

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

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

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; POTOMAC
RIVERKEEPER, d/b/a Potomac Riverkeeper Network, Inc.; SHENANDOAH
RIVERKEEPER, a program of Potomac Riverkeeper Network; SHENANDOAH
VALLEY BATTLEFIELDS FOUNDATION; SHENANDOAH VALLEY
NETWORK; SIERRA CLUB; VIRGINIA WILDERNESS COMMITTEE;
ROBERT WHITESCARVER; WILD VIRGINIA, INC.,
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.

On Petition for Review

**PETITIONERS' MOTION FOR STAY OF THE VIRGINIA STATE WATER
CONTROL BOARD SECTION 401 CERTIFICATION**

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INTRODUCTION

As authorized by Federal Rule of Appellate Procedure 18(a), Petitioners request a stay pending review of the December 20, 2017 Virginia State Water Control Board (the “Board”) and Virginia Department of Environmental Quality’s (“DEQ”) (together, the “state agencies”) issuance of a Clean Water Act Section 401 Certification for the Atlantic Coast Pipeline (“Section 401 Certification” or “Certification”). [JA00025].¹ In the Certification, the state agencies asserted that they had “reasonable assurance” that construction of the Atlantic Coast Pipeline (“ACP”) would not violate Virginia water quality standards. Four months later, the Board acknowledged serious doubts about two of the five bases for their reasonable assurance finding: the Army Corps of Engineers’ Nationwide Permit 12 and Virginia’s certification of Nationwide Permit 12. They opened a public comment period to assess the “sufficiency” of this federal permit and state certification to protect water quality from harm caused by construction of the ACP.

This review process is not complete, meaning the Board does not have “reasonable assurance” that water quality standards will not be violated. Yet construction of the ACP in Virginia is imminent. Meanwhile, construction of another interstate gas pipeline in Virginia, the Mountain Valley Pipeline

¹ As required by Fed. R. App. P. 18(a)(1), Petitioners moved for a stay of the Order before the Board. The state agencies have not acted on that request. Petitioners informed the other parties in this case of their intent to file this motion; the state agencies and Atlantic Coast Pipeline, LLC are opposed.

(“MVP”)—that, like the ACP, cuts through steep, forested mountains—has resulted in numerous water quality violations and suspension of construction to protect water quality.

Petitioners, whose members use rivers, streams, and wetlands and own land adjoining waterways that will be harmed by construction of the ACP, request that the Court stay the Section 401 Certification to prevent irreparable injury to their environmental, aesthetic, recreational, and property interests pending completion of the Court’s review in this case.

BACKGROUND

The Atlantic Coast Pipeline is a proposed 600-mile natural gas transmission pipeline regulated by the Federal Energy Regulatory Commission (“FERC”) under the Natural Gas Act. 15 U.S.C. § 717f(c); [JA00608; JA00964]. The project developer is Atlantic Coast Pipeline, LLC (“Atlantic”), a joint venture of Dominion Energy, Duke Energy, and Southern Company. [JA00699]. The pipeline would extend from West Virginia to North Carolina across 307 miles of Virginia. [JA00961]. Its route intersects 890 Virginia rivers and streams, including 73 wild or stockable trout streams in the mountains of western Virginia. [JA00627]. The pipeline would also cross 74 migratory fish spawning waters or their tributaries. *Id.*

Pipeline construction poses serious risks to water quality. *See* [JA00895–JA00896]. Atlantic may be required to blast in the stream channel or adjacent areas

to install the pipeline through as many as 575 Virginia waterways. [JA00627]. Additionally, Atlantic will clear over 5,000 acres in Virginia—including 3,000 acres of forest and 300 acres of wetlands—which can result in excessive sedimentation in violation of water quality standards. [JA00625; JA00965]. This risk is greatest in western Virginia, where the route traverses the steep, forested landscape of the central Appalachians, [JA00552–JA00553; JA00609], including 41 miles classified as steep slopes, [JA00609], and 16 miles through the George Washington National Forest, [JA00641]. Atlantic’s models, submitted to the U.S. Forest Service, predict an increase in erosion rates of 200 to 800 percent over pre-construction conditions. [JA00622].

On December 20, 2017, the state agencies issued the Section 401 Certification for the ACP, concluding that they had “reasonable assurance” that the project would not violate Virginia water quality standards. [JA00025]. The agencies predicated their reasonable assurance finding on five bases: (1) “[t]he additional conditions contained in Section V of the Certification,” (2) “requirements imposed by [Virginia Water Protection] regulation,” (3) “the Corps Section 404 permitting requirements,” (4) the “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.” [JA00034]. 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 cases were consolidated by this Court's order. Order, Case No. 18-1077 (Jan. 31, 2018), ECF No. 33.

On April 12, 2018, while this case was pending, the Board unexpectedly voted to open a 30-day public comment period to address “whether the approvals the [C]orps granted for the projects under Nationwide Permit 12 are adequate to protect Virginia waterways” from harm caused by construction. Robert Zullo, *Regulatory Board Cracks Open Door for More Review of Pipeline Projects*, Richmond Times-Dispatch (Apr. 12, 2018), ECF No. 74. The Richmond Times-Dispatch reported that Board member Robert Wayland, a former EPA official, “was leading a push for a meeting and public hearing on whether the [C]orps permit adequately protects Virginia waters.” *Id.* Eventually, five of the seven Board members voted to open the comment period, with one member dissenting and one not present. *Id.*

The state agencies formally opened the comment period on April 27, 2018, requesting comments on the “sufficiency” of Nationwide Permit 12 and Virginia’s certification of Nationwide Permit 12. Va. Dep’t of Env’tl. Quality & State Water Control Bd., General Notice: Public Notice – Mountain Valley Pipeline (MVP) and Atlantic Coast Pipeline (ACP) Projects – State Water Control Board Request for Technical Information on Specific Wetland and/or Stream Crossings (Apr. 27,

2018), ECF No. 74. The Court took judicial notice of documents describing the state agencies' recent actions on June 20, 2018. ECF No. 64.

The public comment period closed on June 15, 2018, *see* Va. Dep't of Env'tl. Quality, Pipeline Updates, ECF No. 74, and the Board has yet to take action in response to comments. The next regular Board meeting during which it could consider comments on the sufficiency of Nationwide Permit 12 is not scheduled until August 21, 2018. Va. Regulatory Town Hall, Meetings & Public Hearings, <http://townhall.virginia.gov/L/meetings.cfm>.

Meanwhile, construction of the ACP in Virginia is imminent, as DEQ is finishing its final review of erosion and sediment control and stormwater management plans for the project, a mandatory condition of the Section 401 Certification before construction begins. Construction is already underway in West Virginia, Webb Decl. ¶¶ 1-6, Ex. 1, and Atlantic has requested permission from FERC to begin construction in North Carolina, Matthew Bley, Dominion Energy Transmission, Inc., Letter to Kimberly Bose, FERC (May 14, 2018), FERC eLibrary No. 20180514-6133.

On May 15, 2018, this Court vacated the Endangered Species Act permit (known as an incidental take statement) for the project, *Sierra Club v. U.S. Dep't of the Interior*, 722 Fed. Appx. 321 (4th Cir. 2018), but Atlantic has moved forward with construction in West Virginia since then. Webb Decl. ¶¶ 1-6. FERC

has not responded to the request made by two of the Petitioners here that it suspend construction authorization in West Virginia until the Fish and Wildlife Service issues a new incidental take statement. *Defenders of Wildlife et al., Req. for Reh'g*, FERC Docket No. CP15-554 (June 11, 2018). Moreover, FERC continues to indefinitely delay its final decision on Petitioners' rehearing request, the last step in the administrative review process. Petitioners' request has been pending for eight months, preventing them from seeking judicial review of the FERC certificate approving the project. *Shenandoah Valley Network et al., Req. for Reh'g*, FERC Docket No. CP15-554 (Nov. 13, 2017).

Irreparable harm to the interests of Petitioners' members is likely once construction begins. Construction of two other interstate gas pipelines through similarly steep terrain has resulted in significant water quality problems. In Virginia, MVP developers reached an agreement with DEQ to temporarily suspend construction on June 29, 2018, to attempt to repair erosion control devices that had been repeatedly overwhelmed by rain events. *Buppert Decl.* ¶ 6; Att. B, Ex. 3. On July 10, 2018, DEQ issued a notice of violation to MVP for sediment deposited in surface waters and other violations. *Id.* In the foothills region of South Carolina, Dominion's construction of the Transco to Charleston pipeline in early 2018 choked headwater streams with sediment. *Robbins Decl.* ¶¶ 21-26, Ex. 2. Finally,

construction of the ACP itself has resulted in serious water quality problems in West Virginia. Buppert Decl. ¶¶ 11-16; Atts. E-G.

STANDARD OF REVIEW

A court’s analysis whether to issue a stay pending review requires “consideration of four factors: ‘(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.’” *Nken v. Holder*, 556 U.S. 418, 434 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)).

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 Administrative Procedure Act. *AES Sparrows Point LNG, LLC v. Wilson*, 589 F.3d 721, 727 (4th Cir. 2009). To survive review under that 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. 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)).

ARGUMENT

I. PETITIONERS SATISFY THE REQUIREMENTS FOR A STAY.

A. Petitioners Make a Strong Showing of Likelihood of Success on the Merits.

i. The Board's April 12, 2018 decision renders Virginia's Section 401 Certification of the Atlantic Coast Pipeline arbitrary and capricious.

On April 12, 2018, the Board effectively rejected the state agencies' prior position that Nationwide Permit 12 is adequate by opening a new comment period to assess whether Nationwide Permit 12 and the state's certification of Nationwide Permit 12 are sufficient to protect water quality from ACP construction. This subsequent decision critically undermined the state agencies' prior reasonable assurance determination, rendering the Section 401 Certification for the ACP invalid.

As required by the Clean Water Act, the Section 401 Certification includes a statement of reasonable assurance that water quality standards will not be violated. *See* 40 C.F.R. § 121.2(a)(3); [JA00034]. The plain, unambiguous language of the Certification establishes that state agencies based that reasonable assurance determination on the adequacy of the Corps' Nationwide Permit 12 and the state's certification of Nationwide Permit 12 to protect water quality. [JA00034]. 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* [JA00305]; Issuance and Reissuance of Nationwide Permits, 82 Fed. Reg. 1,860 (Jan. 6, 2017). In April 2017, the state agencies issued a Section 401 certification of Nationwide Permit 12, certifying that any project granted coverage under that general permit by the Corps would comply with Virginia water quality standards. [JA00511].

There is no reasonable dispute that the state agencies relied on Nationwide Permit 12 as critical support for the challenged Certification. In November 2017, in response to public comments on the draft Section 401 Certification for the ACP, 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.” [JA00995]. DEQ also 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 solely the agency’s April 2017 certification of Nationwide Permit 12. [JA00992]. In an accompanying November 2017 memo to the Board outlining the bases for the proposed certification, DEQ explained that “[t]he Department’s 401 Water Quality Certification for the Corps[’] Nationwide Permit 12 issued April 7, 2017 and this additional proposed 401 Certification developed pursuant to Guidance Memo No. GM17-2003...*together* would

constitute...Virginia's 401 Certification for the ACP Project." [JA00968]. DEQ also confirmed that as part of developing the draft Section 401 Certification and determining whether there is reasonable assurance that water quality standards will not be violated, "DEQ reviewed, evaluated and analyzed...Corps Nationwide Permit 12 and Norfolk District Regional Conditions." [JA00969–JA00970].

In their briefing in this case, the state agencies and Atlantic attempt to cabin this Court's review to a purportedly discrete "upland" Section 401 certification, so as to dull the effect of the Board's actions calling into question the sufficiency of Nationwide Permit 12. *See* Resp'ts Br. 63, ECF No. 56; Intervenor Br. 49, ECF No. 57. This Court need look no further than the four corners of the December 20, 2017 Section 401 Certification to make clear what state agencies have muddled. The agencies explicitly predicated their "reasonable assurance" determination on "the Corps Section 404 permitting requirements" (*i.e.*, Nationwide Permit 12) and the state's "Section 401 Water Quality Certification of the Corps Nationwide Permit 12." [JA00034]. Therefore, by its own terms, the Section 401 Certification for the ACP was based on Nationwide Permit 12 and the state's certification of Nationwide Permit 12. When the language of a permit "is plain and capable of legal construction," as is the case here, "the language alone must determine the permit's meaning." *Piney Run Pres. Ass'n v. Cty. Comm'rs of Carroll Cty.*, 268 F.3d 255, 269 (4th Cir. 2001).

The question the Court must answer is whether, by opening a comment period to assess the sufficiency of Nationwide Permit 12, the Board has fatally undermined its “reasonable assurance” determination for the challenged Certification. The Court should answer that question in the affirmative. Two of the five pillars that, together, supported the Board’s reasonable assurance finding, 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.” [JA00034]. Now that the Board has cast doubt on the sufficiency of those two critical pillars, the finding of reasonable assurance is no longer supported.

When a court determines that there is an “insufficient basis” for an agency’s decision, that decision is arbitrary and capricious. *See, e.g., Sierra Club v. Martin*, 71 F. Supp. 2d 1268, 1320 (N.D. Ga. 1996). The Board itself has conceded through its actions that there was insufficient basis for its December 2017 “reasonable assurance” determination. The Court need only recognize that the Board has done so. Without a valid “reasonable assurance” determination, the Section 401 Certification is invalid. *See* 40 C.F.R. § 121.2(a)(3); *see also Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992) (“In the rulemaking context...it is settled law that an agency may be forced to reexamine its approach ‘if a significant factual predicate of a prior decision...has been removed.’”) (quoting *WWHT, Inc. v. FCC*, 656 F.2d 807, 819 (D.C. Cir. 1981)).

ii. The state agencies' failure to consider the combined effects of multiple areas of construction within individual watersheds is arbitrary and capricious.

The state agencies 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. The state agencies wrongly argue that they are not required to consider those effects. The text of Section 401 of the Clean Water Act, considered together with widely accepted principles of environmental science and regulation, establishes that the state agencies could not have “reasonable assurance” that the ACP will comply with water quality standards without considering the combined effects of construction.

First, the Clean Water Act establishes that a state conducting a Section 401 certification must consider the potential impacts on water quality from the permitted activity as a whole. *See* 33 U.S.C. § 1341. The water quality effects from pipeline construction are not concentrated in a single, disturbed area. Rather, a project like the ACP will extend hundreds of miles across the landscape, [JA00600], often intersecting the main channel and many tributaries within an individual watershed, [JA00691–JA00692]. The crossings and associated areas of upland construction have the potential, acting in concert, to contribute to water quality problems downstream.

Second, 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. v. Wash. Dep't of Ecology*, 511 U.S. 700, 704 (1994) (“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)). *Cf. Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 994 (9th Cir. 2004); *Idaho Rivers United v. Probert*, 2016 WL 2757690, at *15 (D. Idaho May 12, 2016); 33 U.S.C. § 1344(e); 40 C.F.R. § 230.7(a); 40 C.F.R. § 230.11(g)(1).

Accordingly, the state agencies 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 water quality standards will be protected. *See* 40 C.F.R. § 121.2(a)(3). For example, the Calfpasture River has 71 stream crossings and associated areas of upland construction concentrated in its watershed. [JA00656–JA0060, JA00677–JA00681]. And while over 800 crossings over 200 miles of the pipeline route in Virginia fall within the Chesapeake Bay watershed, which is impaired for nutrients and sediment and subject to a federal-state cleanup plan, *see* [JA00670]; [JA00686]; [JA01138];

[JA01141], the state agencies failed to analyze the combined effects on the watershed and on the Chesapeake Bay Total Maximum Daily Load (“TMDL”). *See* [JA00960]. The state agencies’ review of the effects of the proposed ACP on water quality must consider the combined effects of this concentrated activity to reach a finding of “reasonable assurance.” *See State Farm*, 463 U.S. at 43.

iii. The State agencies’ failure to conduct the required antidegradation analysis is arbitrary and capricious.

The state agencies arbitrarily concluded that Atlantic’s compliance with its Annual Standards and Specifications (“Annual Standards”) will be adequate to ensure compliance with antidegradation requirements. The agencies’ conclusion that construction of the ACP would not result in any lowering of water quality is contradicted by substantial record evidence. In addition, the state agencies failed to follow antidegradation review procedures established in DEQ’s own guidance document. Finally, recent water quality violations on the Mountain Valley Pipeline—for which state agencies similarly relied on Annual Standards—demonstrate that Atlantic’s Annual Standards are insufficient to protect water quality. *See* Buppert Decl. ¶¶ 1-10, 17-18; Atts. A-D, H.

The antidegradation policy established by the Clean Water Act is a fundamental part of state water quality standards. 33 U.S.C. § 1313(d). States “must apply antidegradation requirements to...any activity requiring a CWA § 401 certification.” 63 Fed. Reg. 36,742, 36,780 (July 7, 1998). Virginia’s

antidegradation policy mandates that the policy “shall be applied whenever any activity is proposed that has the potential to affect existing surface water quality.”

9 Va. Admin. Code § 25-260-30.

The state agencies violated Virginia’s antidegradation policy and federal law by failing to conduct a rational antidegradation review. 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, Resp’ts Br. 53, is contradicted by record evidence. For example, modelling performed by Atlantic 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* [JA00622].

The state agencies have not demonstrated that the non-site-specific control measures outlined in Atlantic’s Annual Standards will reduce those sedimentation impacts sufficiently to prevent lowering of water quality. A Ph.D hydrologist who reviewed the plans concluded that, despite implementation of the measures in Atlantic’s Annual Standards, the project would increase sedimentation and degrade or destroy aquatic habitats. [JA00877]; *see also* [JA00886]. The state agencies have provided no evidence to rebut that finding. 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 state agencies' conclusion that Atlantic's Annual Standards will prevent any lowering of water quality was also reached without following the procedures outlined in DEQ's own guidance. 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. Virginia DEQ, Guidance Memo No. 00-2011, *Guidance on Preparing VPDES Permit Limits* 1 (August 24, 2000) ("DEQ VPDES Guidance"), ECF No. 48. Here, the state agencies did not perform that analysis.

In sum, the record does not support the conclusion that discharges from construction and operation of the ACP would result in no lowering of water quality. No amount of best management practices and sediment control measures can eliminate *all* sedimentation discharges from construction activities through steep, highly erodible terrain. State agencies were required to perform a full antidegradation analysis. The failure to do so renders the approval and 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 karst landscapes and underground water flow systems. [JA00903; JA00669; JA00669]. These areas

present unique environmental challenges, including sinkhole flooding and collapse, groundwater contamination, and potential surface water contamination. [JA00904–JA00905; JA00907–JA00909; JA00959].

Atlantic’s assurances that water in these regions will be protected are meaningless because underground water resources in these regions are unmapped, and the boundaries of the drainage areas are unknown. *See* [JA00912–JA00913; JA00915–JA00916]. Thus, the state agencies do not know what potential sources of contamination might impact a spring or surface water. [JA00912].

William Limpert, a former employee of the Maryland Department of the Environment and an erosion and sediment control expert, provided photographic evidence establishing numerous karst features and landscapes on his and adjacent property, [JA00946–JA00950; JA00952–JA00954], and how construction will lead to landslides, stormwater runoff, and massive sediment pollution in adjacent waterways, including a perennial brook trout stream. [JA00951; JA00955–JA00957]. Both Virginia’s Department of Conservation and Recreation and the U.S. Department of Interior identified similar concerns with construction in karst terrain, recommending that the pipeline path be moved in these areas to avoid harm to water quality. [JA00941; JA00688–JA00689]; *see also* [JA00958; JA00920–JA00923; JA00958].

Because the state agencies have not explained how harms to water quality from construction in karst terrain will be avoided, there was no reasonable basis to claim that water quality would be protected.

B. Petitioners will Suffer Irreparable Harm Absent a Stay.

Absent a stay of the Section 401 Certification, Atlantic will move forward with construction in Virginia and cause irreparable injury to the aesthetic and recreational interests of Petitioners' members in using and enjoying rivers, streams, and wetlands affected by the construction. A plaintiff's aesthetic and recreational interests are harmed by actions that impair his or her enjoyment of the environment. *See Sierra Club v. U.S. Army Corps of Eng'rs*, 645 F.3d 978, 995-96 (8th Cir. 2011). Here, Petitioners' members have substantial interests in waterways that will be harmed by pipeline construction. *See* Decls. of Pet'rs' Members, Pet'rs' Add. 82-333, ECF No. 48.

For example, Rick Webb and Gary Robinson are avid fishermen who enjoy the numerous, pristine brook trout streams in western Virginia that would be affected by the pipeline, including Townsend Draft, Little Valley Run, and the Jackson River. Webb Decl. ¶ 4, 15, ECF No. 48; Robinson Decl. ¶ 17, 20, 22, ECF No. 48. Construction will diminish their aesthetic and recreational enjoyment of these streams. Mr. Webb devoted his career to studying and preserving brook trout streams, including Townsend Draft, and every year Mr. Robinson makes a New

Year's resolution to catch at least one fish every month. Webb Decl. ¶ 5-9, ECF No. 48; Robinson Decl. ¶ 20, ECF No. 48. However, Mr. Webb and Mr. Robinson will be unable to or uninterested in continuing these traditions if brook trout populations are reduced or eliminated as a result of pipeline construction. Webb Decl. ¶ 15-22, ECF No. 48; Robinson Decl. ¶ 19-23, ECF No. 48.

John Cowden has operated Fort Lewis Lodge for thirty years on family property along the Cowpasture River. Cowden Decl. ¶ 3-5, ECF No. 48. Every year, guests visit the lodge for solitude and outdoor recreation, including fishing, canoeing, and kayaking on the Cowpasture River. Cowden Decl. ¶ 11-12, ECF No. 48. The steep slopes traversed by the pipeline descend to the Cowpasture River, and Mr. Cowden believes that resulting erosion and sedimentation will likely damage the suitability and attractiveness of the river for fishing, swimming, and other recreational activities. Cowden Decl. ¶ 18-21, ECF No. 48. Both Mr. Cowden and Lynn Cameron are deeply concerned about the threat increased sedimentation poses to the Cowpasture River, Cowden Decl. ¶ 21, ECF No. 48; Cameron Decl. ¶ 13, ECF No. 48, which DEQ has described as "literally exceptional" and "extremely rare." [ACP047491].

Robert Whitescarver is a cattle farmer who works to improve and protect water quality in the Chesapeake Bay watershed. Whitescarver Decl. ¶ 3, 9-14, ECF No. 48. Mr. Whitescarver fears the ACP will adversely affect the water he depends

on for drinking and for his cattle and will erase decades of work he and others have devoted to improving the health of streams in their communities. Whitescarver Decl. ¶¶ 9, 15, 21, ECF No. 48.

The record validates these concerns. Atlantic's own Soil Erosion and Sedimentation Modeling Report found that there would be an increase in erosion over pre-construction conditions of 200 to 800 percent. [JA00622]; Morgan Decl. Att. B, Ex. 4. Erosion at the levels predicted by Atlantic will be harmful to water quality—and those levels will likely be higher because the model assumes erosion control measures work perfectly. Morgan Decl. Att. B. But recent failures of erosions control measures along the Mountain Valley Pipeline route, which crosses terrain similar to that of the ACP and was similarly certified by DEQ, shows that such an assumption is flawed. Buppert Decl. ¶¶ 1-10, 17-18; Atts. A-D, H. Moreover, Dominion's construction on steep slopes and use of inadequate erosion and sediment control measures has already degraded state waters in South Carolina from construction of another pipeline, and in West Virginia from construction of the ACP. Robbins Decl. ¶¶ 19-22; Buppert Decl. ¶¶ 11-16; Atts. E-G.

Excessive sedimentation in headwater streams will result in long-term or permanent harm to the aquatic ecosystem. Expert biologist Dr. Raymond P. Morgan, Professor Emeritus at University of Maryland Center for Environmental Science, has over 45 years of experience in pollution ecology and aquatic ecology.

Morgan Decl. ¶¶ 2-6. Dr. Morgan explains that a significant increase in sedimentation means irreparable harm to aquatic habitat, long-term reduction in feeding success for species, and enduring harm to entire watersheds. Morgan Decl. ¶¶ 10-17. For example, increased sediment loading into Townsend Draft will result in a long-term, if not permanent, stressor that could lead to the extinction of the wild brook trout population. Morgan Decl. ¶¶ 12, 31. Increased sedimentation into Back Creek in Augusta County will further impair the stream and lessen the chances of recovery. Morgan Decl. ¶ 30. Irreparable harm from sedimentation will not be limited to streams crossed by the pipeline; impacts will likely be seen further downstream in larger waterbodies, eventually reaching the Chesapeake Bay. Morgan Decl. ¶¶ 15, 35-26. According to Dr. Morgan, “These impacts are the epitome of long-term, and anything but temporary.” Morgan Decl. ¶ 15.

There is no question that pipeline construction will result in irreparable harm to water quality and wildlife in Virginia more than sufficient to support a stay of the Certification. *See Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987) (environmental harms “by [their] nature, can seldom be adequately remedied by money damages and [are] often permanent or at least of long duration, *i.e.*, irreparable.”); *Humane Soc’y v. Gutierrez*, 523 F.3d 990, 991 (9th Cir. 2008) (lethal take of species “is, by definition, irreparable.”); *Idaho Conservation League v. Guzman*, No. CV 4:10-26-E-REB, 2011 WL 13134014, at *11, 16 (D. Idaho

Nov. 1, 2011) (finding irreparable harm where activities would exacerbate sediment delivery and degrade water quality and habitat); *Forest Serv. Emps. for Envtl. Ethics v. U.S. Forest Serv.*, No. 3:06-cv-00068 JWS, 2006 WL 3747125, at *5 (D. Alaska Dec. 15, 2006) (granting injunction, in part, requiring Forest Service to restrict use to prevent increased erosion and sedimentation); *Sierra Club v. U.S. Army Corps of Eng'rs*, 399 F. Supp. 2d 1335, 1348 (M.D. Fla. 2005) (the “dredging and filling of [waterbodies] that may occur while [a c]ourt decides [a] case cannot be undone.”).

C. Neither Atlantic nor the State Agencies Will Be Substantially Injured by Issuance of a Stay.

A stay pending review is unlikely to result in substantial injury to Atlantic, and certainly not to the state agencies. Atlantic will likely argue that delaying its construction schedule will result in economic harm. To the extent that monetary loss is relevant, it may only tip the balance of harms when it “threatens the very existence of the movant’s business.” *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). Here, any potential temporary harm to Atlantic is outweighed by the irreparable harm to the environment caused by pipeline construction. *See League of Wilderness Defs. v. Connaughton*, 752 F.3d 755, 766 (9th Cir. 2014) (finding that temporary delay of one year resulting in economic harm to ski resort developer was not so substantial as to outweigh irreparable environmental harm). *See also Bair v. Cal. Dep’t of Transp.*, No. C10-04360 WHA, 2011 WL 2650896,

at *8 (N.D. Cal. July 6, 2011) (irreparable harm to redwoods outweighed cost of delaying the project for a year as a result of time-of-year restrictions); *Idaho Sporting Cong., Inc. v. Alexander*, 222 F.3d 562, 569 (9th Cir. 2000) (irreparable harm of cutting old growth trees outweighed financial harm to Forest Service, companies, and communities).

D. Issuance of a Stay Pending Review of the Section 401 Certification Is in the Public Interest.

In cases involving preservation of the environment, the balance of harms generally favors the grant of injunctive relief. *See Amoco*, 480 U.S. at 545 (“If such injury is sufficiently likely...the balance of harms will usually favor the issuance of an injunction to protect the environment.”). Here, construction impacts to Virginia waters, and the resulting loss of ecological services, constitute injury to the public interest in protecting and maintaining natural resources pursuant to environmental laws. Moreover, the record demonstrates that there is no immediate need for the ACP to meet the region’s energy needs, such that the public’s interest in having adequate energy infrastructure would not be threatened by a stay. [ACP04741–ACP047452].

CONCLUSION

Accordingly, Petitioners request that the Court stay the effectiveness of the Section 401 Certification for the Atlantic Coast Pipeline pending completion of the Court’s review in this case.

Respectfully submitted,

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Dated: July 16, 2018

CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(g), I certify that this motion complies with the word limit of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this motion contains 5,194 words.

I further certify that this motion 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 this motion has been prepared using a proportionally spaced typeface, Times New Roman, 14-point font.

/s/ Charmayne G. Staloff

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DATED: July 16, 2018

CERTIFICATE OF SERVICE

I hereby certify that on July 16, 2018, I electronically filed the foregoing motion 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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