

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

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

**ANSWER OF MOUNTAIN VALLEY PIPELINE, LLC
TO MOTION TO SUPPLEMENT
ENVIRONMENTAL IMPACT STATEMENT**

Pursuant to Rule 213 of the Federal Energy Regulatory Commission’s (“FERC” or “Commission”) Rules of Practice and Procedure,¹ Mountain Valley Pipeline, LLC (“Mountain Valley”) hereby submits this Answer to the August 27, 2020, Motion to Supplement Environmental Impact Statement (“Motion”) by Appalachian Voices, Wild Virginia, Sierra Club, West Virginia Rivers Coalition, Indian Creek Watershed Association, Chesapeake Climate Action Network, Preserve Bent Mountain/BREDL, and Protect Our Water, Heritage, Rights (collectively, “Appalachian Voices”).² For the reasons that follow, Appalachian Voices has failed to demonstrate that a supplemental environmental impact statement is required.³

¹ 18 C.F.R. § 385.213 (2020).

² Motion to Supplement Environmental Impact Statement by Appalachian Voices, et al., Docket Nos. CP16-10-000, et al. (Aug. 27, 2020) (“Motion”). This Answer also applies with equal force to any other filings in Docket No. CP16-10 that allege that a supplemental environmental impact statement is required. *See, e.g.*, Request for Supplemental EIS of Louisa Gay, Docket No. CP16-10-000 (June 18, 2020); Comments of Sierra Club, Docket No. CP16-10-000 (Oct. 2, 2019); Comments of Indian Creek Watershed Association, Docket No. CP16-10-000 (July 22, 2019); Comments of Indian Creek Watershed Association, Docket No. CP16-10-000 (June, 17, 2019); Comments of Indian Creek Watershed Association, Docket No. CP16-10-000 (Dec., 21, 2018); Comments of Thomas Bouldin, Docket No. CP16-10-000 (Sept. 26, 2018).

³ This Answer should not be construed as acknowledgement or agreement that the Motion is procedurally proper under the Commission’s regulations. Rules 202 and 212, which are cited in the Motion, apply to a “proceeding.” Docket No. CP16-10-000 is no longer a “proceeding.” Although its regulations do not define “proceeding,” the Commission has explained “that Commission proceedings and the party status of intervenors terminates after a rehearing order has been issued and the time for judicial review has expired.” *East Tennessee Natural Gas Co.*, 105 FERC ¶ 61,139, at n.6 (2003). The Commission has issued Mountain Valley its certificate and acted on multiple rehearing requests, and the U.S. Court of Appeals for the District of Columbia Circuit affirmed the Commission’s actions. Based on the Commission’s own explanation, the “proceeding” is over. Mountain Valley is filing this Answer out of an abundance of caution and to assist the Commission in its decisionmaking. The Commission should deny the Motion on procedural grounds.

Appalachian Voices' Motion fails to establish there is any ongoing or new "major Federal action" under the National Environmental Policy Act of 1969 ("NEPA")⁴ associated with the completion of construction of the Mountain Valley Pipeline Project. Because the threshold for when an agency must supplement its environmental impact statement ("EIS") is similar to the threshold for when an agency must prepare an EIS in the first instance, Appalachian Voices' allegations are without merit. The Commission's major Federal action in this case was completed when the Commission issued a certificate of public convenience and necessity to Mountain Valley, appeal of which is also now complete. Ongoing construction activities by Mountain Valley and the Commission's oversight of them do not constitute a major Federal action requiring supplemental environmental review. Since there is no remaining major Federal action, the Commission is not required under NEPA to prepare a supplemental EIS.

And even if it is assumed for the sake of argument that a major Federal action did remain, Appalachian Voices has not demonstrated that there are substantial changes to the proposed action or significant new circumstances or information relevant to environmental concerns requiring the preparation of a supplemental EIS. To require supplemental NEPA review, such changes or new information would have to "present a *seriously* different picture of the environmental impact of the proposed project from what was previously envisioned."⁵ That is not the case here. Appalachian Voices has merely raised shop-worn arguments regarding environmental impacts already disclosed during the environmental review process and in the Project's final EIS ("FEIS"). The character of the "new evidence" raised by Appalachian Voices falls far short to require

⁴ 42 U.S.C. §§ 4321 *et seq.*

⁵ *Sierra Club v. Froehlke*, 816 F.2d. 205, 210 (5th Cir. 1987) (emphasis added); *see also Friends of Capital Crescent Trail v. Fed. Transit Admin.*, 877 F.3d 1051, 1055-56 (D.C. Cir. 2017) ("If 'new information' arises that presents 'a *seriously* different picture of the environmental landscape, then the agency must prepare a supplemental EIS") (citation omitted).

supplemental EIS. Appalachian Voices' Motion is nothing more than a collateral attack on Mountain Valley's certificate, which has already been fully litigated and upheld on appeal. Therefore, the Commission should reject Appalachian Voices' Motion.

I. **BACKGROUND**

Mountain Valley initiated the Commission's environmental pre-filing review process in October 2014 to assist the Commission in fulfilling its obligations under NEPA. During this process, Mountain Valley submitted detailed draft environmental resource reports disclosing the potential impact of the Project on all environmental resources, including water use and quality; fish, wildlife, and vegetation; cultural resources; socioeconomics; geological resources; soils; land use, recreation, and aesthetics; air quality and noise; alternatives; and reliability and safety. Commission staff, other federal and state agencies, landowners, and the public were given opportunities to comment on the draft resource reports. Mountain Valley responded to voluminous comments from Commission staff, other governmental entities, and the public, and revised the resource reports, as needed.

Following completion of the Commission's rigorous pre-filing environmental review process, Mountain Valley filed its application pursuant to section 7(c) of the Natural Gas Act⁶ and Part 157 of the Commission's regulations⁷ on October 23, 2015, seeking authorization to construct and operate a new interstate pipeline system designed to provide up to 2,000,000 dekatherms per day of firm natural gas transportation service from Wetzel County, West Virginia, to Transcontinental Pipe Line Company, LLC's Compressor Station 165 in Pittsylvania County,

⁶ 15 U.S.C. § 717f(c).

⁷ 18 C.F.R. Part 157.

Virginia (“Mountain Valley Pipeline Project” or “Project”).⁸ The Application included binding, long-term precedent agreements representing the full capacity of the Project. Mountain Valley’s Application also included a detailed environmental report consisting of revised resource reports that had been refined during the year-long pre-filing review process.⁹

After additional public comment, the Commission issued a draft EIS for the Project on September 16, 2016, and requested public comments on the draft EIS.¹⁰ On June 23, 2017, FERC issued its FEIS.¹¹ The FEIS concluded “that construction and operation of the [Project] would result in limited adverse environmental impacts, with the exception of impacts on forested land.”¹² Although it acknowledged the Project “would have significant impacts on forest,”¹³ the FEIS explained that Mountain Valley minimized forest fragmentation by collocating 30 percent of the pipeline route with existing linear corridors and by implementing Project-specific *Erosion and Sediment Control Plans* and right-of-way restoration measures.¹⁴ The FEIS also recommended that FERC’s order approving the Project contain 35 general and Project-specific environmental mitigations conditions to “further mitigate the environmental impact associated with construction and operation of the [Project].”¹⁵

On October 13, 2017, the Commission issued Mountain Valley a certificate of public convenience and necessity authorizing the construction and operation of the proposed facilities, conditioned upon, among other things, compliance with environmental conditions as appended to

⁸ Application for Certificate of Public Convenience and Necessity and Related Authorizations, Mountain Valley Pipeline, LLC, Docket Nos. CP16-10-000, et al. (Oct. 23, 2015) (“Application”).

⁹ See Application at 29-32, 41.

¹⁰ Notice of Availability of the Draft Environmental Impact Statement, Mountain Valley Pipeline, LLC, Docket No. CP16-10-000 (Sept. 16, 2016).

¹¹ Final Environmental Impact Statement, Mountain Valley Pipeline, LLC, Docket No. CP16-10-000 (June 23, 2017).

¹² FEIS at 5-1.

¹³ *Id.* at 5-6.

¹⁴ *Id.* at 4-183.

¹⁵ *Id.* at 5-17–5-26.

the Certificate Order.¹⁶ The Commission concluded that “the public convenience and necessity requires approval of Mountain Valley’s proposal.”¹⁷ The Commission found that sufficient evidence of market demand for the Project—including evidence that the Project’s full capacity is subscribed—demonstrated need, and that “the public at large will benefit from increased reliability of natural gas supplies.”¹⁸ To mitigate the impacts of the Project, the Commission attached 35 environmental conditions applicable to Mountain Valley to the Certificate Order, requiring Mountain Valley’s compliance with many of the conditions prior to initiating and during construction.

Multiple parties, including Appalachian Voices, opposed the Project and sought rehearing and stay of the Certificate Order, which the Commission denied.¹⁹ In its Rehearing Order, the Commission affirmed the Certificate Order’s conclusions that Mountain Valley demonstrated public need for the Project and that impacts to landowners would be sufficiently mitigated.²⁰ Appalachian Voices appealed the Commission’s orders to the U.S. Court of Appeals for the District of Columbia Circuit, “rais[ing] sixteen different challenges to FERC’s environmental assessment of the Project and subsequent issuance of the certificate.”²¹ The D.C. Circuit affirmed the Commission’s orders and held that none of the challenges had merit.²² With respect to the Commission’s NEPA analysis for the Project, the D.C. Circuit “conclude[d] that the [Commission] adequately considered and disclosed erosion and sedimentation impacts on aquatic resources, impacts on groundwater in karst terrain, and impacts on Peters Mountain residents’ cultural

¹⁶ Mountain Valley Pipeline, LLC, 161 FERC ¶ 61,043 (2017) (“Certificate Order”).

¹⁷ Certificate Order at P 64.

¹⁸ *Id.* at P 62; *see id.* at P 41.

¹⁹ *Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197 (2018) (“Rehearing Order”).

²⁰ Rehearing Order at PP 51, 98.

²¹ *Appalachian Voices v. FERC*, 2019 WL 847199, at *1 (D.C. Cir. 2019).

²² *Id.*

attachment to the land, and appropriately evaluated reasonable alternatives to the Project.”²³ At the end of January 2018, Commission staff authorized Mountain Valley to commence construction of the Project, and, in February 2018, Mountain Valley commenced construction.²⁴

As acknowledged by the Commission, the Mountain Valley Pipeline Project has endured a number of challenges to its non-FERC environmental permits.²⁵ While Mountain Valley has completed significant work on the Project, the Project is currently under a stop work order from Commission Staff. These restrictions currently remain in place as Mountain Valley obtains new or revised permits. Notably, the U.S. Fish and Wildlife Service (“FWS”) recently issued a new biological opinion for the Project.²⁶

II. **ANSWER**

A. The Commission Is Not Required to Supplement the EIS Because There Is No Remaining Major Federal Action.

Appalachian Voices insists that there is new information and Project changes that require the Commission to supplement the Project’s FEIS. However, Appalachian Voices’ arguments miss the mark because they have not shown that the threshold requirement for supplementation—that there must be major Federal action remaining to occur—has been satisfied. Because the Commission has no major Federal action left to take in this proceeding, it has no obligation to supplement the FEIS.

The Council on Environmental Quality’s (“CEQ’s”) regulations for implementing NEPA require agencies to prepare a supplement to an EIS if “(i) The agency makes substantial changes

²³ *Id.* at *2.

²⁴ See Letter order granting Mountain Valley Pipeline, LLC’s request to commence construction at certain yards and access roads, Docket No. CP16-10-000 (Jan. 22, 2018).

²⁵ *Mountain Valley Pipeline, LLC*, 171 FERC ¶ 61,232, at PP 4-8 (2020).

²⁶ FWS’s Biological and Conference Opinion for the Mountain Valley Pipeline Project (Sept. 4, 2020), Accession No. 20200904-3027.

in the proposed action that are relevant to environmental concerns; or (ii) There are significant new circumstances or information relevant to the environmental concerns and bearing on the proposed action or its impacts.”²⁷ The U.S. Supreme Court has explained that this regulation applies only if “there remains ‘major Federal actio[n]’ to occur.”²⁸ This threshold requirement reflects the fact that the decision to prepare a supplemental EIS is similar to the decision whether to prepare an EIS in the first instance,²⁹ and EISs are prepared only for major Federal actions.³⁰

Courts, including the U.S. Supreme Court, have consistently recognized that the major Federal action is complete when an agency approves the proposed action at issue, whether it be a land use plan, a permit, or other project authorization, and thus have rejected supplementation arguments based on new information or circumstances arising after that approval.³¹ The fact that an agency has some continuing oversight authority is insufficient to constitute ongoing major Federal action.³²

²⁷ 40 C.F.R. § 1502.9(c) (2019).

²⁸ *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 374 (1989); *see also Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 73 (2004) (“supplementation is necessary only if ‘there remains “major Federal actio[n]’ to occur””) (quoting *Marsh*). The CEQ recently revised its regulations, with an effective date of September 14, 2020. Council on Environmental Quality, Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43304 (July 16, 2020). Those revised regulations retain the previous language regarding project changes and new information but also expressly acknowledge this threshold requirement that supplementation is required only “if a major Federal action remains to occur.” 40 C.F.R. § 1502.9(d)(1) (2020).

²⁹ *Marsh*, 490 U.S. at 374.

³⁰ 42 U.S.C. § 4332(2)(C).

³¹ *See Norton*, 542 U.S. at 73 (major Federal action was complete upon approval of a land use plan); *Greater Yellowstone Coal. v. Tidwell*, 572 F.3d 1115, 1122-23 (10th Cir. 2009) (major Federal action was complete upon issuance of a special use permit); *Cold Mountain v. Garber*, 375 F.3d 884, 894 (9th Cir. 2004) (same); *Audubon Naturalist Soc’y of the Central Atlantic States v. U.S. Dep’t of Transp.*, 524 F. Supp. 2d 642, 710-11 (D. Md. 2007) (major Federal action was complete upon approval of the highway construction project); *Moapa Band of Paiutes v. U.S. Bureau of Land Mgmt.*, 2011 WL 4738210, *12 (D. Nev. 2011) (major Federal action was complete upon issuance of a right-of-way grant).

³² *See, e.g., Audubon Naturalist Soc’y*, 524 F. Supp. 2d at 710-11 (the fact that the agency still had to approve two of the design-build contracts for the highway project did not constitute remaining major Federal action when the agency had already approved the project); *Moapa Band of Paiutes*, 2011 WL 4738210 at *12 (the agency’s authority to suspend the right-of-way grant or modify the conditions of the grant did not constitute remaining major Federal action).

Similarly, here, although the Commission's decision to issue a certificate of public convenience and necessity under section 7 of the Natural Gas Act was a major Federal action, that action was completed when the Commission issued Mountain Valley's certificate.³³ Because there is no remaining major Federal action for the Commission to take with respect to the Project, the Commission is not required to prepare a supplemental EIS.³⁴

Appalachian Voices alleges without support that "[a]uthorizing construction to resume, extending the duration of such construction, and retaining stop-work authority over the project all constitute 'government action [that] would be environmentally significant.'"³⁵ As an initial matter, this allegation misstates the standard for when supplementation is required. As discussed above, there are two steps that must be satisfied for supplementation to be required. First, there must be a major Federal action remaining to occur (not just government action). Second, there must be a seriously different picture of the environmental impact of that action than what was previously disclosed (not just environmentally significant impacts).³⁶

Moreover, the actions Appalachian Voices has cited do not satisfy the actual supplementation standard because authorizing a resumption in construction or a lifting of a stop work order is not a major Federal action. The Commission explicitly authorized its staff to take actions like these in the Certificate Order, delegating authority to the Director of the Office of Energy Project "to address any requests for approvals or authorizations necessary to carry out the conditions of the order, and take whatever steps are necessary to ensure the protection of all

³³ See *Greater Yellowstone Coalition*, 572 F.3d at 1123 ("Here, the Forest Service's approval and issuance of the Forest Park permit, like BLM's approval of the land use plan in *Norton*, was the major federal action contemplated by NEPA. Under *Norton*, that major federal action was completed when the permit was approved and issued.>").

³⁴ See *Marsh*, 490 U.S. at 374 ("Application of the 'rule of reason' thus turns on the value of the new information to the *still pending decisionmaking process*."). (emphasis added).

³⁵ Motion at 5.

³⁶ The fact that changes and new information in this instance do not satisfy this "seriously different picture" standard is discussed in Section II.B.

environmental resources during construction and operation of the project” including stop work authority and modifications to the conditions in the order.³⁷ Staff also has delegated authority to determine when construction may start and to approve modifications to the Project consistent with the conditions of the Certificate Order, including route changes and changes to mitigation measures.³⁸ Because this authority was contemplated during the environmental review process and approved in the Certificate Order, actions taken pursuant to this delegated authority would not be considered major Federal actions that require a supplemental EIS.³⁹ Rather, these delegated actions, or any action by the Commission itself in implementing its own Certificate Order, are part and parcel of the Commission’s original review and approval, and that major Federal action was complete upon the Commission’s issuance of the Certificate Order. Thus, in the absence of any remaining major Federal action, Appalachian Voices’ Motion does not satisfy the threshold requirement for supplementation.

B. Appalachian Voices Fail to Allege Significant New Circumstances That Would Require Supplementing the EIS.

Even if the Commission’s remaining oversight of the Mountain Valley Project were to constitute a major Federal action, Appalachian Voices has failed to allege any information that would obligate the Commission to prepare a supplemental EIS.

The U.S. Supreme Court has “ma[de] clear that an agency need not supplement an EIS every time new information comes to light after the EIS is finalized.”⁴⁰ The question is whether

³⁷ Certificate Order at Environmental Condition No. 2; see *Mountain Valley Pipeline, LLC*, 172 FERC ¶ 61,193, at P 18 (2020) (“August 31 Order”) (Commission affirmed Staff’s decisions to allow Mountain Valley to continue “certain construction activities based on the status of various federal authorizations, as well as staff’s determinations of what is most protective of the environment.”).

³⁸ See Certificate Order at Environmental Condition Nos. 1, 4, and 5.

³⁹ See *Envtl. Prot. Info. Ctr. v. U.S. Fish & Wildlife Serv.*, 2005 WL 3021939 at *6 (N.D. Cal. 2005) (holding that the major Federal action was complete upon issuance of an incidental take permit and that any adaptive management actions or oversight of the implementation of the permit, including potential approval of road construction, did not constitute major Federal action).

⁴⁰ *Marsh*, 490 U.S. at 373.

the Project changes or new information will affect to the quality of the human environment “in a significant manner or to a significant extent not already considered.”⁴¹ As noted above, in determining whether a change or new information is “significant,” courts have instructed agencies that it “must present a *seriously* different picture of the environmental impact of the proposed project from what was previously envisioned.”⁴² The Supreme Court has also held that the “rule of reason” applies to an agency’s decision whether to prepare a supplemental EIS.⁴³ Nothing in the Motion presents a seriously different picture of the environmental impacts previously disclosed in the Project’s FEIS.

In the FEIS, the Commission conducted a thorough and comprehensive environmental review of the Project. The Commission has been evaluating the environmental impacts of the Project since 2014 when Mountain Valley initiated the pre-filing process. Since then, Mountain Valley has responded to numerous data requests from Commission staff—and comments from other governmental entities, and the public—and implemented numerous revisions, as needed. The Commission’s process included the preparation of substantial and multi-volume draft and final EISs, including multiple public comment periods and public meetings. Based on the robust record developed during the course of the proceeding, the Commission authorized the Project, attaching 35 environmental mitigation conditions and finding that the Project would be an “environmentally acceptable action[.]”⁴⁴ The Commission’s Certificate Order was appealed to the D.C. Circuit, which concluded the Commission “adequately considered and disclosed erosion and sedimentation impacts on aquatic resources, impacts on groundwater in karst terrain, and impacts on Peters

⁴¹ *Id.* at 374; see also *Airport Impact Relief v. Wykle*, 192 F.3d 197, 204 (1st Cir. 1999) (applying the *Marsh* language to both changed plans and changed circumstances).

⁴² *Tennessee Gas Pipeline Company, L.L.C.*, 162 FERC ¶ 61,013 (2018) (citing *Wisconsin v. Weinberger*, 745 F.2d 412, 418 (7th Cir. 1984)); see also *Friends of Capital Crescent Trail*, 877 F.3d at 1055-56; *Sierra Club v. Froehlke*, 816 F.2d at 210.

⁴³ *Marsh*, 490 U.S. at 373.

⁴⁴ Certificate Order, at P 308.

Mountain residents' cultural attachment to the land, and appropriately evaluated reasonable alternatives to the Project."⁴⁵ None of Appalachian Voices' allegations regarding Project changes or new information demonstrate that the impacts of the Project are seriously different than the Commission previously disclosed in this FEIS that the appellate court upheld.⁴⁶

For example, Appalachian Voices allege a supplemental EIS is required to assess new information about sedimentation impacts on the Roanoke logperch and the candy darter.⁴⁷ But the new information is consistent with the analysis previously provided in the FEIS. The FEIS recognized the potential for the Project to cause increased runoff into surface waters, resulting in increased turbidity levels and increased sedimentation rates in the receiving waterbody.⁴⁸ It also acknowledged that

Increased sedimentation and turbidity resulting from in-stream and adjacent construction activities could displace and impact fisheries and aquatic resources. Sedimentation could smother fish eggs and other benthic biota and alter stream bottom characteristics, such as converting sand, gravel, or rock substrate to silt or mud. These habitat alterations could reduce juvenile fish survival, spawning habitat, and benthic community diversity and health. Increased turbidity could also temporarily reduce dissolved oxygen levels in the water column and reduce respiratory functions in-stream biota. Turbid conditions could also reduce the ability for biota to find food sources or avoid prey. The extent of impacts from sedimentation and turbidity would depend on sediment loads, stream flows, stream bank and stream bed composition, sediment particle size, and the duration of the disturbances.⁴⁹

⁴⁵ *Appalachian Voices v. FERC*, 2019 WL 847199, at *2 (D.C. Cir. 2019).

⁴⁶ Appalachian Voices' assertion that a supplement is required to take into account the impacts of the Southgate Project, Motion at 9, merits little attention. The Commission prepared a robust EIS for the Southgate Project, fully analyzing the impacts of that proposed action. FERC Docket No. CP19-14-000, Accession No. 20200214-3010. Appalachian Voices' have not identified how any of the information in the Southgate EIS paints a seriously different picture of the impacts of the Mountain Valley Pipeline Project. Moreover, it would violate the "rule of reason" to require the Commission to repeat that already-completed NEPA analysis.

⁴⁷ Motion at 31-38.

⁴⁸ FEIS at 4-137.

⁴⁹ *Id.* at 4-216–4-217; *see also id.* at 4-216 ("sedimentation and turbidity, alteration or removal of in-stream and stream bank cover, stream bank erosion, introduction of water pollutants, water depletions, and entrainment of small fishes during water withdrawals could increase the rates of stress, injury, and mortality experienced by fisheries and other aquatic life. In general, fish would migrate away from these activities. This displacement could lead to increased competition for habitat and food and could affect fish survival and health.").

The FEIS concluded that the Project was likely to adversely affect, and may significantly impact, the Roanoke logperch and that it would result in impacts to individual candy darters.⁵⁰ Nothing Appalachian Voices offers paints a seriously different picture of the Project's impacts on these species.

Although the candy darter was subsequently listed as endangered under the Endangered Species Act after the publication of the FEIS, this is legally insufficient to constitute "new information" requiring a supplemental EIS. In *Swanson v. U.S. Forest Service*, the Ninth Circuit noted that the listing of a species changes its "legal status" but not its "biological status."⁵¹ There, the court rejected claims that a supplemental EIS was required where a species of salmon was subsequently listed as threatened. As the court explained, "Forest Service determined that it was unlikely that the proposed actions would have a negative impact on the salmon; as this finding was not premised on the salmon's non-threatened status, the determination that the salmon were in fact threatened did not constitute new information[.]"⁵² Here, too, the Commission's conclusions regarding impacts to the candy darter were not premised on its non-threatened status; a change in that status does not constitute new information about the Project's impacts on the species.

Furthermore, the fact that the FWS has issued a new biological opinion for the Project does not require a supplemental EIS. First, the trigger for reinitiation of consultation is different than the supplementation trigger because (1) reinitiation is required when *any* discretionary authority or control is retained, while supplementation is limited to ongoing *major Federal action*, and (2)

⁵⁰ *Id.* at 4-233, 4-244, 4-253.

⁵¹ 87 F.3d 339, 344 (9th Cir. 1996).

⁵² *Id.*

reinitiation has no significance requirement; *any* changes in the analysis of impacts to listed species require reinitiation.⁵³

Second, the FWS's updated analysis of impacts to the Roanoke logperch and candy darter does not paint a seriously different picture of the impacts to these species compared to what the Commission disclosed in the FEIS; both of these analyses recognize the potential range of impacts that the Project may have on fish and conclude that the Project is likely to adversely affect individuals of these fish species in particular.⁵⁴ The Commission's analyses in the FEIS and Certificate Order were upheld by the D.C. Circuit in their entirety. To the extent Appalachian Voices is asserting that the FEIS's analysis was insufficient, such an argument is an impermissible collateral attack on the FEIS that is foreclosed.⁵⁵

Additionally, Appalachian Voices cites the fact that the Commission has granted variance requests to change the stream crossing methods for portions of the Project and describes the impacts anticipated from the new crossing methods. However, in the process of approving these variances, the Commission already analyzed whether they would result in a seriously different impact on the environment than what was disclosed in the FEIS and concluded that they would not.⁵⁶ The issue is not whether the new crossing method would have environmental impacts,

⁵³ 50 C.F.R. § 402.16(a); *cf. Env'tl. Prot. Info. Ctr.*, 2005 WL 3021939 at *7 (noting that ongoing agency involvement in a permit was sufficient to trigger the need to reinitiate consultation but did not rise to the level of major Federal action).

⁵⁴ FEIS at 4-232–4-233, 4-253; FWS's Biological and Conference Opinion for the Mountain Valley Pipeline Project (Sept. 4, 2020).

⁵⁵ *Cf. Williams Natural Gas v. City of Oklahoma City*, 890 F.2d 255, 262 (10th Cir. 1989) (“a challenger may not collaterally attack the validity of a prior FERC order in a subsequent proceeding.”).

⁵⁶ In the Certificate Order, the Commission approved environmental conditions that include processes for Mountain Valley to request, and Commission Staff to review and approve, modifications to procedures, mitigation measures, and workspaces, among other insubstantial changes. For example, Environmental Condition No. 1 of the Certificate Order requires an explanation of how a modification to a construction procedure (like changing a crossing method from open cut to bore) “provides an equal or greater level of environmental protection than the original measure” and approval by Commission Staff before that modification can be used.

because environmental impacts “are inevitable consequences of constructing pipeline facilities.”⁵⁷ Rather, the issue is whether those impacts would be seriously different than the originally proposed method. Appalachian Voices has failed to make that showing.

Appalachian Voices also argues that the Commission “must also analyze the consequences of blasting that has occurred along the right-of-way, as well as additional blasting that would be required if pipeline construction were to resume.”⁵⁸ However, the FEIS already disclosed that blasting may occur along the right-of-way and discussed the potential impacts of such blasting.⁵⁹ The fact that some blasting has occurred neither is remarkable nor paints a seriously different picture of the impacts of the Project that have already been disclosed in the FEIS.⁶⁰

Neither does that fact that other federal agencies still have additional or subsequent actions to take mean that that Commission is required to prepare a supplemental EIS. In particular, the U.S. Forest Service and Bureau of Land Management are preparing a supplemental EIS as a result of a Fourth Circuit decision vacating those agencies’ approvals for the Project.⁶¹ Thus, they both have major Federal action remaining to occur, i.e., whether to reissue those approvals. As noted above, the Commission has no remaining major Federal action to occur.

Moreover, these agencies’ supplemental analysis is limited to approximately 3.5 miles of the Project route, as was the sedimentation analysis in the FEIS that the Fourth Circuit found that Forest Service erred in adopting.⁶² Concerns that the Forest Service expressed about the

⁵⁷ *Mountain Valley Pipeline, LLC*, 172 FERC ¶ 61,193, at P 21 (2020) (“Environmental impacts, which are inevitable consequences of constructing pipeline facilities, are seriously considered by the Commission.”).

⁵⁸ Motion at 17.

⁵⁹ FEIS at 4-44, 4-60, 4-63-4-64, 4-114, 4-203, 4-220, 4-536.

⁶⁰ Appalachian Voices’ arguments about slips and landslides, Motion at 16-17, suffer from a similar issue. The FEIS disclosed that approximately 67 percent of the Project route would cross areas susceptible to landslides, included a detailed analysis of potential effects of landslides, and concluded that there is a high potential for landslides and soil slips. FEIS at ES-64, 4-27-4-32, 4-45, 4-52-4-56. Because the FEIS anticipated the potential for landslides, the fact that some did occur does not trigger the need to supplement the FEIS.

⁶¹ See Notice of intent to prepare a supplemental environmental impact statement, 85 Fed. Reg. 45863 (July 30, 2020).

⁶² *Id.*

assumptions regarding the effectiveness of mitigation measures that informed the FEIS's analysis of impacts for approximately one percent of the pipeline do not constitute new information that would result in a seriously different picture of the Project's impacts.⁶³

Appalachian Voices' related arguments regarding notices of violation issued by state agencies and the Commission's compliance monitoring reports similarly fall short.⁶⁴ The FEIS recognized the potential for increased surface runoff transport sediment into surface waters, resulting increased turbidity levels, which could last for weeks, and a variety of impacts to fish species.⁶⁵ Neither the notices of violation nor the weekly status reports show that Project impacts are seriously different than this discussion in the FEIS. The vast majority of alleged erosion and sediment control violations are "technical violations" that are not associated with any environmental impact. These primarily reflect instances in which routine maintenance or other actions were not completed by a prescribed deadline. For example, of the violations identified by the Virginia Department of Environmental Quality, only 13 percent involved sediment exiting the Project right-of-way, and fewer than half of those instances involved sediment reaching a stream. Moreover, Mountain Valley files weekly status reports with the Commission, describing the construction status of each spread, identifying any instances of non-compliance observed by environmental inspectors, and addressing those instances of non-compliance.⁶⁶ As the

⁶³ The FEIS's analysis of sedimentation impacts for the other 300 miles of the Project was not premised on the Hydrological Analysis of Sedimentation or its mitigation effectiveness assumptions that were at issue before the Fourth Circuit. *See, e.g.*, FEIS at 4-146 (discussing the Hydrological Sedimentation Analysis in the context of the Project's impacts to the 3.5-mile stretch of the route in the Jefferson National Forest).

⁶⁴ Appalachian Voices' assertions regarding pipe integrity, Motion at 38-40, warrant little attention. As the FEIS indicated, Mountain Valley will comply with the Pipeline Hazardous Materials Safety Administration's ("PHMSA's") pipeline integrity regulations. FEIS at 4-564. Nothing in Appalachian Voices' Motion alters that statement. In its warning letter, PHMSA indicated that it decided not to conduct additional enforcement action or penalty assessment proceedings and advised Mountain Valley to correct the items identified. Mountain Valley did just that. Any pipe installed has been and will be in compliance with PHMSA's regulations.

⁶⁵ *Id.* at 4-81, 4-136-4-137, 4-148, 4-216-4-217, 4-604, 4-609.

⁶⁶ Certificate Order at Environmental Condition 8; August 31 Order at P 22.

Commission found recently, “Mountain Valley addressed the compliance measures in an appropriate manner, demonstrating that no additional plans or schedules are necessary.”⁶⁷ The Commission also noted that Mountain Valley “has appropriately documented such incidents and has noted that it will resolve incidents following landowner approval.”⁶⁸ Nothing Appalachian Voices alleges regarding these incidents or any other reason requires the Commission to supplement its FEIS for the Project.⁶⁹

In sum, even if there were a major Federal action remaining to occur, which there is not, Appalachian Voices has not demonstrated significant new circumstances or information that would “present a *seriously* different picture of the environmental impact of the proposed project from what was previously envisioned.”⁷⁰ Therefore, a supplemental EIS is not required.

⁶⁷ August 31 Order at P 23.

⁶⁸ *Id.*

⁶⁹ Appalachian Voices’ arguments about cost and schedule are completely beside the point; they fail to show how additional costs and delay result in any changes to the Project’s proposed *environmental* impacts. The Commission satisfied its obligation to consider alternatives upon issuance of the Certificate Order; regardless, the Project has already experienced increased costs and delay, so they would apply to any other alternative considered, as well. And statements that Mountain Valley may be “looking at” a possible expansion of the Project’s capacity do not constitute new information about the impacts of the Project. Until there is a proposal before the Commission for such expansion, which there is not, there is nothing for the Commission to consider. Further, as the Commission has already explained, the FEIS does not evaluate project need, rather the Commission does that in the Certificate Order. Certificate Order at P 135. Thus, allegations regarding project need are not relevant to the environmental concerns analyzed in the FEIS and cannot form the basis for a requirement to supplement. Finally, Appalachian Voices’ assertions regarding public health risks associated with COVID-19 are inapposite. The CEQ has explained that social effects are not intended by themselves to require preparation of an EIS; an agency should discuss such social impacts in an EIS only when they are interrelated with effects to the natural or physical environment. 40 C.F.R. § 1508.14 (2019); *see also* 40 C.F.R. § 1502.16(b) (2020) (same); *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 744 (1983) (NEPA does not require federal agencies to evaluate health impacts that are not “proximately related to a change in the physical environment.”). Because COVID-19 risks are unrelated to any effects to the natural or physical environment, they cannot trigger the need for a supplemental EIS.

⁷⁰ *Sierra Club v. Froehlke*, 816 F.2d. 205, 210 (5th Cir. 1987).

III.
CONCLUSION

Appalachian Voices' arguments that a supplemental EIS is required are without merit. There is neither (1) an ongoing or remaining major Federal action, nor (2) significant changed or new information about the about Project requiring supplemental NEPA analysis. For these reasons, Mountain Valley respectfully requests that the Commission reject Appalachian Voices' Motion.

Respectfully submitted,

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