. dissenting) (citing Supplemental Information of Mountain Valley Pipeline Regarding New Shipper at 1 (Jan. 27, 2016)).

pipeline capacity created by the Project is demonstrated through long-term, binding contracts for 100 percent of the Project capacity.

The positions taken by AMA and Commissioner LaFleur are inconsistent with long-standing Commission precedent and dismiss the objective assessments of market participants. As the Commission has explained, Commission "policy does not require that shippers be end-use consumers of natural gas. Shippers may be marketers, local distribution companies, producers, or end users."[60] In fact, "a project driven primarily by marketers and producers does not render it speculative."[61] Rather, "producers who subscribe to firm capacity on a proposed project on a long-term basis presumably have made a positive assessment of the potential for selling gas to end-use consumers in a given market and have made a business decision to subscribe to the capacity on the basis of that assessment."[62] As noted above, Commissioner LaFleur, in her roles of Chairman and Acting Chairman, voted to approve projects supported substantially or entirely by contracts with producers on multiple occasions.[63] Indeed, Acting Chairman LaFleur previously found an applicant had established demand through the execution of precedent agreements, most of which by producers, for 100 percent of capacity—just as Mountain Valley has done for the MVP Project.[64] The fact that a number of the project shippers

[60] *Transcon. Gas Pipe Line*, 158 FERC ¶ 61,125 at P 29.

[61] *Id*. (citing *Maritimes & Ne. Pipeline*, 87 FERC ¶ 61,061 at p. 61,241).

[62] *Id.* As explained above, Project shippers have made the positive assessment of the potential for selling gas based on the growing demand for pipeline capacity in order to provide access to new supplies and eliminate bottlenecks.

[63] *See* note 57, *supra*.

[64] *Transcon. Gas Pipe Line*, 158 FERC ¶ 61,125 at P 29 ("Transco designed its project to meet the growing demand for natural gas in the Mid-Atlantic and southeastern markets, and substantiated such demand by executing precedent agreements for 100 percent of the project's capacity."). Commissioner LaFleur also voted in favor of issuing a Certificate of Public Convenience and Necessity in *Nexus Gas Transmission, LLC*, 160 FERC ¶ 61,022, at P 41 (2017), when Nexus Gas Transmission, LLC had entered into long-term precedent agreements for only 60 percent of the project's capacity.

were producers, and not end users, did not affect the Commission's finding of market demand.

In this case, Mountain Valley consulted with potential shippers to determine their transportation needs and the needs of end-users in target markets. Mountain Valley designed the Project to reflect these needs. In return, shippers executed long-term precedent agreements for 100 percent of the Project capacity demonstrating their demand for the Project. This reflects the relationship in the natural gas industry between pipeline companies and shippers (regardless of whether they are marketers, end users, or producers) to link supplies with demand centers.

Commissioner LaFleur explicitly acknowledged that her position was inconsistent with Commission policy and precedent. Commission LaFleur explained that requiring "evidence of the specific end use of the delivered gas within the context of regional needs" in the context of the "broader consideration of need would be a change in our existing practice."[65] Therefore, such a change would require a "generic proceeding to get input from the regulated community, and those impacted by pipelines, on how the Commission evaluates need."[66] Any general proceeding initiated by the Commission is outside the scope of the Commission's review of the Project and irrelevant here.

Contrary to AMA's assertion, Mountain Valley also demonstrated project need with "other indicators of public benefits" under the Certificate Policy Statement.[67] These additional indicators include "environmental advantages of gas over other fuels, lower fuel costs, access to new supply sources or the connection of new supply to the interstate

[65] Certificate Order at p. 61,349 (LaFleur, C. dissenting).

[66] *Id.*

[67] AMA Rehearing Request at 19.

grid, the elimination of pipeline facility constraints, better service from access to competitive transportation options, and the need for an adequate pipeline infrastructure,"[68] all of which Mountain Valley and the Commission addressed. With respect to the environmental advantages of natural gas, the final Environmental Impact Statement ("EIS") notes that "burning natural gas emits less [carbon dioxide] compared to other fuel sources," such as fuel oil or coal.[69] Further, because "coal is widely used as an alternative to natural gas" in the region where the Project will be located, "it is anticipated that [the Project] would result in the displacement of some coal use, thereby potentially offsetting some regional GHG emissions."[70] Concerning lower fuel costs and new supply sources, the Wood Mackenzie reports conclude that the Southeast and Mid-Atlantic markets will benefit from access to lower-priced Appalachian Basin gas in the Marcellus and Utica Shale regions.[71] The MVP Project also would alleviate pipeline facility constraints and result in better service by accommodating increasing peak demand and contributing to gas supply certainty and infrastructure reliability.[72] Finally, both reports conclude that demand for natural gas capacity in the Southeast and Mid-Atlantic regions is expected to increase in the near and long terms.[73] The MVP Project will help satisfy the need for additional pipeline infrastructure in these markets.

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[68] Certificate Policy Statement at p. 61,744; Certificate Order at p. 61,349 (LaFleur, C. dissenting).

[69] Final EIS at 4-620.

[70] *Id.*

[71] Southeast Report at 19-20 (Southeast consumers stand to realize economic benefits from increased access to Marcellus and Utica gas supplies); Mid-Atlantic Report at 7-10 (displacement of Gulf Coast gas would divert most cost-effective gas supplies to other markets across the interstate pipeline grid and lower overall market costs to consumers). The Mid-Atlantic Report also notes that through interconnections, shippers would be able to "extend the reach of MVP supplies beyond the Transco system and effect deliveries to customers on other pipeline systems"). *Id.* at 5.

[72] Southeast Report at 17-19; Mid-Atlantic Report at 13-15.

[73] Southeast Report at 5, 21; Mid-Atlantic Report at 16-17.

3. The Commission Appropriately Approved a 14 Percent Return on Equity.

AMA and others argue that the Commission's Certificate Order "lacked substantial evidence to support the [14 percent] return on equity" granted to Mountain Valley.[74] According to AMA, the Commission simply accepted Mountain Valley's proposed return on equity relying entirely on past precedent without assessing the appropriate return for the MVP Project.[75] AMA argues that the Commission's approval of the 14 percent return on equity improperly incentivizes the construction of new pipeline infrastructure.[76] Citing its own comments on the draft EIS as support, AMA argues that the Commission's return on equity is higher than that allowed by state public service commissions.[77] AMA is wrong on all counts.

First, the Commission did not simply approve Mountain Valley's requested return on equity. Mountain Valley proposed a 14 percent return on equity based on a 60-40 equity-to-debt ratio. While the Commission approved Mountain Valley's requested 14 percent return on equity, it required Mountain Valley to base this on a hypothetical 50-50 equity-to-debt ratio, consistent with Commission precedent.[78] In approving the 14 percent return on equity, the Commission explained that it allows a 14 percent return on equity because it "provides an appropriate incentive for new pipeline companies to enter the market and reflects the fact that greenfield pipelines undertaken by a new entrant in

[74] AMA Rehearing Request at 22; Montgomery County Rehearing Request at 14-15, 17-21.

[75] *Id.*

[76] *Id.*

[77] *Id.* at 22-23.

[78] Certificate Order at P 84.

the market face higher business risks than existing pipelines proposing incremental expansion projects."[79]

Having no supporting evidence of its own, AMA argues instead that the Commission's determination granting Mountain Valley's 14 percent return on equity lacks substantial evidence. But, as noted above, the Commission properly explained and supported the basis for its decisions regarding rate of return and capital structure. Moreover, the D.C. Circuit recently upheld the Commission's approval of a 14 percent return on equity in which petitioners raised the same argument. In *Sierra Club v. FERC*, the D.C. Circuit explained that it is "FERC's job, when evaluating a proposed rate for a new pipeline, . . . to see that the pipeline's investors receive a reasonable, but not excessive, return on their investment."[80] In that case, the court held that the Commission-approved 14 percent return on equity based on a hypothetical 50-50 debt-to-equity ratio was reasonable. The Commission made the exact same determination here.[81] In short, this is recently settled law.

B. The Commission's Issuance of a Conditional Certificate Authority Is Consistent with the Natural Gas Act and the Fifth Amendment of the Constitution.

The Commission should reject AMA's assertions that the issuance of a conditional certificate order—finding the Project in the public interest but requiring the fulfillment of specified conditions prior to its construction—violates the Natural Gas Act

[79] *Id.* at P 82.

[80] *Sierra Club*, 867 F.3d at 1377.

[81] In addition, Mountain Valley's recourse rates will not be static. The Commission also required Mountain Valley to file a cost and revenue study at the end of its first three years of actual operation to justify its existing cost-based rates, which will provide an opportunity for the Commission and the public to review Mountain Valley's original estimates, upon which its initial rates are based, to determine whether Mountain Valley is over-recovering its cost of service with its approved initial rates, and whether the Commission should exercise its authority under Section 5 of the Natural gas Act to establish just and reasonable rates. Certificate Order at Ordering Paragraph (K).

and the Fifth Amendment of the United States Constitution. As discussed below, these assertions are without merit.

1. Section 7 of the Natural Gas Act Permits the Commission to Issue Conditional Certificate Orders.

Section 7(c) of the Natural Gas Act expressly authorizes the Commission's long-standing practice of issuing conditional certificates: "[t]he Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require."[82] AMA creates a false distinction between conditions issued as "prerequisites" to construction and conditions that "limit" the transportation service after the pipeline's construction, and argue—without support—that the Natural Gas Act only permits the latter.[83] This distinction simply does not exist, and AMA ignores the plain language of Section 7(e) of the Natural Gas Act and decades of Commission precedent which has consistently been approved by the federal courts.

In rejecting arguments similar to AMA's, the Commission has explained that "[c]onditioned certificates are a common Commission practice, affirmed by the courts."[84] The Commission has stated that "[i]t is entirely appropriate for the Commission to issue

[82] 15 U.S.C. § 717f(e).

[83] AMA Rehearing Request at 76-78.

[84] *Algonquin Gas Transmission*, 154 FERC ¶ 61,048 at P 28. The inclusion of environmental conditions as prerequisites to construction is a long-standing Commission practice that dates back to its implementation of NEPA, which was enacted in 1969. In Order No. 415-C, the Federal Power Commission adopted regulations requiring environmental review of new pipeline construction projects certificated under Natural Gas Act Section 7. *See Implementation of the National Environmental Policy Act of 1969*, FPC Order No. 415-C, 48 FPC 1442 (1972). The Commission developed its routine practice of conditioning approval of pipeline projects upon compliance with NEPA as early as 1973. *See, e.g.*, *Eascogas LNG, Inc.*, 50 FPC 2075, 2086 (1973) (issuing certificate conditioned on completion of NEPA process); *Trailblazer Pipeline Co.*, 15 FERC ¶ 63,046, at 65,148, 65,177-80 (1981), *aff'd*, Opinion No. 138, 18 FERC ¶ 61,244, *reh'g denied*, Opinion No. 138-A, 19 FERC ¶ 61,116 (1982) (certificating construction of new pipeline system, conditioned upon compliance with 15 environmental conditions).

[a] certificate conditioned on the certificate holder subsequently obtaining necessary permits under other federal laws. Section 7(e) of the Natural Gas Act vests the Commission with broad power to attach to any certificate of public convenience and necessity 'such reasonable terms and conditions' as it deems appropriate."[85]

AMA contends that the Commission's practice of issuing prerequisite certificate conditions has only been upheld by "some" federal district courts, and not at the federal appellate level.[86] Tellingly, AMA cited no federal district court case that rejected the Commission's certificate conditioning authority.[87] Contrary to AMA's assertion, the Commission's certificate conditioning authority is settled law. The Commission's certificate conditioning authority has been approved by federal courts of appeal, which describe the Commission's authority to condition certificates as "extremely broad."[88] The D.C. Circuit recently explained that the Commission "may place *any reasonable conditions* on the issuance of such a certificate 'as the public convenience and necessity

[85] *Algonquin Gas Transmission*, 154 FERC ¶ 61,048 at P 26 (citing *Iroquois Gas Transmission Sys., L.P.*, 52 FERC ¶ 61,091, at 61,402 n.195 (1990) ("The Commission has a longstanding practice of issuing certificates conditioned on the completion of environmental work or the adherence by the applicants to environmental conditions."); *Tex. E. Transmission Corp.*, 47 FERC ¶ 61,341 (1989); *CNG Transmission Corp.*, 51 FERC ¶ 61,267 (1990); *Columbia Gas Transmission Corp.*, 48 FERC ¶ 61,050 (1989)).

[86] AMA Rehearing Request at PP 77-78 (citing *Transcon. Gas Pipe Line Co. v. Permanent Easement for 2.14 Acres*, No. CV 17-1725, 2017 WL 3624250, at *6 (E.D. Pa. Aug. 23, 2017); *Constitution Pipeline Co. v. Permanent Easement for 0.42 Acres*, No. 114-CV-2057, 2015 WL 12556145, at *2 (N.D.N.Y. Apr. 17, 2015)).

[87] *See also Gas Transmission Nw., LLC v. 15.83 Acres of Permanent Easement*, 126 F. Supp. 3d 1192, 1197-98 (D. Or. 2015) (rejecting argument that holder of conditioned certificate could not exercise eminent domain until after conditions are satisfied); *Columbia Gas Transmission, LLC v. 370.393 Acres*, No. CV 1:14–0469, 2014 WL 5092880, at *4 (D. Md. Oct. 9, 2014) (stating that compliance with FERC conditions is not a defense to exercise of eminent domain); *Portland Nat. Gas Transmission Sys. v. 4.83 Acres of Land*, 26 F. Supp. 2d 332, 336 (D.N.H. 1998) ("Compliance with FERC conditions cannot be used as a defense to the right of eminent domain and cannot be cited to divest the court of the authority to grant immediate entry and possession to the holder of a FERC certificate."); *Tenn. Gas Pipeline Co. v. 104 Acres of Land*, 749 F. Supp. 427, 433 (D.R.I. 1990) (finding that conditions in FERC order do not prevent exercise of eminent domain).

[88] *Great Lakes Gas Transmission Ltd. P'ship v. FERC*, 984 F.2d 426, 432 (D.C. Cir. 1993) (citing *Transcon. Gas Pipe Line Corp. v. FERC*, 589 F.2d 186, 190 (5th Cir. 1979), *cert. denied*, 445 U.S. 915 (1980)).

may require.'"[89] In *Myersville Citizens for a Rural Community, Inc. v. FERC*, the D.C. Circuit found that the Commission had not violated the Natural Gas Act or the Clean Air Act by conditioning its approval of a new compressor station on the review process required by the Clean Air Act.[90] Clearly, the Natural Gas Act does not prevent the Commission from issuing conditions to its certificate orders, and the Commission should reject AMA's argument that there is any statutory distinction between "prerequisite" conditions and post-construction "limitations" on transportation services.

AMA asserts that appellate cases related to the Commission's conditioning power historically concerned "rates and contractual provisions," rather than prerequisite conditions, and on this basis, suggests that the Commission may not attach prerequisite environmental conditions to its certificate orders.[91] However, the cases cited by AMA to support its argument are simply not relevant here. In fact, the word "environment" does not appear in any of the cases. Rather, these cases set forth limits on the Commission's use of its conditioning authority under Section 7 of the Natural Gas Act to oversee rates and contractual provisions—issues that inherently apply only after the pipeline has been built—and have nothing to do with the Commission's attachment of environmental

[89] *Del. Riverkeeper Network v. FERC*, 857 F.3d 388, 393 (D.C. Cir. 2017) (emphasis added).

[90] 783 F.3d 1301, 1321 (D.C. Cir. 2015) ("no provision of the Natural Gas Act . . . identified by Petitioners barred the Commission from issuing a conditional Section 7 certificate"). *See also City of Grapevine, Tex. v. Dep't of Transp.*, 17 F.3d 1502, 1508-09 (D.C. Cir. 1994) (under analogous federal conditioning authority, finding that the U.S. Department of Transportation had not violated the National Historic Preservation Act by conditioning its approval of a new airport runway on the review process required by that federal statute).

[91] *See* AMA Rehearing Request at 76-78 (citing *N. Nat. Gas Co., Div. of InterNorth, Inc. v. FERC*, 827 F.2d 779, 782 (D.C. Cir. 1987); *Panhandle E. Pipe Line Co. v. FERC*, 613 F.2d 1120, 1131-32 (D.C. Cir. 1979); *Atl. Ref. Co. v. Pub. Serv. Comm'n of N.Y.*, 360 U.S. 378, 389, 392 (D.C. Cir. 1959); and *Am. Gas Ass'n v. FERC*, 912 F.2d 1496, 1510 (D.C. Cir. 1990)).

conditions to pipeline construction.[92] That certain cases address the Commission's imposition of conditions related to "rates and contractual provisions" provides no support for AMA's argument that the Commission is statutorily barred from including so-called prerequisite conditions in its certificate orders.

2. The Commission's Issuance of Conditional Certificate Orders Does Not Violate the Fifth Amendment of the Constitution.

The Commission should reject AMA's argument that the use of conditional certificate orders violates the Fifth Amendment of the Constitution.[93] Because conditional certificate orders allow pipelines to exercise eminent domain before all conditions of the order are satisfied, AMA asserts that a constitutional violation could occur if the pipeline uses eminent domain but ultimately fails to fulfill all the conditions of its certificate, and thus never commences operations. In that case, AMA argues, property would be taken without a public necessity, in violation of the Fifth Amendment.

Questions concerning the constitutionality of pipelines' eminent domain authority are beyond the Commission's jurisdiction. Under Section 7 of the Natural Gas Act, the Commission determines only that a proposed pipeline project is in the public convenience and necessity. After the Commission makes such a finding, Section 7(h) authorizes a pipeline to exercise the right of eminent domain in a federal district or state court.[94] As the Commission stated in the Certificate Order, "only the courts can determine whether Congress' action in passing section 7(h) of the [Natural Gas Act] conflicts with the

[92] For instance, *Northern Natural Gas*, 827 F.2d at 782, stands for the proposition that the Commission may not "expand Section 7 beyond its intended purpose, into a means of circumventing the protections afforded to pipelines under the NGA's normal rate-adjustment provisions, Sections 4 and 5." (citing *N. Nat. Gas Co. v. FERC*, 780 F.2d 59, 62 (1985) and *Panhandle E. Pipe Line Co. v. FERC*, 613 F.2d 1120, 1129-33 (D.C. Cir. 1979)).

[93] AMA Rehearing Request at 78-80.

[94] Certificate Order at P 63.

Constitution."[95] As such, AMA's speculation about constitutional issues that could arise if a pipeline company takes property but ultimately fails to bring the new project into service are outside the Commission's jurisdiction.

The Commission should also reject AMA's suggestion that, "under the doctrine of constitutional avoidance," it prohibits Mountain Valley from exercising eminent domain until it obtains all permits necessary for construction.[96] There are no constitutional issues to avoid. Here, the Commission has made a finding, based on the substantial record, that the Project is required by the public convenience and necessity. This is sufficient under the Natural Gas Act to trigger the provisions of Section 7(h). Further, accepting AMA's argument would substantially and unnecessarily delay Mountain Valley's construction of the Project. In fact, exercising eminent domain is occasionally necessary to access property to complete the environmental and cultural resource surveys required for permitting. Under AMA's theory, a single landowner could not only delay, but entirely thwart a project found to be required by the public convenience and necessity.

C. The Certificate Order Properly Conveys the Right of Eminent Domain in Accordance with the Natural Gas Act.

AMA argues that the Commission violates the due process clause of the Fifth Amendment by refusing to address the constitutionality of the Natural Gas Act and the exercise of eminent domain.[97] AMA contends that if the Commission refuses to hear arguments with respect to due process and the constitutionality of the exercise of eminent

[95] *Id.* However, the Commission has noted that "courts have uniformly held that a pipeline's right to use eminent domain to acquire the necessary property does not violate the landowner's constitutional rights." *Greenbrier Pipeline Co.*, 108 FERC ¶ 61,255, at P 15 (2004) (citing *Thatcher v. Tenn. Gas Transmission Co.*, 180 F.2d 644 (5th Cir. 1950), *cert. denied*, 340 U.S. 829, *reh'g denied*, 340 U.S. 885 (1950); *Williams v. Transcon. Gas Pipe Line Corp.*, 89 F. Supp. 485 (W.D.S.C. 1950)).

[96] AMA Rehearing Request at 80.

[97] *Id.* at 93.

domain, appellate courts could refuse to hear the issue potentially leaving an affected landowner whose property is subject to condemnation without recourse. By doing so, AMA argues, the Commission "denies those landowners the due process of law required by the Fifth Amendment."[98]

The Commission properly explained in the Certificate Order that "[t]he Commission itself does not confer eminent domain powers."[99] Rather, the Commission determines whether the construction and operation of a project is required by the public convenience and necessity. Section 7(h) of the Natural Gas Act authorizes the certificate holder to seek eminent domain if it cannot acquire the easements by agreement.[100] Furthermore, as the Commission has explained, there is no test other than a finding that a project is required by the public convenience and necessity for determining whether a certificate is warranted.[101] The Commission has interpreted the "public convenience and necessity determination as requiring the Commission to weigh the public benefit of the proposed project against the project's adverse effects."[102] The Commission properly explained that it "undertake[s] this balancing through [its] application of the Certificate Policy Statement criteria," which "balance[s] the public benefits of a project against the residual adverse effects."[103] The Commission's interpretation is afforded deference as it is the agency that administers the provisions of the Natural Gas Act and has the expertise

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[98] *Id.*

[99] Certificate Order at P 59.

[100] *Id.* (citing 15 U.S.C. § 717f(h)).

[101] *Transcon. Gas Pipe Line*, 158 FERC ¶ 61,125 at P 67 (citing 15 U.S.C. § 717(a)); *see contra* Teekell Rehearing Request at 7-9 (arguing that the Commission must determine whether the MVP Project serves a public use); Reilly Rehearing Request at 6-8 (same).

[102] Certificate Order at P 60.

[103] *Id.*

to address the public convenience and necessity standard in the Act.[104] Once the Commission makes the finding that a project is required by the public convenience and necessity and issues a certificate, the natural gas company may properly exercise the right of eminent domain. In this case, the Commission properly found that the MVP Project is required by the public convenience and necessity and issued a certificate for the Project. Therefore, the Natural Gas Act appropriately granted Mountain Valley the right of eminent domain under Section 7(h).

The Commission further addressed the constitutionality of AMA's takings argument. The Commission explicitly found that the Project "served a public purpose sufficient to satisfy the Takings Clause."[105] The Commission concluded that the public at large as well as upstream natural gas producers would benefit from the Project.

> The proposed projects in this proceeding, are designed to primarily serve natural gas demand in the Northeast, Mid-Atlantic, and Southeast regions. Through the transportation of natural gas from the projects, the public at large will benefit from increased reliability of natural gas supplies. Furthermore, upstream natural gas producers will benefit from the project by being able to access additional markets for their product. Therefore, we conclude that the proposed project is required by the public convenience and necessity.[106]

A finding that the Project is required by the public convenience and necessity is all that is required under the Natural Gas Act.[107]

D. The Commission Adequately Evaluated Project Alternatives in Accordance with Purpose and Need Under NEPA.

AMA argues that the Commission's analysis of alternatives to the MVP Project is deficient because the Commission failed to "meaningfully evaluate" the Project's need.[108]

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[104] *Id.* at P 60 n.79.

[105] *Id*. at P 62.

[106] *Id.*

[107] *Transcon. Gas Pipe Line*, 158 FERC ¶ 61,125 at P 67.

According to AMA, the final EIS[109] does not "address in detail the need or public benefits" of the MVP Project, which prevented the Commission from adequately considering alternatives.[110] AMA treats the concepts of "purpose and need" under NEPA and the Commission's analysis of "need" under the Natural Gas Act as interchangeable, when in fact they are distinct analyses with different functions.

The Council on Environmental Quality's NEPA regulations require the Commission to "briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action."[111] "The function of a statement of purpose and need [under NEPA] . . . is to define the objectives of the proposed action such that the agency can identify and consider legitimate alternatives."[112] The Commission, therefore, is not required by NEPA to consider "alternatives that are not consistent with the purpose and need of the proposed project."[113]

Although AMA is correct that the final EIS does not provide a detailed analysis of Project need, AMA is incorrect that this renders the Commission's alternatives analysis deficient. It is not deficient at all. The final EIS sets forth the MVP Project's purpose and need in compliance with NEPA, explaining that the purpose is to alleviate transportation constraints by providing necessary pipeline infrastructure to transport

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[108] AMA Rehearing Request at 32.

[109] *See Mountain Valley Pipeline, LLC*, Final Environmental Impact Statement for the Mountain Valley Project and Equitrans Expansion Project, Docket Nos. CP16-10-000, CP16-13-000 (June 23, 2017).

[110] AMA Rehearing Request at 33 (quoting final EIS at 1-9).

[111] 40 C.F.R. § 1502.13 (2017). *See also Kern River Gas Transmission Co.*, 138 FERC ¶ 61,037, at P 27 (2012) ("The Council on Environmental Quality (CEQ) regulations implementing NEPA requires only that an EA include a brief discussion of the need for the proposal.") (citing 40 C.F.R. § 1508.9 (2011).

[112] *Kern River Gas Transmission*, 138 FERC ¶ 61,037 at P 27 (citing *Colo. Envtl. Coal. v. Dombeck*, 185 F.3d 1162, 1175 (10th Cir. 1999)).

[113] *Dominion Transmission, Inc.*, 155 FERC ¶ 61,106, at P 113 (2016) (citing *Pac. Coast Fed'n of Fishermen's Ass'ns v. Blank*, 693 F.3d 1084, 1100 (9th Cir. 2012)).

lower-priced natural gas produced in the Appalachian Basin to industrial users, power generators, and local distribution companies in the Northeast, Mid-Atlantic, and Southeast.[114] The final EIS also notes correctly that the MVP Project is fully subscribed by five contracted shippers.[115] Manifestly, there is more than sufficient record evidence to allow the Commission to "identify and consider legitimate alternatives," in accordance with NEPA.[116]

Despite the Commission's proper description of the MVP Project's purpose and need, AMA argues that the Commission was unable to adequately consider alternatives to the Project.[117] In particular, AMA reiterates Commissioner LaFleur's identification of the "single pipeline" alternative, which would combine the natural gas volumes of the MVP Project with the ACP into a single pipeline along the ACP route.[118] According to AMA, the Commission paid only "cursory attention" and dismissed the single pipeline alternative because it could not feasibly transport the combined volumes of gas.[119] This just is not so. Notably, Commissioner LaFleur properly recognized that the single pipeline alternative was eliminated because it could not accommodate either project's purpose.[120] Commissioner LaFleur further recognized that the Commission identified "environmental disadvantages" with the single pipeline alternative, "such as the need for

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[114] Final EIS at 1-8.

[115] *Id.*

[116] *Kern River Gas Transmission*, 138 FERC ¶ 61,037 at P 27 (citing *Colo. Envtl. Coal.*, 185 F.3d at 1175).

[117] AMA Rehearing Request at 36-37 ("FERC could not determine if a differently configured project could meet any actual public need for the gas to be carried on the MVP.").

[118] Certificate Order at p. 61,348 (LaFleur, C. dissenting); final EIS at 3-14 (describing the "one pipe-one route" alternative); Certificate Order at P 299 (same).

[119] AMA Rehearing Request at 38; Counties' Rehearing Request at 39-40; Preserve Craig Rehearing Request at 48-49.

[120] Certificate Order at p. 61,348 (LaFleur, C. dissenting).

additional compression to deliver the additional gas."[121] Despite these drawbacks, AMA nevertheless asserts that the need for both projects could be met through a single pipeline alternative and that the Commission failed to consider this properly. However, the Commission plainly and properly evaluated the one pipeline alternative in the final EIS and concluded not only that it would result in adverse environmental impacts of its own, but also that it was not feasible.[122]

As demonstrated in the final EIS, the single pipeline alternative would require new pipeline construction and significant "additional compression," as well as the construction of multiple laterals to accommodate Mountain Valley's proposed receipt and delivery points.[123] Any modifications to the locations of these receipt and delivery points could impact agreements and impede the ability of contracted shippers to move natural gas to regional markets—effectively undermining the entire purpose of the MVP Project.[124] In particular, the single pipeline alternative would "bypass[] . . . the two delivery taps to Roanoke Gas," which would undermine the need and purpose of the Project.[125] In addition, the construction of laterals to reach the location of the MVP Project taps would result in impacts to many new landowners, whom to date have not been part of the certification proceeding.[126]

Further, the eight additional compressor stations needed to move the combined volumes of gas—3.44 Bcf/d—could "triple air quality impacts in comparison to the MVP

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[121] *Id.*

[122] Final EIS at 3-14 – 3-16.

[123] *Id.* at 3-15; Certificate Order at P 300.

[124] Final EIS at 3-15.

[125] *Id.*

[126] Certificate Order at P 300.

and ACP considered individually."[127] As an alternative to additional compression, a larger diameter, non-standard 48-inch pipeline could be used, which would increase the construction right-of-way width by 30 feet or more, and would require "additional temporary workspaces to accommodate construction issues such as heavier equipment, additional spoil storage, and safety considerations."[128] The Commission reviewed detailed data, aerial photography, and topography of the ACP route and concluded that in many areas, "there is insufficient extra space available . . . to accommodate the additional construction right-of-way width and additional temporary workspaces."[129] Either option—additional compression or a larger diameter pipeline—would still require construction of "at least 353 miles of greenfield pipeline in order to reach the contracted-for receipt and deliver points."[130]

The Commission therefore properly concluded that the single pipeline alternative "is not technically feasible or practical."[131] And, contrary to AMA's assertion, the Commission's review was not "cursory;" rather, the Commission thoroughly reviewed the environmental impacts and technical requirements of the single pipeline alternative, and reasonably concluded that it was not feasible, and did not "offer a significant environmental advantage."[132]

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[127] Final EIS at 3-15; Certificate Order at P 300 (noting that eight new compressor stations would total approximately 873,015 hp of additional compression).

[128] Final EIS at 3-15. The final EIS observed that a 48-inch pipeline would encompass an area approximately 30 percent larger than the proposed 42-inch pipeline, which would result in the displacement of at least 30 percent more spoil. *Id.*

[129] *Id.* at 3-16.

[130] Certificate Order at P 301.

[131] Final EIS at 3-16; Certificate Order at P 301.

[132] Certificate Order at P 301.

E. The Commission Adequately Analyzed the MVP Project's GHG Emissions.

AMA asserts that the Commission failed to adequately analyze the downstream GHG emissions, and the resulting climate impacts, of the end use of natural gas to be transported by the MVP Project.[133] According to AMA, the Commission's analysis did not meet the standard set forth by the D.C. Circuit in *Sierra Club v. FERC*.[134] Contrary to AMA's position, the Commission adequately analyzed downstream GHG emissions and met the standard set forth in *Sierra Club*.

CEQ regulations implementing NEPA require the Commission to consider the direct and indirect effects of a proposed project.[135] Indirect effects "are caused by the [project] and are later in time or farther removed in distance, but are still reasonably foreseeable."[136] The court in *Sierra Club* found that it was reasonably foreseeable that the natural gas transported on the pipeline would be burned downstream and that such end use would result in the release of some GHG emissions, which may contribute to climate change.[137] In that case, Sierra Club had challenged the Commission's environmental analysis with respect to the Southeast Market Pipelines Project ("SMP Project").[138] Specifically, the SMP Project EIS did not contain an estimate of downstream GHG emissions resulting from use of natural gas at Florida power plants.[139]

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[133] AMA Rehearing Request at 53.

[134] 867 F.3d 1357.

[135] *Id.* at 1371 (citing 40 C.F.R. § 1502.16(b)).

[136] *Id.* (quoting 40 C.F.R. § 1508.8(b)).

[137] *Id.* at 1372.

[138] *Id.* at 1365. *See also* Florida Southeast Connection, LLC, Transcontinental Gas Pipe Line Company, LLC, Sabal Trail Transmission, LLC, Final Environmental Impact Statement for the Southeast Market Pipelines Project, Docket Nos. CP14-554-000, CP15-16-000, CP15-17-000 (Dec. 18, 2015). The Southeast Market Pipelines Project is composed of the Hillabee Expansion, Sabal Trail, and Florida Southeast Connection projects.

[139] 867 F.3d at 1371-72.

According to the court, "the EIS . . . should have either given a quantitative estimate of the downstream greenhouse emissions that will result from burning the natural gas that the pipelines will transport or explained more specifically why it could not have done so."[140] Importantly, the court clarified that "[w]e do not hold that quantification of greenhouse-gas emissions is required *every* time those emissions are an indirect effect of an agency action."[141]

Unlike the EIS for the SMP Project, the final EIS for the MVP Project contained exactly what the Court required in *Sierra Club*—a quantitative estimate of downstream GHG emissions. The final EIS estimates the total projected GHG emissions from end-use combustion of natural gas transported by the MVP Project and the Equitrans Expansion Project to be 48 million tons per year.[142] AMA asserts that the Commission made "no real effort to assess significance" of the emissions.[143] However, the Commission specifically evaluated "both the regional and national emissions of GHGs" in comparison to the estimated emissions from the MVP Project.[144] The Commission concluded that emissions from both the MVP and Equitrans Expansion Projects would result in a two percent increase in regional GHG emissions due to fossil fuel combustion, and "at most," a one percent increase in total national GHG emissions.[145] It is worth noting, however, that the Commission's estimates regarding the increase to GHG

[140] *Id.* at 1374.

[141] *Id.* (emphasis in original).

[142] Final EIS at 4-620, tbl.4.13.2-2. The MVP Project and the SMP Project are further distinguishable on the grounds that the final use of the natural gas for the SMP Project was known, which is not the case with the MVP Project. *See* Certificate Order at P 292, n.286.

[143] AMA Rehearing Request at 57.

[144] Certificate Order at P 294 (footnote omitted).

[145] *Id.*

emissions are overly conservative, and most likely include an over-estimation of the potential total downstream GHG emissions.

In the Certificate Order, the Commission observes that "combustion of all the gas transported by the MVP and [Equitrans Expansion] Projects will, at most, result in a one percent increase of national GHG emissions."[146] Although the Certificate Order does not provide a source for this calculation, the final EIS relied on the Environmental Protection Agency's Greenhouse Gases Equivalencies Calculator, which in turn cites their Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2015.[147] The 2017 Inventory reports 2015 GHG emissions from fossil fuel combustion to be 5,049 million metric tons.[148] Dividing 48 million—the total projected GHG emissions from end-use combustion of natural gas transported by both the MVP and Equitrans Expansion Projects—by 5,049 million results in an increase of GHG emissions from fossil fuel combustion of approximately 0.95 percent. Projected GHG emissions from fossil fuel combustion from the MVP Project alone would result in an increase of approximately 0.80 percent.

The 2017 Inventory reports 2015 total national GHG emissions to be 6,587 million metric tons.[149] When considered against 2015 total national GHG emissions, both Projects combined would result in an increase of approximately 0.73 percent, and the MVP Project alone would result in an increase of approximately 0.61 percent, which

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[146] *Id.*

[147] *Id.*; Final EIS at 4-620, tbl.4.13.2-2 (citing "EPA, 2016b"). *See also id.*, App. Z, References (listing "U.S. Environmental Protection Agency (EPA). 2016b. GHG Equivalencies Calculator – Calculations and References, https://www.epa.gov/energy/greenhouse-gases-equivalencies-calculator-calculations-and-references."); EPA, Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2015 (Apr. 15, 2017) ("2017 Inventory"), https://www.epa.gov/sites/production/files/2017-02/documents/2017_complete_report.pdf.

[148] 2017 Inventory at ES-5, tbl.ES-2.

[149] *Id.* at ES-4, fig. ES-1.

is more than one-third less than the Commission's over-estimate of one percent.[150] The Commission thus not only provided a quantitative estimate of GHG emissions, it conservatively evaluated their significance in comparison to regional and national emissions in accordance with the holding of *Sierra Club*. The Commission and the public were thus "fully informed of the potential impacts from the project."[151]

The final EIS satisfied NEPA and the requirements set forth by the *Sierra Club* Court, yet AMA attempts to mischaracterize the Court's holding in an effort to find a deficiency in the Commission's analysis. AMA expansively argues that the Court held that "quantification [is] not sufficient,"[152] greatly overstating the court's holding. In *Sierra Club*, Sierra Club urged the court to require the Commission to "link those downstream carbon emissions to particular climate impacts."[153] The SMP Project EIS had declined to do so, explaining that "there is no standard methodology for making this sort of prediction."[154] Notwithstanding the arguments of Sierra Club, the court declined to require the Commission on remand to do so.[155] Sierra Club further argued that the Commission should use the Social Cost of Carbon methodology to translate emissions to

[150] 48 million and 40 million divided by 6,587, respectively. GHG emissions from fossil fuel consumption have also decreased approximately 12.1 percent since 2005, which is in large part attributable to natural gas-fired generation's displacement of coal. *See* 2017 Inventory at ES-10 – ES-13; *id.* at ES-12 (noting that "a decrease in the carbon intensity of fuels consumed to generate electricity has occurred due to a decrease in coal consumption, and increased natural gas consumption"); *id.* at fig. ES-8 (demonstrating natural gas displacement of coal-fired generation); and *id.* at ES-4 – ES-17 (discussion of decrease in total national GHG emissions and GHG emissions from fossil fuel combustion in part due to substitution from coal to natural gas consumption in the electric power sector).

[151] Certificate Order at P 292.

[152] AMA Rehearing Request at 56, n.174 (citing *Sierra Club*, 867 F.3d at 1375).

[153] 867 F.3d at 1375.

[154] *Id.*

[155] *Id.*

"concrete harms."[156] Rather than requiring the Commission to use the Social Cost of Carbon, the Court simply directed the Commission on remand to explain its position on the usefulness of the methodology, allowing that the Commission could decline to use it.[157]

In the Certificate Order, the Commission clearly articulated its position that the Social Cost of Carbon "is not appropriate for use in any project-level NEPA review."[158] The final EIS reasonably concluded that although emissions from the MVP Project, combined with past and future emissions from all other sources, would "contribute incrementally to climate change," because the Commission "cannot determine the [MVP Project's] incremental physical impacts on the environment caused by climate change," the Commission is unable to determine whether the Project's "contribution to cumulative impacts on climate change would be significant."[159] Therefore, the Commission properly analyzed the Project's potential downstream GHG emissions in conformance with the court's directive in *Sierra Club*.

F. The Commission Adequately Analyzed Impacts to Aquatic Resources in Accordance with NEPA.

AMA argues that the final EIS "failed to take a 'hard look' at the direct and indirect effects of the [MVP] Project on waterbodies and wetlands."[160] According to AMA, the final EIS's conclusion that the MVP Project would not result in significant impacts to surface waters and wetlands, and that temporary impacts would be adequately

[156] *Id.*

[157] *Id.*

[158] Certificate Order at P 296.

[159] Final EIS at 4-620; Certificate Order at P 295.

[160] AMA Rehearing Request at 62.

minimized, is not supported by "substantial evidence."[161] However, the final EIS thoroughly and sufficiently evaluated impacts to surface waters[162] and wetlands,[163] and reasonably concluded that "[n]o long-term or significant impacts on surface waters are anticipated as a result of the [MVP Project]," and that any temporary impacts would be adequately avoided or minimized.[164] Contrary to AMA's position, the Commission fully satisfied its obligation under NEPA by performing a fulsome environmental review of direct, indirect, and cumulative impacts of the MVP Project on surface waters and wetlands.[165]

AMA further asserts that the Commission must support its conclusion that proposed mitigation measures would adequately minimize impacts to surface waters with "substantial evidence" in order to satisfy NEPA's requirement that the Commission take a "hard look" at the impacts of the MVP Project.[166] AMA similarly argues that the final EIS does not evaluate the effectiveness or discuss the details of various mitigation plans submitted by Mountain Valley.[167] In particular, AMA states that the final EIS "simply

[161] *Id.* at 65. *See also* Counties' Rehearing Request at 19-22; Preserve Craig Rehearing Request at 20-25 (arguing that the final EIS does not support the Commission's conclusions with respect to sedimentation impacts).

[162] Final EIS at 4-136 – 4-149.

[163] *Id.* at 4-153 – 4-163.

[164] *Id.* at 4-149. *See also id.* at 4-163 (concluding that although some adverse and long-term impacts to wetlands may occur, because the majority of impacts would be short-term, and impacts would be adequately minimized, "impacts on wetlands would not be significant"); Certificate Order at PP 185, 190.

[165] *Mo. Coal. for the Env't v. FERC*, 544 F.3d 955, 958 (8th Cir. 2008) (citing *Mayo Found. v. Surface Transp. Bd.*, 472 F.3d 545, 549 (8th Cir. 2006)); *see also Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983).

[166] AMA Rehearing Request at 65.

[167] *Id.* at 67.

assume[s]" that Mountain Valley's Erosion and Sedimentation Plans "would successfully minimize sedimentation impacts."[168] This just is not so.

AMA significantly overstates the Commission's obligations with respect to mitigation measures.[169] The Council on Environmental Quality's NEPA regulations provide that when an EIS is prepared, an agency must discuss possible mitigation measures.[170] Importantly, "[t]here is a fundamental distinction . . . between a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated . . . and a substantive requirement that a complete mitigation plan be actually formulated and adopted."[171] According to the Supreme Court, "it would be inconsistent with NEPA's reliance on procedural mechanisms—as opposed to substantive, result-based standards—to demand the presence of a fully developed plan that will mitigate environmental harm before an agency can act."[172] To satisfy NEPA, the Commission need only conduct a "reasonably complete discussion of possible mitigation measures."[173] The final EIS does just that. The final EIS contains a detailed discussion of numerous mitigation measures intended to minimize impacts to surface waters[174] and wetlands, which more than constitutes a "reasonably

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[168] *Id.*

[169] In addition, AMA's reliance on *New York v. NRC*, 589 F.3d 551, 555 (2d Cir. 2009), is misplaced. *New York v. NRC* describes the standard for when an agency relies on mitigation measures to demonstrate that impacts will not be significant and declines to prepare an EIS. In this case, the Commission prepared an EIS, so the case is inapplicable.

[170] 40 C.F.R. §§ 1502.14(f), 1502.16(h), 1508.25(b).

[171] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989).

[172] *Id.* at 353.

[173] *Id.* at 352.

[174] *See* Final EIS at 4-136 – 4-139 (discussing general mitigation measures to reduce impacts to surface waters); *id.* at 4-139 – 4-147 (discussing MVP Project-specific mitigation measures to reduce impacts to surface waters); *id.* at 4-159 – 4-163 (discussing general and specific mitigation measures to reduce impacts to wetlands).

complete discussion" in accordance with NEPA. Further, the final EIS describes and relies on several robust mitigation plans developed and submitted by Mountain Valley, as well as the Commission's own Plans and Procedures.[175] The Commission's analysis exceeds the standard set forth by the Court.

AMA further asserts that the final EIS improperly relied on the conditional Clean Water Act Section 401 water quality certification issued by the West Virginia Department of Environmental Protection ("WVDEP") on March 23, 2017.[176] According to AMA, the Commission's reliance on the certification to support its conclusion that the MVP Project would not significantly impact fisheries and aquatic resources is "arbitrary and capricious" because the certification was subsequently vacated by the Fourth Circuit Court of Appeals.[177] Contrary to AMA's assertion, the final EIS does not rely on the Section 401 certification in concluding that impacts would not be significant.

In June 2017, Sierra Club and other parties filed suit against WVDEP challenging the Section 401 certification.[178] WVDEP subsequently submitted a consent motion in September 2017, for voluntary remand, agreeing that the Section 401 certification

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[175] *Id.* at 4-149 (citing *Erosion and Sediment Control Plans*, *Spill Prevention, Control, and Countermeasures Plan*, *Preparedness, Prevention, and Contingency and Emergency Action Plans*, *Fugitive Dust Control Plans*, *Karst Mitigation Plan*, *Blasting Plan*, and *HDD Contingency Plan*, as well as the Commission's Plan and Procedures). *See also id.* at 2-30 (listing the Commission's *Upland Erosion Control, Revegetation and Maintenance Plan* and *Wetland and Waterbody Construction and Mitigation Procedures*); *id.* at 2-32, tbl.2.4-2, Construction, Restoration, and Mitigation Plans for the Mountain Valley Project and the Equitrans Expansion Project.

[176] AMA Rehearing Request at 64, n.206.

[177] *Id.* (citing final EIS at 4-224, 4-138, 5-4). *See also* Order on Voluntary Remand, *Sierra Club v. W Va. Dep't of Envtl. Prot.*, No. 17-1714 (4th Cir. Oct. 17, 2017), ECF No. 45 ("Order on Voluntary Remand").

[178] Pet. for Review, Sierra Club v. W. Va. Dep't of Envtl. Prot., No. 17-1714 (4th Cir. June 6, 2017), ECF No. 3; Petrs.' Opening Br., Sierra Club v. W. Va. Dep't of Envtl. Prot., No. 17-1714 (4th Cir. Aug. 15, 2017), ECF No. 36 (arguing that WVDEP failed to implement the Clean Water Act's antidegradation policy, failed to ensure compliance with water quality standards, and failed to respond to public comments).

required further evaluation.[179] The Fourth Circuit Court of Appeals granted the motion on October 17, 2017, and remanded the matter to WVDEP.[180] After further review, WVDEP indicated it waived the individual Section 401 certification and relied on its general certification of the Nationwide Permit 12 administered by the U.S. Army Corps of Engineers.[181] WVDEP noted that the recently reissued Nationwide Permit 12 contains new conditions specific to West Virginia that when combined with the state's stormwater permit requirements, "will allow for better enforcement capabilities and enhanced protection for the state's waters."[182] Thus, WVDEP has recognized that the Nationwide Permit 12, as conditioned by West Virginia, combined with better utilization of the state's stormwater permit, will "provide significantly stronger safeguards for the waters of West Virginia."[183]

With respect to the final EIS's conclusion on impacts, the document merely describes the Section 401 certification—nowhere does it state that the special conditions contained therein were necessary to ensure impacts will not be significant.[184] Although the final EIS stated that impacts would be further minimized by compliance with

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[179] Consent Motion for Voluntary Remand with Vacatur by Respondents West Virginia Department of Environmental Protection and Austin Caperton, Sierra Club v. W. Va. Dep't of Envtl. Prot., No. 17-1714, (4th Cir. Sept. 13, 2017), ECF No. 42.

[180] *See* Order on Voluntary Remand.

[181] West Virginia Dep't of Environmental Protection Waives 401 WQC for FERC Certificate, FERC Docket No. CP16-10 (Nov. 1, 2017); Press Release, WVDEP Announces Permit Adjustments for Mountain Valley Pipeline ("WVDEP Press Release") (Nov. 1, 2017), https://www.documentcloud.org/documents/4165328-DEP-MVP-Press-Release-Nov-1-2017.html.

[182] WVDEP Press Release.

[183] *Id.*

[184] Final EIS at 4-224. Regarding impacts to wetlands, the compensatory mitigation requirements contained in the Section 401 certification will be a requirement of the Section 404 permit, even with WVDEP's subsequent waiver of its Section 401 authority. Indeed, the Certificate Order notes that "[p]roof of compensatory mitigation credit purchase will be provided by the applicants to the Army Corps prior to construction." Certificate Order at P 190, n.213.

measures required by state permitting agencies, the final EIS observed correctly that conditions in the Section 401 certification were based on "measures outlined in [Mountain Valley's] project-specific [p]rocedures."[185] The final EIS reasonably concluded that Mountain Valley's specific mitigation measures "would adequately minimize impacts on surface water resources."[186] The final EIS's conclusion regarding minimization of impacts was, therefore, not based on the Section 401 certification.[187]

The Certificate Order also recognizes that impacts are not based on the Section 401 certification, as it was issued after the certification was vacated. The Certificate Order states that "[i]n addition to the measures we require here, the Army Corps, the Pennsylvania Department of Environmental Protection (PADEP), WVDEP, and Virginia Department of Environmental Quality (VADEQ) have the opportunity to impose conditions to protect water quality pursuant to sections 401 and 404 of the Clean Water Act."[188] Thus, the Commission did not rely on WVDEP's certification in concluding that impacts would be adequately minimized, as it specifically noted that WVDEP and other agencies may impose additional conditions in the future.

AMA also asserts that the *Hydrologic Analysis of Sedimentation* that Mountain Valley prepared for the portion of the pipeline crossing the Jefferson National Forest is unsupported and arbitrary.[189] AMA takes issue with the document's conclusion that erosion and sedimentation control measures are likely to be 79% effective, arguing that

[185] Final EIS at at 5-4; 4-224 (certification required Mountain Valley to complete all stream crossings in accordance with the FERC Upland Erosion Control, Revegetation, and Maintenance Plan and Mountain Valley's project-specific procedures, including its Stream Bank Restoration Plan).

[186] *Id.* at 5-4.

[187] *Id.*

[188] Certificate Order at P 187.

[189] AMA Rehearing Request at 69.

this is untrue because the Forest Service previously expressed concerns about the accuracy of this conclusion.[190] AMA ignores the fact that Mountain Valley has already addressed the Forest Service's concerns. In addition, in the final EIS the Commission agreed with Mountain Valley's explanation and conclusions.[191] As the Supreme Court has noted, "[w]hen specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts."[192]

AMA also cites previous criticisms of Mountain Valley's erosion and stormwater control plans by the Virginia Department of Environmental Quality ("VADEQ").[193] Again, this ignores the fact that VADEQ approved Mountain Valley's Annual Standards and Specifications for Erosion and Sediment Control and Stormwater Management on June 20, 2017. Further, any concerns raised by VADEQ's consultant regarding the site-specific plans will be addressed to VADEQ's satisfaction prior to construction. In light of VADEQ's approval, AMA's discussion of the consultant's comments on the site-specific plans does not demonstrate that the measures will be ineffective when implemented.

AMA also asserts that the Commission failed to consider increased sedimentation from conversion of forested land to herbaceous cover.[194] AMA focuses its claims on steep slopes and highly erodible soils, because it acknowledges that that sedimentation

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[190] *Id*. (citing Forest Service Comment on Biological Evaluation at 2 (Apr. 24, 2017) (Accession No. 201704245097)).

[191] *See* Final EIS at 4-146.

[192] *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989).

[193] AMA Rehearing Request at 70-71.

[194] *Id.* at 71-72.

increases for low slopes and stable soils would be low.[195] The final EIS addresses sedimentation issues from these areas in its analysis of landslide risk and imposes additional mitigation measures to minimize the potential for sedimentation from steep slopes, including after construction is complete.[196] The final EIS recognizes the potential for sedimentation from slope failure in numerous instances, along with Mountain Valley's measures to address these risks. The final EIS states that "[c]ut slopes and fill slopes along the pipeline right-of-way could be a source of debris flow in the project area triggered by intense and/or prolonged rainfall events," but recognizes that "Mountain Valley would implement an operational monitoring program to verify slope stability and provide Mountain Valley with early-warning detection of subtle ground movement that could indicate incipient slope failure."[197] Likewise, the Certificate Order recognizes and addresses the potential for sedimentation from slope failure, and reasonably concludes that Mountain Valley has proposed adequate protections against sedimentation and reduction of the potential for slope failures.[198] Accordingly, AMA's concerns about the effectiveness of Mountain Valley's erosion and sedimentation control measures are unwarranted.

AMA also asserts that the Commission's conclusion that cumulative impacts would be minor is based on flawed assumptions about the best management practices for the Project, and that these assumptions are particularly unsupported with regard to projects that are not regulated by the Commission.[199] For the reasons outlined above, the

[195] *Id.* at 72.

[196] *See* Final EIS at 4-52 – 4-56.

[197] *Id.* at 4-52, 4-55; *see also id.* at 4-56, 4-69.

[198] Certificate Order at P 146.

[199] AMA Rehearing Request at 74 and n.243.

Commission's conclusion that the numerous mitigation measures required for the MVP Project and other Commission-regulated projects would effectively minimize impacts to water quality are fully supported by the record. For projects that are not regulated by the Commission, it is appropriate for the Commission to rely on federal, state, and local permitting requirements to minimize impacts on waterbodies, especially given the fact that the Commission has no oversight or control over these non-FERC projects.[200]

IV.
CONCLUSION

For the foregoing reasons, Mountain Valley respectfully requests that the Commission accept its Answer and deny the requests for rehearing.

Respectfully submitted,

MOUNTAIN VALLEY PIPELINE, LLC

/s/ Brian D. O'Neill

Brian D. O'Neill
Michael R. Pincus
Frances B. Morris
Van Ness Feldman LLP
1050 Thomas Jefferson Street N.W.
Seventh Floor
Washington, D.C. 20007
202-298-1800
202-338-2416
bdo@vnf.com
mrp@vnf.com
ftb@vnf.com

Matthew Eggerding
Counsel, Midstream
EQT Corporation
625 Liberty Avenue
Suite 1700
Pittsburgh, PA 15222
412-553-5786 (phone)
412-553-7781 (fax)
meggerding@eqt.com

Counsel for Mountain Valley Pipeline, LLC

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[200] *See Okanogan Highlands Alliance v. Williams*, No. Civ. 97-806-JE, 1999 WL 1029106, at *5 (D. Or. Jan. 12, 1999) ("federal agencies may determine that other agencies with specialized jurisdiction over a given environmental impact will issue and enforce a permit as required by law"), *aff'd*, 236 F.3d 468, 477 (9th Cir. 2000); *Edwardsen v. U.S. Dep't of Interior*, 268 F.3d 781, 789 (9th Cir. 2001) (in evaluating cumulative impacts to air quality, "[i]t was not unreasonable for the [Minerals Management Service] at this stage to rely upon compliance with the [National Ambient Air Quality Standards].").

CERTIFICATE OF SERVICE

Pursuant to Rule 2010 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.2010 (2017), I hereby certify that I have this 12th day of December 2017, served the forgoing documents on each person designated on the official service list compiled by the Secretary in this proceeding.

/s/ Claire M. Brennan
Claire M. Brennan
Senior Paralegal Specialist
Van Ness Feldman, LLP
1050 Thomas Jefferson Street, NW
Washington, DC 20007