

Nos. 18-1077 (L), 18-1079

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

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APPALACHIAN VOICES; CHESAPEAKE BAY FOUNDATION, INC.;  
CHESAPEAKE CLIMATE ACTION NETWORK; COWPASTURE RIVER  
PRESERVATION ASSOCIATION; FRIENDS OF BUCKINGHAM;  
HIGHLANDERS FOR RESPONSIBLE DEVELOPMENT; JEANNE  
HOFFMAN; JACKSON RIVER PRESERVATION ASSOCIATION, INC.;  
POTOMAC RIVERKEEPER, INC., d/b/a Potomac Riverkeeper Network;  
SIERRA CLUB; SHENANDOAH RIVERKEEPER, a program of Potomac  
Riverkeeper Network; SHENANDOAH VALLEY BATTLEFIELDS  
FOUNDATION; SHENANDOAH VALLEY NETWORK; VIRGINIA  
WILDERNESS COMMITTEE; WILD VIRGINIA; ROBERT WHITESCARVER,  
*Petitioners*

v.

VIRGINIA STATE WATER CONTROL BOARD; ROBERT DUNN, Chair of the  
Virginia State Water Control Board; VIRGINIA DEPARTMENT OF  
ENVIRONMENTAL QUALITY; DAVID K. PAYLOR, Director, Virginia  
Department of Environmental Quality; MELANIE D. DAVENPORT, Director,  
Water Permitting Division, Virginia Department of Environmental Quality  
*Respondents*

and

ATLANTIC COAST PIPELINE, LLC  
*Intervenor.*

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On Petition for Review

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**PETITIONERS' RULE 30(c) PAGE PROOF OPENING BRIEF**

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Gregory Buppert (Va. Bar No. 86676)  
Charmayne G. Staloff (Va. Bar No. 91655)  
Jonathan M. Gendzier (Va. Bar No. 90064)  
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*Counsel for Cowpasture River Preservation Association, Friends of Buckingham, Highlanders for Responsible Development, Jackson River Preservation Association, Inc., Potomac Riverkeeper, Inc., Shenandoah Riverkeeper, Shenandoah Valley Battlefields Foundation, Shenandoah Valley Network, and Virginia Wilderness Committee*

Benjamin Lockett (W.Va. Bar No. 11463)  
Joseph M. Lovett (Va. Bar No. 89735)  
APPALACHIAN MOUNTAIN ADVOCATES  
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*Counsel for Appalachian Voices, Chesapeake Climate Action Network, Sierra Club, and Wild Virginia*

Jon Alan Mueller (Va. Bar No. 21855)  
Margaret L. Sanner (Va. Bar No. 66983)  
Ariel Solaski (N.Y. Bar No. 5319694)  
CHESAPEAKE BAY FOUNDATION, INC.  
6 Herndon Avenue  
Annapolis, MD 21403  
Telephone: 410-268-8816 / Facsimile: 410-268-6687  
Email: jmueller@cbf.org; psanner@cbf.org; asolaski@cbf.org

*Counsel for Chesapeake Bay Foundation, Inc., Jeanne Hoffman, and Robert Whitescarver*



4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))?  YES  NO  
If yes, identify entity and nature of interest:

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

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

Signature: /s/ Benjamin A. Lockett

Date: February 22, 2018

Counsel for: Appalachian Voices

**CERTIFICATE OF SERVICE**

\*\*\*\*\*

I certify that on February 22, 2018 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Benjamin A. Lockett  
(signature)

February 22, 2018  
(date)



4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))?  YES  NO  
If yes, identify entity and nature of interest:

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If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

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

Signature: /s/ Jon A. Mueller

Date: April 17, 2018

Counsel for: Chesapeake Bay Foundation, Inc.

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I certify that on April 17, 2018 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Jon Mueller  
(signature)

April 17, 2018  
(date)



4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))?  YES  NO  
If yes, identify entity and nature of interest:

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

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

Signature: /s/ Benjamin A. Lockett

Date: February 22, 2018

Counsel for: Chesapeake Climate Action Network

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(date)

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

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

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

No. 18-1077 Caption: Appalachian Voices et al. v. Virginia State Water Control Board et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Cowpasture Preservation Association

(name of party/amicus)

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

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

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))?  YES  NO  
If yes, identify entity and nature of interest:

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

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

Signature: /s/ Gregory Buppert

Date: 17 April 2018

Counsel for: Cowpasture River Preservation Ass.

**CERTIFICATE OF SERVICE**

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I certify that on 17 April 2018 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Gregory Buppert  
(signature)

17 April 2018  
(date)



4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))?  YES  NO  
If yes, identify entity and nature of interest:

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

Signature: /s/ Gregory Buppert

Date: 17 April 2018

Counsel for: Friends of Buckingham

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17 April 2018  
(date)

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

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No. 18-1077 Caption: Appalachian Voices et al. v. Virginia State Water Control Board et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Highlanders for Responsible Development  
(name of party/amicus)

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

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

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))?  YES  NO  
If yes, identify entity and nature of interest:

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

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

Signature: /s/ Gregory Buppert

Date: 17 April 2018

Counsel for: Highlanders for Responsible Dev.

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/s/ Gregory Buppert  
(signature)

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(date)



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If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question)  YES  NO  
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6. Does this case arise out of a bankruptcy proceeding?  YES  NO  
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Jon A. Mueller

Date: April 17, 2018

Counsel for: Chesapeake Bay Foundation, Inc.

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/s/ Jon Mueller  
(signature)

April 17, 2018  
(date)

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

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

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No. 18-1077 Caption: Appalachian Voices et al. v. Virginia State Water Control Board et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Jackson River Preservation Association, Inc.

(name of party/amicus)

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

1. Is party/amicus a publicly held corporation or other publicly held entity?  YES  NO

2. Does party/amicus have any parent corporations?  YES  NO  
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity?  YES  NO  
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))?  YES  NO  
If yes, identify entity and nature of interest:

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

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

Signature: /s/ Gregory Buppert

Date: 17 April 2018

Counsel for: Jackson River Preservation Ass'n

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/s/ Gregory Buppert  
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DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

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No. 18-1077 Caption: Appalachian Voices et al. v. Virginia State Water Control Board et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Potomac Riverkeeper, Inc. d/b/a Potomac Riverkeeper Network  
(name of party/amicus)

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

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

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))?  YES  NO  
If yes, identify entity and nature of interest:

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

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

Signature: /s/ Gregory Buppert

Date: 17 April 2018

Counsel for: Potomac Riverkeeper Network

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(date)



4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))?  YES  NO  
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5. Is party a trade association? (amici curiae do not complete this question)  YES  NO  
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

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

Signature: /s/ Benjamin A. Lockett

Date: February 22, 2018

Counsel for: Sierra Club

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If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Gregory Buppert

Date: 17 April 2018

Counsel for: Potomac Riverkeeper Network

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

Signature: /s/ Gregory Buppert

Date: 17 April 2018

Counsel for: Shenandoah Valley Battlefields Foun

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

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No. 18-1077 Caption: Appalachian Voices et al. v. Virginia State Water Control Board et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Shenandoah Valley Network  
(name of party/amicus)

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

1. Is party/amicus a publicly held corporation or other publicly held entity?  YES  NO

2. Does party/amicus have any parent corporations?  YES  NO  
If yes, identify all parent corporations, including all generations of parent corporations:

Note, however, that the Shenandoah Valley Network is a project of Piedmont Environmental Council.

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity?  YES  NO  
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))?  YES  NO  
If yes, identify entity and nature of interest:

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

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

Signature: /s/ Gregory Buppert

Date: 17 April 2018

Counsel for: Shenandoah Valley Network

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No. 18-1077 Caption: Appalachian Voices et al. v. Virginia State Water Control Board et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Virginia Wilderness Committee  
(name of party/amicus)

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

1. Is party/amicus a publicly held corporation or other publicly held entity?  YES  NO
  
2. Does party/amicus have any parent corporations?  YES  NO  
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3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity?  YES  NO  
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6. Does this case arise out of a bankruptcy proceeding?  YES  NO  
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Gregory Buppert

Date: 17 April 2018

Counsel for: Virginia Wilderness Committee

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

Signature: /s/ Benjamin A. Lockett

Date: February 22, 2018

Counsel for: Wild Virginia

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No. 18-1077 Caption: Appalachian Voices, et. al. v. State Water Control Board, et. al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Chesapeake Bay Foundation, Inc.  
(name of party/amicus)

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

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

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))?  YES  NO  
 If yes, identify entity and nature of interest:

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

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

Signature: /s/ Jon A. Mueller

Date: April 17, 2018

Counsel for: Chesapeake Bay Foundation, Inc.

**CERTIFICATE OF SERVICE**

\*\*\*\*\*

I certify that on April 17, 2018 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Jon Mueller  
 (signature)

April 17, 2018  
 (date)

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## INTRODUCTION

The scale of the proposed Atlantic Coast Pipeline (“ACP”) is dramatic. It will cross Virginia for more than 300 miles between Highland County and Tidewater, intersecting 890 Virginia rivers and streams and hundreds of acres of wetlands along its route. Many of these waterways are in the Chesapeake Bay watershed. It will require the developer, Atlantic Coast Pipeline, LLC (“Atlantic”) to clear 5,000 acres in the state, including 3,000 acres of forest. And pipeline construction will carve up and down steep mountainsides in the central Appalachian Mountains through some of Virginia’s most undeveloped lands. Under these circumstances, it is a certainty that a project of this scale will result in substantial erosion and sedimentation and thus have a significant effect on water quality in Virginia.

Section 401 of the federal Clean Water Act authorizes states to review and either deny approval for or put conditions on an otherwise federally-permitted project to protect water quality in the state’s rivers, streams, and wetlands. Under this authority, the Virginia State Water Control Board (the “Board”) and the Virginia Department of Environmental Quality (“DEQ”) (together, the “state agencies”) issued a Section 401 Certification for the Atlantic Coast Pipeline on December 20, 2017, finding that there is “reasonable assurance” that the project would comply with Virginia water quality standards. Because the state agencies

did not consider the combined effects of pipeline construction, did not conduct a proper antidegradation review, and did not adequately consider the effects of construction in karst geology, their finding is arbitrary and capricious. Furthermore, the State Water Control Board itself cast serious doubt on the bases of its reasonable assurance finding at its meeting on April 12, 2018 by opening a new public comment period to consider the water quality effects of the pipeline's river, stream, and wetland crossings. For these reasons, Petitioners' respectfully request that the Court vacate the Section 401 Certification for the pipeline and remand the matter to the State Water Control Board and the Department of Environmental Quality.

### **JURISDICTIONAL STATEMENT**

Under the Natural Gas Act, this Court has "original and exclusive jurisdiction" over "review of an order or action of a ... permit, license, concurrence, or approval" issued by a "State administrative agency acting pursuant to Federal law" for a gas pipeline. 15 U.S.C. § 717r(d)(1); *see AES Sparrows Point LNG, LLC v. Wilson*, 589 F.3d 721 (4th Cir. 2009). The Section 401 Certification issued by Virginia is such an approval. 33 U.S.C. § 1341. *See AES Sparrows Point*, 589 F.3d at 723 (reviewing a 401 certification challenge pursuant to § 717r(d)(1)). Furthermore, the Section 401 Certification is a final agency action reviewable under the Administrative Procedure Act. 5 U.S.C. § 704.

The Natural Gas Act does not provide a statute of limitations for challenges to state agency actions pursuant to federal law. *See* 15 U.S.C. § 717r(a). When a federal statute does not contain a statute of limitations, federal courts generally “borrow” the most appropriate statute of limitations provided by state law. *DelCostello v. Int’l Bhd. of Teamsters*, 462 U.S. 151, 158 (1983). DEQ provided in its 401 Certification that parties appealing the Certification must do so within thirty days of the date of service, as required by Rule 2A:2 of the Supreme Court of Virginia. *See* ACP000116 (J.A.\_\_). Petitioners received notice the day the Certification was issued, December 20, 2017. *See id.* Petitioners filed suit in this Court within thirty days, on January 18, 2018. Pet. for Review, Case No. 18-1077 (Jan. 18, 2018), ECF No. 3-1; Pet. for Review, Case No. 18-1079 (Jan. 18, 2018), ECF No. 2-1. As required by Va. Sup. Ct. R. 2A:2, Petitioners also provided a Notice of Appeal to David Paylor, Executive Secretary of the Virginia State Water Control Board and Director of the Virginia Department of Environmental Quality, within thirty days. Notice of Appeal, In re: 401 Water Quality Certification for the Atlantic Coast Pipeline, No. 17-002 (filed with DEQ Jan. 19, 2018). Thus, Petitioners filed timely Petitions for Review of the state agencies’ decision.

Petitioners are organizations dedicated to the conservation of the natural environment, water quality, wildlife, and communities across Virginia and in the project area, with standing to seek review of this agency decision. In the context of

environmental litigation, courts have recognized that “standing requirements are not onerous.” *Am. Canoe Ass’n v. Murphy Farms, Inc.*, 326 F.3d 505, 517 (4th Cir. 2003). An organization “has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization’s purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000). Petitioner organizations satisfy these criteria. *See* Petitioners’ Members’ Declarations, (demonstrating members’ standing); Organizational Purpose Declarations, (demonstrating organizations’ germane interests).<sup>1</sup>

Petitioners’ members “have standing to sue in their own right,” *Friends of the Earth*, 528 U.S. at 181, because they have: “(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable decision.” *Hill v. Coggins*, 867 F.3d 499, 505 (4th Cir. 2017).

First, environmental plaintiffs satisfy injury in fact when they “aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity.” *Friends of the Earth*, 528 U.S. at 183.

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<sup>1</sup> Petitioners’ member standing declarations and organizational purpose declarations are included in Petitioners’ Addendum.

Here, Petitioners' members' aesthetic, recreational, and property interests in protecting water quality in Virginia serve as the basis for standing. For example, Lynn Cameron regularly spends time at Braley Pond, Brown's Pond, and along the Cowpasture River, where she hikes annually with her husband. Cameron Decl. ¶¶ 5-6, 12-13. John Cowden owns approximately 3,200 acres of land along the Cowpasture River, including a lodge that serves as a "gateway to the outdoors" for guests to fish, swim, and canoe or kayak in the Cowpasture River. Cowden Decl. ¶ 3-5, 11-12. Richard Averitt co-owns property on which the pipeline would cross Spruce Creek in Nelson County. Averitt Decl. ¶¶ 3, 8. Prior to announcement of the pipeline, Mr. Averitt planned to build a \$32-million eco-resort on the property, featuring Spruce Creek. *Id.* ¶¶ 4, 8. Jeanne Hoffman and Robert Whitescarver reside and operate a farm in Augusta County, approximately one mile from the proposed pipeline. Hoffman Decl. ¶¶ 2, 12; Whitescarver Decl. ¶¶ 3, 21. They have invested time and resources to implement best management practices to improve water quality in the Middle River, which runs through their property. Hoffman Decl. ¶ 6-7, 10; Whitescarver Decl. ¶ 9-13. They also birdwatch, boat, and swim in and around the waterbodies and forests that lie in the path of the proposed pipeline. Hoffman Decl. ¶ 13; Whitescarver Decl. ¶ 20.

Pipeline construction and operation will harm Petitioners' members' interests. For instance, Ms. Cameron is concerned that the crossing of the access

road to Braley Pond will ruin the scenic gateway to the National Forest, and that widening the access road to Brown's Pond to facilitate construction will intrude on the karst topography and cause the pond to drain, destroying rare plant habitat. Cameron Decl. ¶¶ 10, 12. A proposed crossing of the Cowpasture River would be located on the Fort Lewis Lodge property, along a section of the river guests regularly use for fishing, and Mr. Cowden is concerned that construction will cause siltation of the river and fish kills. Cowden Decl. ¶ 20-21. Mr. Cowden expects to close his business for as long as two years, after which it could take years—if at all—for him to rebuild. *Id.* ¶ 13. Mr. Averitt is concerned that pipeline construction across Spruce Creek will increase sedimentation, harming the creek and everything downstream, including a complex of wetlands on his property. Averitt Decl. ¶ 8. The degraded water quality of the stream and wetlands are incompatible with the character of an eco-resort and will prevent him from going through with his plans for the project. *Id.* Ms. Hoffman and Mr. Whitescarver are concerned about the pipeline's direct and indirect impacts to water quality and quantity, and the negative impacts to local wildlife and the people who use and enjoy these natural resources. Hoffman Decl. ¶¶ 5-6, 12-15; Whitescarver Decl. ¶¶ 7-8, 15-18, 20, 22. Mr. Whitescarver is also concerned that construction activity will disrupt and impact the springs and wells used for their livestock operation and personal use. Whitescarver Decl. ¶¶ 21-23.

Second, Petitioners' members' injuries are fairly traceable to the Section 401 Certification issued by the state agencies. In enacting Section 401, "Congress intended that states would retain the power to block, for environmental reasons, local water projects that might otherwise win federal approval." *Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991); *see United States v. Marathon Dev. Corp.*, 867 F.2d 96, 99-100 (1st Cir. 1989). The state agencies' issuance of a 401 Certification not based on reasonable assurance that water quality will be protected is "fairly traceable" to Petitioners' members' injuries.

In addition to authorizing states to stop projects that would violate water quality standards, Congress also provided states the discretion to waive that authority. 33 U.S.C. § 1341(a)(1). However, the fact that the state agencies *could* have waived their authority—but instead chose to exercise it—does not undermine Petitioners' standing. As the Supreme Court has held, "[a]gencies often have discretion about whether or not to take a particular action. Yet those adversely affected by a discretionary agency decision generally have standing to complain that the agency based its decision upon an improper legal ground." *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 25 (1998); *see also Townes v. Jarvis*, 577 F.3d 543, 547-48 (4th Cir. 2009). Thus, the Court in *Akins* held that "respondents' 'injury in fact' [was] 'fairly traceable' to the [agency's discretionary] decision." 524 U.S. at 25.

Third, Petitioners' members' injuries will be redressed by a favorable decision by this Court vacating the Section 401 Certification and remanding it to the state agencies for further consideration. Because the Certificate of Public Convenience and Necessity issued by the Federal Energy Regulatory Commission is conditioned on the Section 401 Certification from Virginia, the project cannot go forward without a valid Certification. The project could proceed only if Virginia state agencies remedied the process and issued a valid Certification. Again, the fact that the state agencies could have waived their authority under Section 401 does not affect this Court's ability to redress Petitioners' harms. *See id.*; *Townes*, 577 F.3d at 548.

Finally, the record also demonstrates that Petitioners' claims "fall within the zone of interests protected by the law invoked" in the Petition for Review. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014) (internal quotations omitted). "[I]n the APA context, that ... test is not especially demanding...." *Id.* at 1389. The statutory zone of interests is determined "by reference to the particular provision of law upon which the plaintiff relies"—in this case, Section 401 of the Clean Water Act. *Bennett v. Spear*, 520 U.S. 154, 175-76 (1997). Petitioners' interests in the recreational and aesthetic use of Virginia's waters would be adversely affected by a project that threatens the water quality by

discharging into those waters. Therefore, Petitioners' interests are within the "zone of interests" protected by Section 401 of the Clean Water Act.

### **STATEMENT OF THE ISSUES**

1. Does the Board's April 12, 2018, decision to open a comment period on the sufficiency of Nationwide Permit 12 to protect water quality undermine the prior finding of "reasonable assurance" under 33 U.S.C. § 1341 and render the Section 401 Certification for the ACP invalid?
2. Does the state agencies' decision not to consider how multiple areas of pipeline construction within individual watersheds, including the Chesapeake Bay, will combine to affect water quality render the finding of "reasonable assurance" under 33 U.S.C. § 1341 arbitrary and capricious?
3. Does the state agencies' failure to conduct an adequate antidegradation review as required by the Clean Water Act, 33 U.S.C. § 1313(d), and state law, 9 Va. Admin. Code § 25-260-30, render the issuance of the Section 401 Certification arbitrary and capricious?
4. Does the state agencies' failure to adequately assess impacts to water quality from construction through karst geology render the finding of "reasonable assurance" under 33 U.S.C. § 1341 arbitrary and capricious?

## STATEMENT OF THE CASE

### **A. Procedural History**

On October 13, 2017, the Federal Energy Regulatory Commission (“FERC”) issued a Certificate of Public Convenience and Necessity to Atlantic to construct and operate the Atlantic Coast Pipeline. ACP012224 (J.A.\_\_\_). In the Certificate, FERC explicitly recognized Virginia’s authority to impose conditions on the project pursuant to Section 401 of the federal Clean Water Act. ACP012312 (J.A.\_\_\_).

In May 2017, Virginia DEQ issued guidance explaining that its Section 401 Certification for the Atlantic Coast Pipeline would consist of two parts: 1) the Section 401 Certification for the Army Corps of Engineers’ (“Corps”) Nationwide Permit 12, issued April 7, 2017, which would apply to the pipeline’s river, stream, and wetland crossings; and 2) a Section 401 review process to evaluate “upland impacts.” *See* ACP000128 (J.A.\_\_\_). On November 9, 2017, DEQ recommended that the Board approve a Section 401 Certification of the project. ACP049363 (J.A.\_\_\_). On December 20, 2017, DEQ issued the Section 401 Water Quality Certification for the ACP. *See* ACP000116 (J.A.\_\_\_).

Petitioners filed timely petitions for review of the Certification. Pet. for Review, Case No. 18-1077 (Jan. 18, 2018), ECF No. 3-1; Pet. for Review, Case

No. 18-1079 (Jan. 18, 2018), ECF No. 2-1. The two cases were consolidated by this Court's order. Order, Case No. 18-1077 (Jan. 31, 2018), ECF No. 33.

Most recently, at a meeting last week on April 12, 2018, the Board approved a new, 30-day public comment period to address whether the approvals granted by the Corps under Nationwide Permit 12 and, therefore, the state agencies' 401 Certification of Nationwide Permit 12, are adequate to protect Virginia's waterways from harm caused by ACP crossings. *See* Robert Zullo, *Regulatory Board Cracks Open Door for More Review of Pipeline Projects*, Richmond Times-Dispatch (Apr. 12, 2018), [http://www.richmond.com/news/regulatory-board-cracks-open-door-for-more-review-of-pipeline/article\\_e7d42cb8-2a11-5c72-8fd7-971faea029a8.html](http://www.richmond.com/news/regulatory-board-cracks-open-door-for-more-review-of-pipeline/article_e7d42cb8-2a11-5c72-8fd7-971faea029a8.html).

### **B. Statement of Facts**

The Atlantic Coast Pipeline is a proposed 600-mile natural gas transmission pipeline regulated by FERC under Section 7 of the federal Natural Gas Act. 15 U.S.C. § 717f(c); ACP004662, ACP049349 (J.A. \_\_, \_\_). The pipeline would extend from West Virginia to North Carolina across 307 miles of Virginia. ACP049346. Its route intersects 890 Virginia rivers and streams, including 73 wild or stockable trout streams in the mountains of western Virginia. ACP005021 (J.A. \_\_). In addition to trout waters, the pipeline will also cross 74 migratory fish spawning waters or their tributaries. *Id.* Pipeline access roads will cross 89

Virginia rivers and streams, including 31 wild or stockable trout streams or tributaries to those trout streams. *Id.*

The construction of waterbody crossings poses a serious risk to water quality. *See* ACP030153–ACP030154 (J.A. \_\_–\_\_) (quoting New York regulators). Atlantic may be required to blast in the stream channel or in adjacent areas to install the pipeline through 575 Virginia waterways. *Id.* Atlantic will drill under others, like the James River at the border of Buckingham and Nelson Counties, with the inherent risk that drilling fluids and other pollutants will be inadvertently released to the waterway. ACP004923–ACP004924 (J.A. \_\_–\_\_). In 2017, construction of the Rover Pipeline in Ohio resulted in the release of several million gallons of drilling mud into a wetland at a horizontal directional drilling site and numerous other water quality violations. ACP030154 (J.A. \_\_).

In addition to waterbody crossings, Atlantic will clear over 5,000 acres in Virginia, including 3,000 acres of forest and 300 acres of wetlands, to construct the pipeline. ACP004963 (J.A. \_\_). Excessive sedimentation from these activities in “upland areas, outside of wetlands and streams” also poses a significant risk to water quality. ACP049350 (J.A. \_\_). That risk is likely greatest in western Virginia where the route traverses the steep, forested landscape of the central Appalachians, ACP003964–ACP003965 (J.A. \_\_–\_\_), ACP004836 (J.A. \_\_), including 41 miles classified as steep slopes, ACP004836 (J.A. \_\_), and 16 miles through the George

Washington National Forest, ACP005204 (J.A.\_\_). Atlantic's models, submitted to the U.S. Forest Service, predict an increase in sediment loads delivered to affected rivers and streams of 200 to 800 percent over pre-construction conditions. ACP004936 (J.A.\_\_).

Along the route, many individual watersheds will have multiple pipeline and access road crossings on the main channel or its tributaries. For example, Townsend Draft, a Virginia wild trout stream in Highland County, has nine pipeline and access road crossings on the main channel and tributaries over one-half mile. ACP006635–ACP006636 (J.A. \_\_–\_\_). The Calfpasture River in Bath and Augusta Counties has 71 pipeline and access road crossings in its watershed. ACP006645–ACP006649 (J.A. \_\_–\_\_). Over 200 miles of the pipeline route in Virginia, including more than 800 stream and wetlands crossings, fall within the Chesapeake Bay watershed, which is impaired for nutrients and sediment and subject to a federal-state cleanup plan established in 2010. See ACP006618 (J.A.\_\_); ACP006711 (J.A.\_\_); ACP051793 (J.A. \_\_); ACP051797 (J.A. \_\_).

### **SUMMARY OF THE ARGUMENT**

The Clean Water Act requires a state certifying a project under Section 401 of the Act to have “reasonable assurance” that state water quality standards will not be violated. The Section 401 Certification issued by DEQ and the Board is

arbitrary and capricious because it was issued without a basis for a finding of reasonable assurance.

First, on April 12, 2018 the Board effectively invalidated its prior finding of reasonable assurance when it voted to open a comment period on whether reliance on the Corps' Nationwide Permit 12 is adequate to protect Virginia's water quality from impacts of pipeline crossings. Because the adequacy of Nationwide Permit 12 was a principal basis for the Board's finding of reasonable assurance, the Certification is no longer valid.

Second, the Board lacked reasonable assurance because DEQ did not assess the combined impacts on water quality likely to result from multiple areas of pipeline construction activities within individual watersheds. The plain language of Section 401, as well as widely accepted principles of environmental science and regulation, illustrates that the Board could not have reasonable assurance without considering the combined impacts of all pipeline construction activities. The record demonstrates that Virginia's water quality is at risk from such combined impacts. For instance, the ACP would traverse more than 200 miles within the Chesapeake Bay watershed, but the state agencies failed to analyze the combined effects on the Bay watershed and Chesapeake Bay Total Maximum Daily Load ("TMDL") from pollutant runoff and nitrogen impairment.

Third, the state agencies failed to conduct an adequate antidegradation review. Analyses in the record demonstrate that construction and operation of the ACP will result in substantial erosion and sedimentation, yet the state agencies concluded that no detailed antidegradation review was required. In reaching that conclusion, the agencies did not cite any specific analyses to contradict record evidence showing the likelihood of sedimentation impacts, nor did they follow the procedures outlined in DEQ guidance. Issuance of the Section 401 Certification was thus arbitrary and capricious.

Finally, the state agencies failed to ensure that water quality will be protected in fragile karst geology. Water quality in these areas is threatened by landslides, stormwater runoff, and sediment pollution. The state agencies had no basis for reasonable assurance that water quality would be protected because the underground water systems have not been mapped and the agencies have not explained how harm to water quality will be avoided.

## **ARGUMENT**

### **Standard of Review**

Although 15 U.S.C. § 717r(d) establishes jurisdiction in this Court for review of certain state agency actions related to natural gas facilities, it does not prescribe a standard of review. *See Islander E. Pipeline Co., LLC v. Conn. Dep't of Env'tl. Prot.* (“*Islander East I*”), 482 F.3d 79, 93-95 (2d Cir. 2006).

In this Court's only previous review of a Section 401 certification under 15 U.S.C. § 717r(d), the Court applied the "arbitrary and capricious" standard provided in the federal Administrative Procedure Act ("APA") on agreement of the parties. *AES Sparrows Point v. Wilson*, 589 F.3d 721, 727 (4th Cir. 2009). That is generally consistent with the standard of review applied by other federal circuits that have heard challenges to Section 401 certifications under 15 U.S.C. § 717r(d). *See Del. Riverkeeper Network v. Sec'y Pa. Dep't of Env'tl. Prot.*, 833 F.3d 360, 377 (3d Cir. 2016); *Islander E. Pipeline Co., LLC v. McCarthy* ("Islander East II"), 525 F.3d 141, 150 (2d Cir. 2008); *Islander East I*, 482 F.3d at 93-95.<sup>2</sup>

To survive review under the arbitrary and capricious standard, an agency must show that it examined "the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). Though the standard is deferential, the court still must engage in a "searching and careful inquiry of the record." *AES Sparrows*

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<sup>2</sup> The Second and Third Circuits based their application of the APA standard to Section 401 certifications in part on the fact that they applied that standard to state agency actions under the Telecommunications Act. In reviewing state decisions under that statute, this Court has applied the "substantial evidence" standard. The distinction in this context is immaterial, however, because "[w]ith respect to review of fact findings," there is "no meaningful difference" between the standards. *GTE S., Inc. v. Morrison*, 199 F.3d 733, 745 n.5 (4th Cir. 1999); *see also Crooks v. Mabus*, 845 F.3d 412, 423 (D.C. Cir. 2016).

*Point*, 589 F.3d at 733 (quoting *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 192-93 (4th Cir. 2009)). An

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

*Bedford Cty. Mem'l Hosp. v. Health & Human Servs.*, 769 F.2d 1017, 1022 (4th Cir. 1985) (citing *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43). If a state agency's determination under Section 401 is found to be arbitrary and capricious, the court must vacate the certification. 5 U.S.C. § 706(2)(A).

### **Legal Framework of Section 401**

The objective of the federal Clean Water Act is to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). Section 401 of the Clean Water Act mandates: “Any applicant for a Federal license or permit to conduct any activity...which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate...that any such discharge will comply” with the requirements of Clean Water Act. 33 U.S.C. § 1341(a)(1). As an interstate natural gas pipeline, the ACP

requires federal permits<sup>3</sup> and will involve discharges to navigable waters, triggering the requirement for state certification under Section 401. *See* ACP049351 (J.A.\_\_).

Specifically, certification under Section 401 must ensure that a federally permitted project complies with sections 301 and 303 of the Clean Water Act, 33 U.S.C. §§ 1311, 1313, which “require[] each State, subject to federal approval, to institute comprehensive water quality standards establishing water quality goals for all intrastate waters.” *PUD No. 1 of Jefferson Cty. v. Wash. Dep’t of Ecology*, 511 U.S. 700, 704 (1994). State water quality standards “consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses.” 33 U.S.C. § 1313(c)(2)(A). State water quality standards must also “include ‘a statewide antidegradation policy’ to ensure that ‘[e]xisting instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.’” *PUD No. 1*, 511 U.S. at 705 (quoting 40 C.F.R. § 131.12).

EPA regulations require that 401 certifications include a “statement that there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards[.]” 40 C.F.R. §

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<sup>3</sup> Specifically, the ACP requires a Certificate of Public Convenience and Necessity from the Federal Energy Regulatory Commission under section 7 of the Natural Gas Act. 15 U.S.C. § 717f(c).

121.2(a)(3). As DEQ has acknowledged, “reasonable assurance” requires “more than a probability or mere speculation” that the activity requiring a federal permit will comply with water quality standards. ACP049354 (J.A.\_\_).

To determine whether a federally-permitted project like the ACP would lead to violations of Virginia’s water quality standards, DEQ must, at a minimum, evaluate (1) whether the project’s discharges would interfere with designated uses; (2) whether the project’s contributions of sediment and other pollutants would violate numeric standards and/or harm human, animal, plant, or aquatic life (*i.e.*, violate narrative standards); and (3) assure compliance with the antidegradation provisions. *See* 40 C.F.R. § 121.2(a)(3); *see also Nat. Res. Def. Council, Inc. v. EPA*, 16 F.3d 1395, 1400 (4th Cir. 1993) (internal citations omitted).

Virginia has adopted water quality standards, including designated uses, numeric and narrative criteria, and an antidegradation policy. 9 Va. Admin. Code § 25-260-5 *et seq.* Virginia regulations designate all state waters for the following uses: “recreational uses, e.g., swimming and boating; the propagation and growth of a balanced, indigenous population of aquatic life, including game fish, which might reasonably be expected to inhabit them; wildlife; and the production of edible and marketable natural resources, e.g., fish and shellfish.” 9 Va. Admin. Code § 25-260-10(A).

Virginia's water quality standards both establish numeric criteria for specific pollutants designed to ensure that the designated uses will be met, and include a narrative criterion that prohibits "substances attributable to sewage, industrial waste, or other waste in concentrations, amounts, or combinations which contravene established standards or interfere directly or indirectly with designated uses of such water or which are inimical or harmful to human, animal, plant, or aquatic life." 9 Va. Admin. Code § 25-260-20(A). The list of substances that are to be controlled specifically includes turbidity-causing pollutants such as sediment. 9 Va. Admin. Code § 25-260-20(B).

Finally, Virginia regulations include an antidegradation policy, which requires that "[a]s a minimum, existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected[.]" and that if water quality exceeds the numerical and narrative standards, water quality may not be degraded below existing levels. 9 Va. Admin. Code § 25-260-30(A); *see also* 63 Fed. Reg. 36,742, 36,780 (July 7, 1998) (EPA explaining that states "must apply antidegradation requirements to...any activity requiring a CWA § 401 certification[.]").

**I. ON APRIL 12, 2018, THE STATE WATER CONTROL BOARD EFFECTIVELY INVALIDATED ITS PRIOR FINDING OF REASONABLE ASSURANCE FOR THE ACP.**

Last week, on April 12, 2018, the Board effectively repudiated the state agencies' position that the Army Corps of Engineers' Nationwide Permit 12 for stream and wetland crossings is sufficient to support a finding of "reasonable assurance" that the ACP will comply with Virginia water quality standards. Because reliance on Nationwide Permit 12 was a principal basis for the state agencies' reasonable assurance determination for the Section 401 Certification, that Certification is now invalid. The Court must vacate the Certification for the ACP and remand it to the Board for further consideration.

**A. The adequacy of Nationwide Permit 12 to protect water quality from pipeline construction through Virginia rivers, streams, and wetlands was essential to the Board's finding of reasonable assurance for the ACP.**

Throughout the Section 401 review process for the ACP, the state agencies have stood by their decision not to conduct a state-level review and analysis of the impacts of the ACP's crossings of rivers, streams, and wetlands. Instead, they opted to defer to the Corps' decision to grant the ACP coverage under Nationwide Permit 12 for each of the water crossings proposed by the project. Nationwide Permit 12 is a general permit designed to streamline the permitting process for utility line crossings of streams and wetlands that will have no more than "minimal individual and cumulative adverse environmental effects." *See* ACP001112

(J.A.\_\_); Issuance and Reissuance of Nationwide Permits, 82 Fed. Reg. 1,860 (Jan. 6, 2017). In April 2017, the state agencies issued a blanket Section 401 Certification for Nationwide Permit 12, certifying that any project authorized under that general permit would comply with Virginia water quality standards. In that Certification, the state agencies “reserve[d] [the] right to require an individual application for a permit or a certificate or otherwise take any action on any specific project that could otherwise be covered under any of the NWP’s when it determines on a case by case basis that concerns for water quality and the aquatic environment so indicate.” ACP001544 (J.A.\_\_).

For the ACP specifically, DEQ insisted that “[Nationwide Permit 12] as currently certified and conditioned in Virginia is protective of the Commonwealth’s water quality standards for the physical crossings of wetlands and streams.” ACP049380 (J.A. \_\_). In its response to public comments on the draft Section 401 Certification for the ACP, DEQ claimed that it had “already established reasonable assurance that activities in streams and wetlands ... will be conducted in a manner that will not violate applicable water quality standards,” citing as the sole support for that finding the agency’s April 2017 Certification of Nationwide Permit 12. ACP049377 (J.A. \_\_).

When they approved and issued the Section 401 Certification for the ACP in December 2017, the state agencies explicitly stated that the reasonable assurance

finding was based on the adequacy of Nationwide Permit 12 and the state's April 2017 Certification of that nationwide permit. ACP000125 (J.A.\_\_). In compliance with Clean Water Act requirements, the state agencies included in the ACP 401 Certification a statement of reasonable assurance with five specific bases for their determination: 1) the conditions contained in the "upland activities" 401 certification; 2) requirements imposed by the Virginia Water Protection regulation; 3) *the Corps Section 404 permitting requirements*; 4) approval and requirements of the July 2017 Annual Standards and Specifications; and 5) *the April 7, 2017 Section 401 Water Quality Certification of the Corps Nationwide Permit 12. Id.* Together, those five elements—including Nationwide Permit 12 itself and the state's April 2017 401 Certification of Nationwide Permit 12—established the basis for the Board's finding of reasonable assurance.

**B. On April 12, 2018, the Board effectively renounced its reliance on Nationwide Permit 12, invalidating the ACP 401 Certification.**

At a Board meeting last week, the Board reversed course, casting serious doubt on—if not effectively abandoning—its reliance on Nationwide Permit 12 as a basis for its reasonable assurance finding. Citing Petitioners' concerns, the Board voted on April 12, 2018 to open a 30-day comment period to "solicit comment on whether the approvals the [C]orps granted for the projects under Nationwide Permit 12 are adequate to protect Virginia waterways from the blasting, drilling

and trenching that crossing them could entail.”<sup>4</sup> Robert Zullo, *Regulatory Board Cracks Open Door for More Review of Pipeline Projects*, Richmond Times-Dispatch (Apr. 12, 2018), [http://www.richmond.com/news/regulatory-board-cracks-open-door-for-more-review-of-pipeline/article\\_e7d42cb8-2a11-5c72-8fd7-971faea029a8.html](http://www.richmond.com/news/regulatory-board-cracks-open-door-for-more-review-of-pipeline/article_e7d42cb8-2a11-5c72-8fd7-971faea029a8.html). As a result, it is now entirely possible that the Board will conclude that Nationwide Permit 12 is insufficient to ensure protection of water quality standards. At a minimum, the Board’s action establishes that this is still an open question for the ACP.

As it stands now, two of the five pillars supporting the Board’s reasonable assurance finding for the ACP have been removed: “the Corps Section 404 permitting requirements” and “the April 7, 2017 Section 401 Water Quality Certification of the Corps Nationwide Permit 12.” ACP000125 (J.A.\_\_). Now that the Board has cast doubt on the sufficiency of Nationwide Permit 12 and the state’s Certification of that permit, the finding of reasonable assurance is unsupported and the Section 401 Certification for the ACP is invalid.

For this reason alone, this Court should vacate the Section 401 Certification for the ACP and remand it to the state agencies, which must first determine

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<sup>4</sup> As of the time of the filing of this brief, neither DEQ nor the Board have made any official, public announcements regarding the Board’s decision to open a comment period on the adequacy of Nationwide Permit 12. Since the decision was made only five days before this filing, the only available source documenting the decision is the cited Richmond Times-Dispatch article.

whether Nationwide Permit 12 is adequate to provide reasonable assurance that water quality will be protected. If the Board then determines, after the 30-day comment period, that Nationwide Permit 12 is not an adequate basis for reasonable assurance, the agency must conduct an individual review of the impacts on water quality from pipeline crossings.

**II. THE STATE AGENCIES' FAILURE TO CONSIDER THE COMBINED EFFECTS OF MULTIPLE AREAS OF CONSTRUCTION WITHIN INDIVIDUAL WATERSHEDS IS ARBITRARY AND CAPRICIOUS.**

**A. Section 401 requires consideration of the water quality effects of the entire federally permitted project, including the combined effects of multiple project activities.**

The Board and DEQ erred by failing to consider the combined effects on water quality likely to result from multiple areas of pipeline construction occurring within individual, smaller-scale watersheds. Section 401 of the Clean Water Act and its implementing regulations do not expressly identify combined effects as a required part of a certification analysis, and the Board and DEQ argue that they are not required to consider those effects. But the state agencies are wrong. The text of Section 401 of the Clean Water Act, when considered together with widely accepted principles of environmental science and regulation, establishes that the Board and DEQ could not have “reasonable assurance” that the ACP will comply with Virginia water quality standards without considering the combined effects of pipeline construction.

First, the Clean Water Act establishes that a state conducting a Section 401 certification for a federally permitted project must consider the potential impacts on water quality from the permitted activity as a whole. *See* 33 U.S.C. § 1341(a)(1); *PUD No. 1 of Jefferson Cty.*, 511 U.S. at 711 (holding that Section 401(d) authorizes “conditions and limitations on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied”). Section 401(a) specifies that “[a]ny applicant for a Federal license or permit to conduct *any activity*...which may result in any discharge into the navigable waters” shall provide a certification from the state “that any such discharge will comply with” state water quality standards. 33 U.S.C. § 1341(a)(1) (emphasis added). Section 401(d) then requires that the state “shall” include limitations to “assure that any applicant” will comply with the Clean Water Act and state law. *Id.* § 1341(d). Thus, the certification requirement is triggered by the federal permit and applies to the activity’s effects on water quality, *i.e.*, the effects that will result from the federally permitted project considered as a whole. *See PUD No. 1 of Jefferson Cty.*, 511 U.S. at 711.

A critical element of the water quality effects of a FERC-regulated pipeline is the combined effect of multiple areas of pipeline construction within individual, smaller-scale watersheds. *See* ACP007463–ACP007464 (J.A. \_\_–\_\_). Pipelines and pipeline access roads affect surface water quality in three principal ways:

construction of river, stream, and wetland crossings, ACP004921 (J.A.\_\_); construction in upland areas, *id.*, ACP049350 (J.A.\_\_); and the combined effects of multiple areas of construction within a watershed, ACP007463–ACP007464 (J.A. \_\_–\_\_). Unlike some projects with only one point of impact, the water quality effects from pipeline construction are not concentrated in a single, disturbed area. To the contrary, a project like the ACP will extend hundreds of miles across the landscape, ACP004642 (J.A. \_\_), often intersecting the main channel and many tributaries within an individual watershed, ACP007463–ACP007464 (J.A. \_\_–\_\_). Each crossing and the areas of upland construction associated with that crossing have the potential, acting in concert, to contribute to water quality problems downstream.

Second, the significance of the combined effects of multiple pollution sources on water quality is well-established. A fundamental tenet of water quality science and regulation is that multiple sources of pollutants, even if they individually have minimal effects, can combine to cause significant harm to water quality. *See PUD No. 1 of Jefferson Cty.*, 511 U.S. at 704 (“state water quality standards provide ‘a supplementary basis...so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated’” to protect water quality) (quoting *EPA v. Cal. ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 205 n.12 (1976)). The Ninth Circuit described this effect this way:

Sometimes the total impact from a set of actions may be greater than the sum of the parts. For example, the addition of a small amount of sediment to a creek may have only a limited impact on salmon survival, or perhaps no impact at all. But the addition of a small amount here, a small amount there, and still more at another point could add up to something with a much greater impact, until there comes a point where even a marginal increase will mean that *no* salmon survive.

*Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 994 (9th Cir. 2004). *Cf.* 33 U.S.C. § 1344(e) (general permits for discharge of dredged or fill material into jurisdictional waters are appropriate only if covered activities “have only minimal cumulative adverse effect on the environment”); 40 C.F.R. § 230.7(a) (authorizing Corps of Engineers general permit only if “[t]he activities...will have only minimal adverse effects when performed separately” and “only minimal cumulative adverse effects”); 40 C.F.R. § 230.11(g)(1) (Corps of Engineers regulation recognizing that “[a]lthough the impact of a particular discharge may constitute a minor change in itself, the cumulative effect of numerous such piecemeal changes can result in a major impairment” of water quality); EPA, 820-B-15-001, *Water Quality Standards Handbook, Chapter 7: Water Quality Standards and the Water Quality-based Approach to Pollution Control 7* (2015) (“Many water pollution concerns are area-wide phenomena caused by multiple dischargers, multiple pollutants (with potential synergistic and additive effects)...”); *Idaho Rivers United v. Probert*, 2016 WL 2757690, at \*15

(D. Idaho May 12, 2016) (“Without considering the sum of all the parts—i.e., the estimated landslide, mass erosion, and sedimentation risks from the Project activities in addition to the effects from, or expected from, the other state and private post-fire harvesting activities—the sedimentation estimate is likely incomplete.”); ACP030152 (J.A.\_\_\_\_) (citing a recent study recognizing that the combined effects of pipeline construction within a watershed may exceed “the capacity of the system to recover”).<sup>5</sup>

Accordingly, the state agencies must consider the ACP’s effects on water quality in their entirety. The Board and DEQ cannot consider some aspects of the project’s effects on water quality while ignoring other, inextricably related effects and still fulfill their obligation to find “reasonable assurance” that Virginia water quality standards will be protected. *See* 40 C.F.R. § 121.2(a)(3). The state agencies’ review of the effects of the proposed ACP on water quality must consider the “relevant data” and “relevant factors.” *See Motor Vehicles Mfrs. Ass’n*, 463 U.S. at 43. The agencies’ review is inadequate if it ignores or glosses over the combined effects of multiple discharges within individual watersheds. *See id.*

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<sup>5</sup> This principle is not limited to the water pollution context. It is also contained in regulations implementing the National Environmental Policy Act (“NEPA”), which recognize that “[c]umulative impacts can result from individually minor but collectively significant actions taking place over a period of time.” 40 C.F.R. § 1508.7.

The U.S. EPA endorsed the review of the combined effects of ACP construction on individual, smaller-scale Virginia waterways in its comments to FERC. ACP007463 (J.A.\_\_). The EPA recommended a “cumulative impact assessment at the individual watershed scale” and identified the Calfpasture River, Hamilton Branch, and Back Creek as examples of Virginia waterways at risk from the combined effects of multiple stream crossings and construction activities within their watershed. ACP007463–ACP007464 (J.A.\_\_–\_\_).

**B. The Board and DEQ’s Section 401 Certification for the ACP is invalid because it failed to assess combined impacts.**

Here, Atlantic applied for and received a Certificate of Public Convenience and Necessity—a federal permit—from FERC to construct and operate the ACP, ACP012224–ACP012379 (J.A.\_\_–\_\_). Atlantic sought a Section 401 certification from the Board and DEQ for its pipeline project, and the state agencies, for their part, provided a certification of the FERC permit. ACP000118–ACP000126, ACP49353 (J.A.\_\_–\_\_, \_\_).

There is no dispute that the state agencies did not consider the combined effects of multiple areas of pipeline construction on water quality to prepare its Section 401 Certification for the ACP. ACP049384 (J.A.\_\_). Thus, the agencies do not know what the combined effects of pipeline construction will be for downstream water quality in watersheds all along the route. This omission is fatal to the Section 401 Certification. As Petitioners describe in the next section, the

record contains many examples, like Hamilton Branch, the Calfpasture River, and Back Creek, with multiple areas of construction activity within an individual, smaller-scale watershed.

The state agencies have repeatedly contended that they are not required to assess the combined effects of ACP construction. Petitioners and many others raised this issue in their comments on the draft Section 401 Certification. *See, e.g.*, ACP030152 (J.A.\_\_); ACP028149 (J.A.\_\_); ACP025069 (J.A.\_\_). But in its response to comments, DEQ stated that “there is no Virginia regulatory framework for DEQ to conduct such an analysis.” ACP049384 (J.A.\_\_). The state agencies reiterated that position in their response brief in a case presenting similar issues concerning the Mountain Valley Pipeline, arguing that “nothing in Section 401” required the consideration of cumulative impacts. *See Br. for Resp’ts 41, Sierra Club v. State Water Control Bd.*, Case Nos. 17-2406(L), 17-2433 (4th Cir. Mar. 19, 2018).

The state agencies’ position ignores the basic parameters of their obligations under the Clean Water Act. The Clean Water Act requires states performing a Section 401 review to reach “reasonable assurance” that water quality standards will be met. And the agencies cannot do so without assessing the combined effect of multiple areas of construction activities on water quality.

Here, the state agencies brushed aside any consideration of combined effects, and in doing so, they did not “consider an important aspect” of the water quality problems that are likely to result from construction of the ACP. *Cf. W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 493 (9th Cir. 2011) (finding agency “entirely failed to consider an important aspect of the problem” rendering its “no effect conclusion” arbitrary and capricious) (citation omitted). Moreover, the state agencies never argue or even imply that the combined effects of pipeline construction will, in fact, be insignificant for watersheds like the Calfpasture River. They simply did not consider this aspect of the project.

The state agencies’ approach is based on an incorrect assumption about water pollution. They argue that pollution control technology, such as the requirements of the Annual Standards and Specifications, applied to discrete project discharges will result in minimal effects on the water quality of the stream or river receiving sediment from the site. ACP049379 (J.A.\_\_). The state agencies then appear to assume, even though they never expressly articulate their rationale in their response to public comments, that the combined effects of multiple project activities within an individual watershed must also be insignificant, *i.e.*, minimal effects plus minimal effects equals minimal effects. Petitioners do not concede that the contribution of individual sources will be minimal. But even accepting the agencies’ argument on that point, their apparent assumption about combined

effects is not supported by basic water quality science and is rejected by the Clean Water Act: minimal effects plus minimal effects can—and often do—equal significant water quality problems. In effect, the state agencies have ignored the critical role of water quality standards to protect water quality *even when* the discharge sources comply with control technology. *See PUD No. 1 of Jefferson Cty.*, 511 U.S. at 704.

**C. The record contains numerous examples of Virginia rivers and streams at risk from the combined effects of multiple areas of pipeline construction in their watershed.**

The record illustrates the seriousness of the gap in the state agencies' Section 401 Certification review for the ACP. The ACP enters Virginia in Highland County through an extremely steep part of the George Washington National Forest. *See* ACP005660 (J.A.\_\_). There it will cross the watershed of Townsend Draft, a Virginia-designated wild trout stream that supports a “naturally reproducing” population of brook trout and at least one tributary, Lick Fork, that is also designated as a wild trout stream. ACP000278, ACP004059 (J.A.\_\_, \_\_). Virginia considers these wild trout streams “both ecologically and economically significant resources,” and Virginia agencies have recommended their protection as part of the review of the ACP. ACP004059 (J.A.\_\_).

Brook trout populations in streams like Townsend Draft and Lick Fork are vulnerable to disturbances, like increased sedimentation or increased flows, which

can push them towards an “extinction vortex” and result in the loss of the population. ACP030153 (J.A.\_\_). Cf. ACP004064 (J.A.\_\_) (DEQ stating that it is “concerned regarding potential for serious events including slope failures, instream sedimentation, washout of fill materials, and compromise or contamination of sensitive biological or hydrogeological features such as trout streams”). In its comments on the draft Environmental Impact Statement (“draft EIS”), DEQ expressed concern that pipeline construction would “result in a permanent alteration of impacted” waterways. ACP003938 (J.A.\_\_).

The slopes in the Townsend Draft watershed are some of the steepest on the entire pipeline route in Virginia, and the Forest Service identified this area as one of several critical areas for which Atlantic was required to provide site-specific slope stability plans. ACP004853 (J.A.\_\_). During construction of the ACP, sedimentation into the downslope tributaries of Townsend Draft is certain in light of the steep, difficult terrain the pipeline will cross. Indeed, Atlantic quantified the risk for the U.S. Forest Service. According to Atlantic’s analysis, streams will receive “significant increases in erosion during construction” of approximately 200 to 800 percent above baseline, with higher rates for steep slope areas. ACP004936 (J.A.\_\_). The state agencies did not address or update the conclusions of that model. Cf. *Idaho Rivers United*, 2016 WL 2757690, at \*12 (failure to quantify combined sediment inputs into a river system was likely arbitrary and capricious).

The pipeline and access roads will cross Townsend Draft and its tributaries nine times along a half-mile section of the route. ACP006635–ACP006636 (J.A. \_\_, \_\_) (listing the Townsend Draft crossings). Those crossings will be accompanied by acres of land clearing and other construction on the steep slopes adjacent to the waterways. Moreover, Townsend Draft flows into Back Creek, which is also crossed by the pipeline and is potential habitat for the federally endangered James spinymussel. ACP005114 (J.A. \_\_).

Because areas of intense construction activity are highly concentrated in the Townsend Draft watershed, there is a significant risk that sediment loads reaching this wild trout stream from multiple sources could combine to adversely affect water quality. And this risk will be compounded during storm events when each source will simultaneously contribute its maximum amount of sediment to the watershed. *See* ACP004936 (J.A. \_\_). Because the states agencies have eschewed their obligation to consider these combined effects, they have no idea—much less reasonable assurance—how serious the water quality risks are. *See* ACP049384 (J.A. \_\_).

Nor is Townsend Draft an isolated example. All along the pipeline's route there are concentrated areas of disturbance within individual watersheds. In the steep terrain east of Fort Lewis in Bath County, Gibson Hollow and its tributaries will receive five pipeline crossings and seven access road crossings along a 0.4-

mile stretch of the route. ACP005665 (J.A.\_\_); ACP006641. The pipeline and access roads will intersect 15 tributaries to Mill Creek in Bath County, a waterway known to contain the federally endangered James spiny mussel, ACP005113 (J.A.\_\_), over approximately 2.5 miles, ACP005666–ACP005667 (J.A. \_\_–\_\_), ACP006642–ACP006644 (J.A. \_\_–\_\_). In the Calfpasture River watershed, Hamilton Branch and its tributaries have 31 pipeline and access road crossings over approximately three miles, and the main channel of the Calfpasture River and its tributaries have another 40 crossings over eight miles, bringing the total number of crossings to a remarkable 71 for the watershed. ACP005668–ACP005672 (J.A. \_\_–\_\_); ACP006645–ACP006649 (J.A. \_\_–\_\_). Construction will also affect waterways that are already struggling with heavy sediment loads. On the west side of the Blue Ridge in Augusta County, the pipeline and access roads will intersect Back Creek (not the same Back Creek discussed above) and its tributaries 49 times, ACP005681–ACP005682 (J.A. \_\_–\_\_); ACP006651–ACP006653 (J.A. \_\_–\_\_) even though aquatic life in the creek is already impaired because of sedimentation and could be “exacerbated by the proposed pipeline construction and maintenance,” ACP004936 (J.A. \_\_).

**D. The state agencies failed to analyze the combined effects on the Chesapeake Bay watershed and Chesapeake Bay Total Maximum Daily Load.**

DEQ also failed to analyze the combined effects on the Chesapeake Bay watershed and Chesapeake Bay Total Maximum Daily Load (“Bay TMDL”). Impacts to the Chesapeake Bay TMDL are not discussed once in the 83-page memo from DEQ to the Board recommending Section 401 certification, *see* ACP049345 (J.A.\_\_), nor are they addressed in FERC’s 866-page final Environmental Impact Statement (“final EIS”). *See* ACP004619 (J.A.\_\_). The state agencies’ failure to consider how the Project would impact the Chesapeake Bay TMDL is arbitrary and capricious.

The Chesapeake Bay TMDL is a federal-state partnership designed to attain water quality standards in Chesapeake Bay and its tributaries. *See* ACP048340 (J.A.\_\_) (citing EPA, Chesapeake Bay TMDL (Dec. 2010), <https://www.epa.gov/chesapeake-bay-tmdl>). To develop the Bay TMDL, EPA calculated the maximum amount of sediment, nitrogen, and phosphorus the Chesapeake Bay could receive and still meet water quality standards. *See* Bay TMDL at ES-1. These overall pollutant loads were then allocated to each of the seven Bay jurisdictions. *Id.* Each jurisdiction is responsible for reducing its amount of pollutant contribution to meet the TMDL goals. To this end, each Bay

jurisdiction developed watershed implementation plans (“WIPs”) designed to attain the pollutant reductions assigned by the TMDL. *Id.*

Virginia is a Bay jurisdiction and has expended significant resources<sup>6</sup> towards attainment of the pollutant reduction goals established by the Bay TMDL.

For example, Virginia’s Phase II WIP states:

With the obligation to meet nutrient and sediment loads contained in the Chesapeake Bay TMDL, Virginia has an opportunity to incorporate into the Phase II WIP strategies to slow or reverse the loss of forestland and the associated water quality benefits...Virginia will examine WIP strategies that not only will result in nutrient and sediment reductions but will also maintain forest cover that protects water quality over the long term.<sup>7</sup>

Goals for the Bay watershed are also embodied in Virginia regulations as specific numeric water quality criteria for the Chesapeake Bay and its tidal tributaries. *See* 9 Va. Admin. Code § 25-260-185 (listing criteria for dissolved oxygen, submerged aquatic vegetation, water clarity, and chlorophyll). As a plan established to attain water quality standards, the state agencies erred in failing to analyze how the combined effects of the ACP’s construction and permanent land use changes would impact the Bay TMDL. *See, e.g., AES Sparrows Point*, 589 F.3d at 734 (upholding state denial of 401 certification which found, in part, that project

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<sup>6</sup> *See, e.g., ACP048341*, at n.7 (J.A.\_\_\_\_).

<sup>7</sup> Virginia Phase II WIP at 33 (Mar. 30, 2012), <http://www.deq.virginia.gov/Portals/0/DEQ/Water/TMDL/Baywip/vatmdlwipphase2.pdf>.

impacts “run contrary to the objective and intent of the Baltimore Harbor TMDL.”).

The final EIS details the ACP’s proposed changes in land cover in Virginia: 1,029 acres of forest permanently impacted for operation, including 847 acres maintained as “herbaceous/scrub-shrub” right-of-way and 179 acres converted from forest to access roads, ACP005158 (J.A.\_\_), ACP005153-4 (J.A.\_\_); 197 acres of permanent impacts to wetlands, ACP005154 (J.A.\_\_); and for the 2,425 acres of “temporarily” impacted forest in Virginia, the final EIS notes that “the reestablishment of forest areas that resemble preconstruction conditions would take at least 30 years...[f]orest restoration could take a century or more in areas that currently are mature or old-growth forests.” ACP005170 (J.A.\_\_). These land cover changes will result in long-term and permanent shifts in the pollutant runoff quality and quantity within the Chesapeake Bay watershed, and may affect the pollution reduction obligations for Virginia. *See, e.g.*, ACP048770 (J.A.\_\_) (citing Recommendations of the Expert Panel to Define Removal Rates for Erosion and Sediment Control Practices, at 13, Table 3 (Jan. 4, 2014), [https://www.chesapeakebay.net/channel\\_files/21146/attachment\\_d--final\\_long\\_draft\\_esc\\_expert\\_panel\\_01072014.pdf](https://www.chesapeakebay.net/channel_files/21146/attachment_d--final_long_draft_esc_expert_panel_01072014.pdf) (comparing sediment loads by land cover, including a 48-fold increase in sediment loading between forest and construction sites *with* erosion and sediment control practices); *see also*, ACP050427 (J.A.\_\_).

In comments on FERC's draft EIS, DEQ notes that "[f]or segments of the ACP crossing the Chesapeake Bay TMDL tributaries, heightened erosion and sediment control practices should be implemented." ACP003985 (J.A.\_\_). However, these practices, even if "heightened," focus on construction activity and fail to account for the long-term or permanent impacts to the Bay TMDL of accumulated legacy sediments from construction and post-construction runoff and from permanently removing more than 1,000 acres of forest cover. Sediment and nitrogen pollutant loads from a BMP-restored herbaceous right-of-way will still be higher than those from forested land. *See* EPA, Chesapeake Bay Phase 5.3 Cmty. Watershed Model (2011) ("Bay Model"), [https://www.chesapeakebay.net/what/programs/modeling/phase\\_5.3\\_watershed\\_model](https://www.chesapeakebay.net/what/programs/modeling/phase_5.3_watershed_model) (Section 9: Table 9-1, and Section 10: Table 10-1 listing forest as the land cover with the lowest pollutant runoff in pounds-per-acre). Furthermore, "there is agreement that none of the BMPs can provide 100 percent effectiveness." ACP027751 (J.A.\_\_); *see also* ACP048344 (J.A.\_\_) (citing scientific studies demonstrating long-term impacts of pipeline construction, despite transient periods of construction activity); ACP004937 (J.A.\_\_) (Final EIS noting that "ongoing impacts could occur due to increased surface runoff and erosion/sedimentation from cleared areas, disturbed steep slopes, surface compaction, access roads, and the proximity of the right-of-way and other features to streams.").

Land cover data (e.g., forest, pasture, developed land) and best management practice (“BMP”) are key inputs to the Bay Model, which provides EPA and Bay jurisdictions with information about pollutant loads and the impact of efforts to improve water quality. *See* Bay Model. The ability to estimate the increase or decrease of nutrient or sediment loading due to a land use change is a fundamental underpinning of the Bay TMDL. Despite the availability of modeling tools<sup>8</sup>, DEQ failed to use any methodology to assess pollutant loading from the construction and permanent land cover changes of the ACP and resulting impacts on the Bay TMDL. *See* ACP049376 (J.A. \_\_) (DEQ noting that “a state may rely on tools that reduce the uncertainty inherent in the predictive nature of a § 401 certification”).

In addition to impacts from pollutant runoff, the construction and operation of the project will introduce nitrogen oxides (NOx) and other pollutants into the air. *See* ACP005365–ACP005367. (J.A. \_\_–\_\_) (noting that construction of the project will take two years and will emit 4,513 tons of NOx and 230 tons per year during operation). Notably for the Chesapeake Bay TMDL, nitrogen from this new source of air pollution will deposit to the land or water and contribute to the nitrogen impairment in the Bay watershed. *See* ACP011223–ACP011225 (J.A. \_\_–\_\_) (citing expert air modeling analysis concluding that an additional 13,297

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<sup>8</sup> *See, e.g.*, Chesapeake Assessment Scenario Tool (“CAST”), <https://cast.chesapeakebay.net/About>.

pounds of nitrogen would deposit in the Bay watershed annually due to ACP emissions). The state agencies entirely failed to consider this new source of nitrogen and its potential to impact water quality and the Bay TMDL.

The state agencies failed to consider the change in land cover proposed by the Project and how this change, coupled with stream crossings and other impacts, will result in long-term and permanent impacts to water quality in the Chesapeake Bay, and to the ultimate success of the Chesapeake Bay TMDL. Despite decades of efforts devoted to restoring the Chesapeake Bay and the unprecedented scale of the proposed landscape impacts from the ACP, DEQ failed to consider the Bay TMDL in its Section 401 review. ACP048341 (J.A.\_\_) (“The states’ role in evaluating and certifying a federal project has never been more important than it is here, given the ACP’s scope and potential to impact hundreds of small streams as well as larger tributaries that drain to the Chesapeake Bay.”). This omission renders the Board’s Certification of the project arbitrary and capricious. *See Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43 (an agency decision would be arbitrary and capricious if it “entirely failed to consider an important aspect of the problem.”).

### **III. THE STATE AGENCIES’ RELIANCE ON ATLANTIC’S ANNUAL STANDARDS TO MEET ANTIDEGRADATION REQUIREMENTS IS ARBITRARY AND CAPRICIOUS.**

The Board and DEQ arbitrarily concluded that Atlantic’s compliance with its Annual Standards and Specifications (“Annual Standards”) will be adequate to

ensure compliance with Virginia's water quality standards, including antidegradation requirements. The agencies found that construction of the ACP would not result in any lowering of water quality, such that a full antidegradation review was not required. The agencies' conclusion, however, is contradicted by substantial evidence in the record demonstrating that the pipeline would in fact lead to, among other things, significant and long-term increases in erosion and sedimentation and thus harm aquatic life in the waters receiving that sediment. Further, the state agencies failed to follow the procedures for antidegradation review established in DEQ's own guidance document. Issuance of the Section 401 Certification was thus arbitrary and capricious and not in accordance with the law.

Ensuring an activity's compliance with water quality standards requires not only examining whether the proposed discharges can comply with narrative and numeric water quality criteria, such that existing and designated uses are protected, but also performing an antidegradation review. The antidegradation policy established by Clean Water Act § 303(d), 33 U.S.C. § 1313(d), is a fundamental part of state water quality standards. *See PUD No. 1 of Jeff. Cty.*, 511 U.S. at 705; *Nat. Res. Def. Council, Inc.*, 16 F.3d at 1400. The EPA has made clear that States "must apply antidegradation requirements to...any activity requiring a CWA §401 certification." 63 Fed. Reg. 36,742, 36,780 (July 7, 1998); *see also* Virginia DEQ, Guidance Memo No. 00-2011, *Guidance on Preparing VPDES Permit Limits 7*

(August 24, 2000) (“DEQ VPDES Guidance”) (“Any action undertaken by the Board, DEQ or its staff requires application of the antidegradation policy.”), <http://www.deq.virginia.gov/Portals/0/DEQ/Water/Guidance/002011.pdf>.

State antidegradation policies must be consistent with 40 C.F.R. § 131.12(a), and states must develop implementation methods consistent with that provision, 40 C.F.R. § 131.12(b). The federal regulations require that antidegradation policies protect existing uses, maintain the existing quality of high-quality waters unless degradation is justified by important socioeconomic development, and prohibit degradation of outstanding National resource waters. *Id.* § 131.12(a).

Virginia’s antidegradation policy is set out in 9 Va. Admin. Code § 25-260-30, which mandates that the policy “shall be applied whenever any activity is proposed that has the potential to affect existing surface water quality.” It assigns three tiers of protection to Virginia’s waters, commonly known as Tier 1, Tier 2, and Tier 3, depending on their existing quality and national significance. 9 Va. Admin. Code § 25-260-30A.

Tier 1 includes so-called “impaired” waters, that is, waters that fail to meet their designated use due to one or more pollutants, as well as waters that just barely meet those uses. *See* DEQ VPDES Guidance at 8. For Tier 1 waters, Virginia’s antidegradation policy requires that “existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and

protected.” 9 Va. Admin. Code § 25-260-30A.1. As DEQ explains on its website, “[t]his means that as a minimum, all waters should meet adopted water quality standards.” DEQ, *Antidegradation*, <http://www.deq.virginia.gov/Programs/Water/WaterQualityInformationTMDLs/WaterQualityStandards/Antidegradation.aspx> (last visited Apr. 16, 2018).

Tier 2 waters constitute those “high quality” waters that exceed water quality standards. The quality of those waters “shall be maintained and protected” unless DEQ “finds, after full satisfaction of the intergovernmental coordination and public participation provisions of the Commonwealth’s continuing planning process, that allowing lower water quality is necessary to accommodate important economic or social development.” 9 Va. Admin. Code § 25-260-30.A.2. Tier 2 review is designed to protect the “assimilative capacity” of waters, that is, the capacity of waters to accept pollutants while still maintaining designated and existing uses. *See, generally, Ohio Valley Env’tl. Coal. v. Horinko*, 279 F. Supp. 2d 732, 746-47 (S.D.W. Va. 2003).

DEQ’s comprehensive VPDES Guidance, which replaced its earlier antidegradation guidance, explains: “Since the quality of tier 2 waters is better than required by the standards, no significant degradation of the existing quality will be

allowed.” DEQ VPDES Guidance at 9.<sup>9</sup> DEQ has outlined specific restrictions that it believes will prevent significant degradation in Tier 2 waters, including that the activity will not use “more than 25% of the unused assimilative capacity...for toxic criteria for the protection of aquatic life.” *Id.*

In order to determine whether a proposed activity complies with these restrictions for Tier 2 waters, it is necessary to establish the “baseline” conditions regarding the extent to which the water quality of a particular body presently exceeds the water quality standard, *i.e.*, the “amount of unused assimilative capacity.” *Id.* (“The unused assimilative capacity is defined as the difference between the existing water quality and the lower quality allowed by the standards. For example: If the criteria for a water body is 10 mg/l and the existing quality is found to be 2 mg/l then the unused capacity is:  $10 - 2 = 8$  mg/l.”). “A baseline needs to be established for all criteria that apply to the stream in question.” *Id.* at 10. An activity that would result in significant degradation of a Tier 2 water may not be allowed unless the applicant demonstrates that the degradation is justified

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<sup>9</sup> Petitioners do not concede that DEQ’s Guidance, including the Guidance’s conception of “significant degradation” as applied to Tier 2 waters, necessarily complies with the Clean Water Act’s minimum federal standards. Though Petitioners believe that the Guidance would in certain circumstances permit a level of degradation in Tier 2 waters that violates the Act, it nonetheless serves as a useful guide to what DEQ considers its minimum responsibilities and provides the procedures DEQ considers necessary to make antidegradation findings.

by important socioeconomic development, which must be determined through a formal process. *Id.* at 11-12; 9 Va. Admin. Code § 25-260-30.A.2.

Finally, Tier 3 waters are those which have been specifically designated as “exceptional state waters” because they “provide exceptional environmental settings and exceptional aquatic communities or exceptional recreational opportunities.” 9 Va. Admin. Code § 25-260-30.A.3. Water quality in Tier 3 waters “shall be maintained and protected to prevent permanent or long-term degradation or impairment.” *Id.* See also DEQ VPDES Guidance at 10.

The state agencies violated Virginia’s antidegradation policy and federal law by failing to conduct a rational antidegradation review. In response to comments on the Draft Certification faulting DEQ for failing to conduct such a review, DEQ merely states:

In the absence of information demonstrating otherwise, compliance with the requirements under the Annual Standards and Specifications Program will result in stormwater discharges being controlled as necessary to meet applicable water quality standards and antidegradation requirements. More specifically, by imposing requirements that discharges to impaired, TMDL, and exceptional waters comply with additional requirements, to stabilize exposed areas faster and to conduct site inspections more frequently than other sites (in addition to meeting SWPPP, VESC and SWM requirements), authorizing these discharges will not result in a lowering of water quality. Thus, DEQ has determined that compliance with the Annual Standards and Specifications approval generally is sufficient to satisfy Tier 2 and Tier 3 antidegradation requirements because the controls will not result in a lowering of water quality, making individualized Tier 2 or Tier 3 review unnecessary.

ACP050097-98 (J.A.\_\_\_\_). However, the information in the record “demonstrate[s] otherwise.” Uncontroverted evidence shows that additional discharges of sediment and other pollutants associated with construction and operation of the ACP will lower water quality in violation of Virginia’s antidegradation policy.

DEQ’s assertion that Atlantic’s compliance with its Annual Standards is sufficient to prevent lowering of water quality, such that a full antidegradation review was not required, is contradicted by record evidence from multiple sources. Region 4 of the EPA takes the position that “it is generally accepted that a new or increased volume of discharge will result in the lowering of water quality for a Tier [2] water body.” *Horinko*, 279 F. Supp. 2d at 752 (rejecting portions of EPA’s approval of West Virginia’s antidegradation review procedures). Likewise, EPA’s Water Quality Standards Handbook states that “new discharges or expansion of existing facilities would presumably lower water quality and would not be permissible unless the State conducts” a full Tier 2 socioeconomic review. *Id.* (quoting 1994 Water Quality Standards Handbook, Ch. 4.5, at 4–7 (2d ed.1994)).

Indeed, the Board and DEQ had before them expert analyses demonstrating that the pipeline would lead to significant lowering of water quality. As noted above, modelling performed by Atlantic as part of the U.S. Forest Service’s review of the pipeline found that the project would result in “significant increases in erosion during construction” of approximately 200 to 800 percent above baseline,

with higher rates for steep slope areas. *See* ACP004936 (J.A.\_\_). This analysis estimated that elevated sedimentation rates would typically persist for five years following restoration. *Id.* *See also* ACP004938 (J.A.\_\_) (FERC explaining that “ongoing impacts could occur due to increased surface runoff and erosion/sedimentation from cleared areas, disturbed steep slopes, surface compaction, access roads, and the proximity of the right-of-way and other features to streams. If sources of sedimentation result from stormwater runoff from access roads or the construction right-of-way, and are received by waterbodies, there is potential for substantial episodic impacts.”). A separate analysis of two undisclosed locations in Bath County, Virginia, submitted by Atlantic showed increases in soil loss, *i.e.*, erosion, in the pipeline corridor of between 227 and 246 times pre-construction levels. ACP027749 (J.A.\_\_) (expert analysis summarizing calculations made by Atlantic).

The state agencies do not explain how or even if these sedimentation analyses, performed by the pipeline developer, will be changed by the requirements of the Annual Standards. Moreover, Atlantic has routinely acknowledged that it must comply with Virginia state law requirements such as the Annual Standards, *see* ACP005050 (J.A.\_\_), and its analysis for the Forest Service “accounted for the implementation of soil erosion devices, such as water diversion bars and standard silt fencing,” ACP005048 (J.A.\_\_).

Additionally, independent consulting firm Downstream Strategies prepared an analysis of the sedimentation impacts associated with construction and with post-construction land use change utilizing computer modeling tools. ACP048261-3 (J.A.\_\_). Application of those models to the Falls Run of Dutch Creek watershed in Nelson County, Virginia—which, like much of the pipeline corridor in Virginia, is characterized by steep slopes and highly erodible soils—found that sedimentation during construction would increase by a staggering 9,051%, even assuming imposition of Best Management Practices (BMPs) to control erosion, such as those included in Atlantic’s Annual Standards. ACP048263 (J.A.\_\_). Further, the analysis predicted that post-construction sedimentation would increase by 319% even after restoration efforts, due to conversion of forested land to the herbaceous cover that would need to be permanently maintained in the pipeline right-of-way. *Id.*

The state agencies have not demonstrated that the general, non-site-specific control measures outlined in Atlantic’s Annual Standards will reduce those sedimentation impacts sufficiently to prevent a lowering of water quality. A Ph.D hydrologist who reviewed the plans explained that “[t]here are numerous ratings for BMPs, providing a range of percent effectiveness values. However, there is agreement that none of the BMPs can provide 100 percent effectiveness.” ACP027751 (J.A.\_\_). She cited literature showing a range of expected

effectiveness between 40 and 60 percent and concluded that, despite implementation of the measures in Atlantic's Annual Standards:

Increased peak stormwater discharge from construction activities will result in increased sedimentation in streams 1) directly, because BMPs are not 100 percent effective in preventing sediment transport to streams; and 2) indirectly, because peak stormwater discharge will cause stream bed scour and stream bank erosion downstream, resulting in the introduction of turbidity and sediment to the streams. The increased turbidity and sedimentation will 1) degrade water quality...and will 2) increase embeddedness in the stream beds, degrading or destroying aquatic habitats ... .

ACP027736 (J.A.\_\_); *see also* ACP027755 (J.A.\_\_) (same hydrologist concluding that “the Best Management Practices (BMPs) described for use during the proposed ACP construction in upland headwater areas are deficient and will result in increased sedimentation to receiving streams”). The state agencies have not provided evidence regarding the effectiveness of the measures outlined in the Annual Standards to rebut that finding. In light of this record, the Court may not defer to the agencies' bare conclusion that the measures are sufficient to prevent a lowering of water quality. *See Meister v. U.S. Dep't of Agric.*, 623 F.3d 363, 367 (6th Cir. 2010).

The Board and DEQ's conclusion that Atlantic's Annual Standards will prevent any lowering of water quality was not just contrary to the record evidence, it was also reached without following the procedures outlined in DEQ's own guidance. That guidance makes clear that, in order to determine whether a

proposed activity will result in a lowering of water quality, DEQ must first establish the “baseline” for the waterway and determine the amount of unused assimilative capacity. DEQ VPDES Guidance at 1. Here, the state agencies did not establish the baseline water quality of all impacted streams, assess the assimilative capacity of those waters, or calculate how much sediment would enter those waters after implementation of erosion control measures, all of which are necessary to determine to what degree the project would lower water quality. Without establishing this baseline, the agencies could not determine the amount of assimilative capacity that would be used up by the pipeline’s discharges of sediment and other pollutants. *See id.* at 10 (explaining that a significant lowering of water quality requiring a full socioeconomic review occurs when, among other things, a proposed activity uses greater than 25% of the available assimilative capacity for toxic criteria for the protection of aquatic life). Consequently, the agencies could not, in accordance with the procedures established by their own guidance, determine whether the ACP would result in a significant lowering of water quality.

In sum, the record does not support the conclusion that discharges associated with construction and operation of the ACP would result in no lowering of water quality. The Annual Standards do not purport to prevent all discharges of sediment. As FERC’s Environmental Impact Statement, comments from other state and

federal agencies, and independent expert reviews demonstrate, construction activities through the type of steep and highly erodible terrain that would be traversed by the pipeline would result in substantial sedimentation impacts. No amount of best management practices and sediment control measures can eliminate *all* sedimentation discharges. DEQ was thus required to perform, and the Board was required to review, a full socioeconomic assessment for all Tier 2 waters, subject to detailed “intergovernmental coordination and public participation” requirements. 9 Va. Admin. Code § 25-260-30.A.2. The failure to do so renders the Board’s approval and DEQ’s issuance of the Certification arbitrary and capricious and contrary to law.

#### **IV. CONSTRUCTION AND OPERATION OF THE PIPELINE IN AREAS OF KARST GEOLOGY WILL IMPAIR WATER QUALITY.**

The pipeline will cut through over 70 miles of limestone bedrock, which is especially soluble to water and forms karst landscapes and underground water flow systems where the rock has dissolved to create caves, sinkholes, underground rivers, and springs. ACP047045 and ACP047053 (J.A. \_\_ and \_\_); ACP006475 (J.A. \_\_). Typically, the connections between surface drainages in these areas are not known because the water is flowing underground. These areas present a unique set of environmental challenges, including sinkhole flooding, sinkhole collapse,

and groundwater contamination. ACP047048–ACP047049 (J.A. \_\_–\_\_); ACP049177 (J.A. \_\_).

Karst regions contain aquifers capable of producing large supplies of water used for watering livestock, drinking water, and stream recharge. Streams flowing through karst regions often disappear underground for many yards or miles before resurfacing as a spring or stream. ACP047054–ACP047056 (J.A. \_\_–\_\_). *See also* ACP046833–ACP046836 (J.A. \_\_–\_\_). Rainfall landing on karst areas sinks quickly into the soil and the highly permeable rock beneath and then flows through a similarly integrated, but underground, drainage system. Rainfall carrying pollutants might flow hundreds or thousands of feet, or even several miles, to eventually emerge at and possibly contaminate a surface water. *Id.*

Although Atlantic has assured, and the state agencies have accepted, that water in these regions will be protected, this assurance is meaningless as neither knows the boundaries of all the drainage areas in these regions. ACP047069–ACP047070 (J.A. \_\_–\_\_); ACP047074–ACP047075 (J.A. \_\_–\_\_). Thus, the state agencies have not determined what areas surrounding the pipeline path actually drain to a particular stream or creek. *Id.* Without that information, the state agencies had no ability to pre-determine the potential impacts to water quality in karst areas, and therefore had no basis for a finding of reasonable assurance.

Moreover, where limestone bedrock is exposed at the surface, the subterranean water network can underlie much of the limestone outcrop area—not just where sinkholes or other obvious surface features exist. Because detailed hydrologic studies have not been done in all the karst areas affected by the pipeline, the state agencies do not know where all the underground streams in these areas flow. Thus, the state agencies do not know what potential sources of pipeline-related contamination might impact a spring or surface water. ACP047069 (J.A.\_\_). Therefore, karst groundwater along the ACP route is vulnerable to contamination, and construction activities associated with land clearing, digging, blasting and handling of chemicals like diesel fuel and herbicides that can produce sediment and other sources of contamination could pollute karst groundwater resources. Because water resources in these regions are unmapped, the state agencies had no reasonable basis to claim that water quality would be protected.

For example, in 2015 a diesel fuel spill along a right-of-way of the recently constructed Columbia Gas Pipeline in Giles County, Virginia, contaminated a public drinking water supply in Peterstown, West Virginia. ACP047058 (J.A.\_\_), ACP047071 (J.A.\_\_); ACP046862 (J.A.\_\_). DEQ determined that a post-construction spill by a contractor at an equipment staging area along the pipeline route sank into the karst aquifer, emerging about a half-mile away at a spring providing drinking water to the Red Sulfur Public Service District. The water

supply had to be shut off and alternative water obtained. If a groundwater dye tracing investigation had been done *in advance* to delineate the source area for the karst spring, the pipeline could have been rerouted to avoid the karst area or intensive safety precautions could have been implemented prior to construction and harm to the aquifer could have been avoided.

Mr. William Limpert, a former employee of the Maryland Department of the Environment and an erosion and sediment control expert, submitted extensive comments on this and other related issues to FERC and the state agencies. ACP048767–ACP048995 (J.A. \_\_–\_\_). Mr. Limpert and his wife own land near Little Valley in Bath County, Virginia. ACP048768. The pipeline will travel through 3,000 feet of his property along a steep slope known as Miracle Ridge. ACP048771. Mr. Limpert provided photographic evidence establishing numerous karst features and landscapes on his and adjacent property, ACP048781–ACP048785 (J.A. \_\_–\_\_), ACP48799–ACP48801 (J.A. \_\_–\_\_), and how construction in this area will lead to landslides, stormwater runoff, and massive sediment pollution to adjacent waterways including Little Valley Run, a perennial brook trout stream. ACP 048787 (J.A. \_\_), ACP048804–ACP048806 (J.A. \_\_–\_\_). The state agencies have not explained how these harms will be avoided, other than to say that appropriate controls will be required. What those controls are and where

they will be placed is not explained. Thus, there is no reasonable assurance that water quality will not be impaired.

Both Virginia's Department of Conservation and Recreation and the U.S. Department of Interior identified similar concerns with construction of the pipeline in karst terrain including Little Valley and Valley Center, Virginia. ACP048377 (J.A.\_\_); ACP007454–ACP007455 (J.A.\_\_–\_\_). Both agencies recommended that the pipeline path be moved in these areas to avoid harm to water quality. ACP048386 (J.A.\_\_) (“DCR-DNH continues to recommend the avoidance of *all* conservation sites intersected by the pipeline footprint.” (emphasis in original)); ACP007454–ACP00745 (J.A.\_\_–\_\_). *See also* ACP049176 (J.A.\_\_); ACP048232–ACP048235 (J.A.\_\_–\_\_); ACP049176 (J.A.\_\_). Atlantic did not move the pipeline route and thus, harm to water quality is assured.

### **CONCLUSION AND RELIEF REQUESTED**

For these reasons, the State Water Control Board and the Department of Environmental Quality's finding that there is reasonable assurance that the construction and operation of the Atlantic Coast Pipeline will comply with Virginia water quality standards is arbitrary and capricious. Petitioners respectfully request that the Court vacate the state agencies' Section 401 Certification for the pipeline and remand the matter to the agencies.

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Dated: April 17, 2018

**CERTIFICATE OF COMPLIANCE**

As required by Fed. R. App. P. 32(g), I certify that this Opening Brief complies with the length limit of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 12,844 words.

I further certify that this Opening Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared using a proportionally spaced typeface, Times New Roman, 14-point font.

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 17, 2018, I electronically filed the foregoing Opening Brief on behalf of Petitioners with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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