No. 21-2425

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SIERRA CLUB, et al.
Petitioners

v.

STATE WATER CONTROL BOARD, et al.
Respondents

and

MOUNTAIN VALLEY PIPELINE, LLC
Intervenor

On Petition for Review from the
Virginia Department of Environmental Quality's
VWP Individual Permit Number 21-0416 (December 20, 2021)

PETITIONERS' MOTION FOR STAY PENDING REVIEW

BENJAMIN A. LUCKETT
DEREK O. TEANEY
APPALACHIAN MOUNTAIN ADVOCATES. INC.
P.O. Box 507
Lewisburg, WV 24901
Telephone: (304) 873-6080
Email: bluckett@appalmad.org
Counsel for Sierra Club; Appalachian Voices; Chesapeake Climate Action Network; Wild Virginia; Preserve Craig, Inc.; Blue Ridge Environmental Defense League; and Preserve Franklin

GREGORY BUPPERT
SPENCER GALL
CLAIRE HORAN
SOUTHERN ENVIRONMENTAL LAW CENTER
201 West Main Street, Suite 14
Charlottesville, VA 22902
Telephone: (434) 977-4090
Email: gbuppert@selcva.org
Counsel for Preserve Bent Mountain and Preserve Giles County

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

INTRODUCTION

On December 20, 2021, Virginia issued its second water quality certification under Section 401 of the Clean Water Act ("CWA"), 33 U.S.C. §1341 (the "Certification"), to Intervenor Mountain Valley Pipeline, LLC ("MVP") for its proposed Mountain Valley Pipeline project (the "Pipeline").[1] This time the Certification is for a CWA §404 permit that MVP has sought from the United States Army Corps of Engineers (the "Corps") to allow it to trench through streams and wetlands. This Certification, therefore, examines very different activities from the upland construction activities at issue the last time this Court considered a Virginia §401 certification for the Pipeline. *See generally Sierra Club v. State Water Control Bd.*, 898 F.3d 383 (4th Cir. 2018).

The types of activities at issue are not the only difference between this Certification and the 2017 certification. Many flaws in the Certification challenged here result from the certifying agencies' legal errors and omissions, not their technical, scientific predictions. That is, this time Virginia has misconstrued governing law and entirely failed to consider important aspects of the problem.

A stay is necessary to prevent irreparable harm from activities authorized by the Certification. Although MVP has committed to deferring such activities until

1 Ex. 1.

January 31, 2022,[2] it has also declared its intention to "ramp up" construction in February 2022 to complete the Pipeline by summer 2022.[3] MVP's haste necessitates this stay motion. Respondents and MVP oppose the motion.[4]

BACKGROUND

MVP proposes to build its 42-inch-diameter Pipeline through West Virginia and Virginia. *Sierra Club v. U.S.A.C.O.E.*, 981 F.3d 251, 255 (4th Cir. 2020). "Because construction of the Pipeline will involve the discharge of fill material into federal waters, the CWA requires MVP to obtain approval from [the Corps] before beginning construction." *Id.* at 256.

After this Court published its opinion explaining its stay of two of MVP's waterbody-crossing authorizations issued by the Corps (*see generally id.*), MVP implemented a new strategy.[5] MVP purported to evaluate each of its crossings to determine whether it wanted to trench *through* the waterbody using an open-cut, dry-ditch crossing (which would require a CWA §404 permit), or bore *under* the waterbody using a trenchless crossing (which would not require a CWA §404

2 Doc. #11, ¶4.

3 Ex. 2 at 7.

4 On December 22, 2021, Petitioners asked Respondents to stay the Certification pending review. Ex. 3. They refused. Ex. 4.

5 Ex. 5 at 1-2.

permit).[6] MVP decided to seek an individual CWA §404 permit from the Corps for the waterbodies it wants to trench *through*, and asked the Corps to revoke its nationwide permit authorizations.[7] Contemporaneously, MVP sought approval from the Federal Energy Regulatory Commission ("FERC") for the waterbodies it wants to bore *under*.[8]

Under CWA §401, a Corps individual permit requires certification from the affected states that discharges from the permitted activities will comply with water quality standards. 33 U.S.C. §1341(a)(1). To comply with that requirement, MVP submitted an application for a Virginia Water Protection Permit to the Department of Environmental Quality ("DEQ") and the State Water Control Board (the "Board") (collectively, "the Agencies") on March 1, 2021.[9] Under Virginia law, such a permit "shall constitute the certification required under [CWA §401.]" Va. Code §62.1-44.15:20(D). The DEQ reviews applications like MVP's and makes a recommendation to the Board. *Id.* §62.1-44.15:02(P).

Like the North Carolina program at issue in *Mountain Valley Pipeline, LLC v. N.C.D.E.Q.*, 990 F.3d 818 (4th Cir. 2021), Virginia's CWA §401 program requires

6 *Id.* at 2.

7 Ex. 6.

8 Ex. 5 at 2.

9 Ex. 1 at 1.

the Board to consider alternatives to the proposed activities to avoid and minimize impacts to the Commonwealth's waters. Virginia's statutes implementing CWA §401 require that "[a]ll pipelines shall be constructed in a manner that minimizes temporary and permanent impacts to state waters and protects water quality to the maximum extent practicable." Va. Code §62.1-44.15:21(J)(2). To implement that statute, the Board has promulgated regulations requiring it to consider alternative crossing locations and alternative construction methods to determine whether they would minimize impacts to waters and are practicable. 9 Va. Admin. Code §25-210-80(B)(1)(g).

Applications for Virginia CWA §401 certifications must include an alternatives analysis "to first avoid and then minimize impacts to surface waters to the maximum extent practicable in accordance with" the federal §404(b)(1) Guidelines. *Id.* Under Virginia law, "[a]voidance and minimization includes … the specific on-site and off-site measures taken to reduce the size, scope, configuration, or density of the proposed project, including review of alternative sites where required for the project, which would avoid or result in less adverse impact to surface waters." *Id.*

The applicant bears the burden to "demonstrate to the satisfaction of the board that avoidance and minimization opportunities have been identified and measures have been applied to the proposed activity such that the proposed activity in terms

of impacts to state waters and fish and wildlife resources is the least environmentally damaging practicable alternative." *Id.* The Board must deny applications where "[t]he project that the applicant proposed fails to adequately avoid and minimize impacts to state waters to the maximum extent practicable." *Id.* §25-210-230(A)(3).

The term "least environmentally damaging practicable alternative"—or "LEDPA"—is a CWA term-of-art. When determining the LEDPA, a reviewing agency has "an obligation to independently verify the information supplied to it" by the applicant. *Friends of the Earth v. Hintz*, 800 F.2d 822, 835 (9th Cir. 1986).

In Virginia, the LEDPA analysis requires the applicant to analyze alternative crossing locations and alternative construction methods. 9 Va. Admin. Code §25-210-80(B)(1)(g). MVP's application to Virginia incorporated the alternatives analysis in its CWA §404 application to the Corps.[10] On alternative crossing locations, that application failed to provide a crossing-by-crossing examination of minor route alignment changes that would avoid water crossings entirely or minimize impacts on aquatic resources by relocating crossing locations upstream or downstream. Instead, MVP only summarized the handful of high-level routes considered by FERC in 2017, and contended that the route "certified by FERC[] should be considered the LEDPA."[11] On alternative construction methods, MVP

10 Ex. 7, att. B-1 at 1.

11 Ex. 8 at 13.

purported to include a crossing-by-crossing analysis of whether particular crossings should be completed using an open-cut, dry-ditch crossing or by boring underneath the waterbody, but MVP's analysis was opaque, conclusory, and unsupported.[12] Moreover, as explained below, MVP lacks credibility about whether particular crossing methods are practicable.

Virginia law provides that, for projects like the Pipeline, "[e]ach wetland and stream crossing shall be considered as a single and complete project." Va. Code §62.1-44.15:21(J)(1). Consequently, the requirements imposed on the applicant and the Agencies apply on a *crossing-by-crossing basis*, not at a *project-level basis*.[13] Although DEQ purported to complete individual crossing reviews for all waterbody crossings, those reviews were defective because neither DEQ nor MVP adequately analyzed alternative crossing locations and alternative construction methods. But

12 Ex. 9.

13 At minimum, Virginia law requires individual review for crossings of waterbodies with upstream drainages of five square miles or greater. Va. Code §62.1-44.15:21(J)(1); 9 Va. Admin. Code §25-210-80(B)(1) (listing the "minimum" application requirements). DEQ represented to the Board that it had performed an individual review for every crossing, not just those for which the review was minimally required. At the December 14, 2021 Board hearing, DEQ estimated that there are "a couple dozen" crossings with an upstream drainage area of five square miles or greater, but Petitioners are unaware of a list of those crossings in the record. Ex. 10 at 60. In all events, having opted to review individually each crossing, DEQ's analysis "is properly subject to 'arbitrary and capricious' review[.]" *Cmtys. Against Runway Expansion, Inc. v. F.A.A.*, 355 F.3d 678, 689 (D.C. Cir. 2004).

rather than recommend permit denial because MVP's crossing-by-crossing alternatives analysis was deficient, DEQ recommended that the Board issue the permit.[14]

On December 14, 2021, a majority of the Board voted to issue the Certification, finding that "[t]he permit has been prepared in conformance with all applicable statutes, regulations, and agency practices" and "[t]he proposed permit addresses avoidance and minimization of surface water impacts to the maximum extent practicable."[15] DEQ finalized the Certification on December 20, 2021.

STANDARD OF REVIEW

Four factors govern a stay pending review:

> (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.

Hilton v. Braunskill, 481 U.S. 770, 776 (1987). In Natural Gas Act ("NGA") proceedings reviewing §401 certifications, this Court applies the Administrative Procedure Act's standard of review. *State Water Control Bd.*, 898 F.3d at 403; *AES Sparrows Point LNG v. Wilson*, 589 F.3d 721, 727 (4th Cir. 2009). Under that

14 Ex. 11 at 30.

15 *Id.*

standard, the Court must set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(A).

ARGUMENT

I. Petitioners Are Likely To Succeed On The Merits.

Petitioners are likely to succeed on the merits for two reasons. First, the Certification was not issued in accordance with law because the Agencies refused to consider crossing location alternatives. Second, the Certification is arbitrary and capricious because the Agencies failed to properly examine (and irrationally accepted) MVP's crossing-method alternatives analysis.

A. The Agencies Unlawfully Refused To Evaluate Alternative Crossing Locations.

Virginia law required the Agencies to consider whether MVP's proposed crossing locations would "avoid and then minimize impacts … to the maximum extent practicable," including by asking, on a crossing-by-crossing basis, whether "alternative sites" for MVP's proposed crossings "would avoid or result in less adverse impact to surface waters." 9 Va. Admin. Code §25-210-80(B)(1)(g). But the Agencies flatly refused to ask that question. Instead, they relied on an erroneous statutory interpretation to conclude that they are not authorized to evaluate alternative crossing locations for the Pipeline. That legal error infected the Agencies' entire decision and has real-world consequences.

1. The Agencies Misconstrued Governing Law.

The Agencies refused to evaluate alternative waterbody-crossing locations and justified their refusal by inaccurately claiming Virginia law prohibited them from doing so. The Agencies specifically invoked Section 62.1-44.15:81(F), which provides that "[n]o action by either [DEQ] or the Board on a certification pursuant to this article shall alter the siting determination made through [FERC] or State Corporation Commission approval."[16]

But the Agencies fundamentally misunderstand Section 62.1-44.15:81(F). Pipelines like MVP's are regulated by a variety of agencies with different but overlapping purviews. FERC sits at the center of the regulatory scheme, but other agencies like the Forest Service and the Corps must also regulate within their spheres based on their independent judgment and the laws they administer. *See, e.g.*, *Cowpasture River Pres. Ass'n v. U.S.F.S.*, 911 F.3d 150, 169 (4th Cir. 2018), *rev'd on other grounds sub nom U.S.F.S. v. Cowpasture River Pres. Ass'n*, 140 S.Ct. 1837 (2020). CWA §401 enshrines a role for States to regulate water quality impacts from federally-approved projects, 33 U.S.C. §1341(a), and the NGA confirms that authority applies to pipelines like MVP's, notwithstanding the NGA's scheme of overlapping jurisdictions, 15 U.S.C. §717b(d). Indeed, this Court recognizes that the NGA "expressly preserves States' duties to regulate pipelines under the Clean Water

16 Ex. 11 at 6 (quoting Va. Code §62.1-44.15:81(F)).

Act, and FERC's powers cannot sideline States from protecting their own waters." *Mountain Valley Pipeline*, 990 F.3d at 830 (citing *State Water Control Bd.*, 898 F.3d at 388).

Simply put, the Virginia §401 program codifies an independent obligation to evaluate alternative waterbody-crossing locations, notwithstanding FERC's general siting authority. Section 62.1-44.15:81(F) does not circumscribe Virginia's avoidance and minimization requirements, or the Agencies' obligation to apply them and deny applications when those requirements are not met. As explained below, the Agencies retain their authority *to deny* an application where the proposed crossing locations are not the LEDPA—so the Agencies must at least evaluate whether less environmentally damaging alternative crossing locations exist.

The Agencies' position—that Section 62.1-44.15:81(F) strips their authority to even evaluate alternative crossing sites—relies on a construction that conflicts with the statute's plain language and its other provisions. The cardinal rule of Virginia statutory interpretation is that "courts apply the plain language of a statute unless the terms are ambiguous or applying the plain language would lead to an absurd result." *Boynton v. Kilgore*, 623 S.E.2d 922, 926 (2006) (cleaned up). Furthermore, courts "must harmonize apparently conflicting statutes to give effect to both." *Id.* at 927. And because "pure statutory interpretation is the prerogative of the judiciary," "little deference is required to be accorded the agency decision." *Sims*

Wholesale Co. v. Brown-Forman Corp., 468 S.E.2d 905, 908 (Va. 1996) (cleaned up).

Importantly, the plain language of Section 62.1-44.15:81(F) does not limit the Board's obligation *to deny* an application under 9 Va. Admin. Code §25-210-230(A)(3) where the applicant has not shown its proposed crossing locations are the LEDPA. Rather, Section 62.1-44.15:81(F)'s terms limit only the Board's authority to "alter" FERC's siting determination for the Pipeline. To "alter" means "to change or make different; modify." *American Heritage Dictionary* 53 (4th ed. 2000). Consequently, the statute's plain language limits only the Board's authority to change or modify a siting determination, such as by including routing realignments as a condition of a §401 certification. The statute has no effect on the Board's obligation to deny an application where the proposed activity is not demonstrated to be the LEDPA.

Beyond contradicting the plain language, the Agencies' interpretation of Section 62.1-44.15:81(F) also ignored the context of the statutory and regulatory scheme as a whole and did not harmonize apparent conflicts. *Cuccinelli v. Rector, Visitors of Univ. of Va.*, 722 S.E.2d 626, 629-630 (Va. 2012); *Boynton*, 623 S.E.2d at 927. Other statutory and regulatory provisions make clear that alternative locations must be evaluated, even if the Board's options for what to do with that analysis are limited by Section 62.1-44.15:81(F).

Virginia Code §62.1-44.15:21(A) provides that "[p]ermits shall address avoidance and minimization of wetland impacts to the maximum extent practicable." And Virginia Code §62.1-44.15:21(J)(2) provides that "[a]ll pipelines shall be constructed in a manner that minimizes temporary and permanent impacts to state waters and protects water quality to the maximum extent practicable." Mitigation is allowed only if consistent with Corps' regulations, *id.* §62.1-44.15:21(B), which allow mitigation only for "unavoidable adverse impacts after all avoidance and minimization measures have been taken." *Ohio Valley Envtl. Coalition v. Aracoma Coal*, 556 F.3d 177, 202 (4th Cir. 2009).

The General Assembly gave the Board the authority to adopt rules regarding §401 certifications, and the Board has done so. Va. Code §62.1-44.15(10). The Board defines "avoidance" as *either* "not taking *or* modifying a proposed action or parts of an action so that there is no adverse impact to the aquatic environment[;]" "minimization" as "lessening impacts by reducing the degree or magnitude of the proposed action and its implementation[;]" and "mitigation" as "sequentially *avoiding and minimizing* impacts to the maximum extent practicable, and then compensating for remaining unavoidable impacts of a proposed action." 9 Va. Admin. Code §25-210-10(B) (emphasis added). And the regulations make clear that avoidance and minimization includes a "review of alternative sites" in order to

establish the proposed activity as the "least environmentally damaging practicable alternative." *Id.* §25-210-80(B)(1)(g).

Absent Section 62.1-44.15:81(F), those provisions would give the Board two options when faced with a permit application that does not comport with the avoidance and minimization requirements of the alternatives analysis. ***First,*** the Board could deny the permit because "[t]he project that the applicant proposed fails to adequately avoid and minimize impacts to state waters to the maximum extent practicable." Va. Code §62.1-44.15:21(E); 9 Va. Admin. Code §25-210-230(A)(3). ***Second,*** the Board could impose conditions on the §401 certification affirmatively requiring the applicant to select a different site that avoids and minimizes impacts through a practicable alternative. Va. Code §62.1-44.15:21(E); 9 Va. Admin. Code §25-210-110(A)-(B).

Section 62.1-44.15:81(F) may limit the Board's second option, but it leaves the first option untouched. That is, it affects only the Board's ability to issue a §401 certification with conditions requiring the applicant to relocate crossing locations, which could have the prohibited effect of "alter[ing]" FERC siting determinations. In contrast, a denial of a §401 certification on the ground that the application failed to demonstrate impacts had been avoided and minimized would not "alter" siting determinations in any sense of that word; it would simply reject an application that did not meet the applicable requirements.

Importantly, the Board's regulations explicitly recognize that denial and modification are two separate means to avoid impacts. *See* 9 Va. Admin. Code §25-210-10(B) (explaining that effects can be avoided either by "[1] not taking [a proposed action] or [2] modifying a proposed action"). And an agency can reject a proposal for an NGA project based on its substantive alternative requirements, even in the face of a FERC siting determination. *Mountain Valley Pipeline*, 990 F.3d at 830; *cf. Sierra Club v. U.S.F.S.*, 897 F.3d 582, 604 (4th Cir. 2018); *Cowpasture River*, 911 F.3d at 168-70.

Even if the meaning of the term "alter" in Section 62.1-44.15:81(F) were ambiguous, a subsequent paragraph of Section 62.1-44.15:81 confirms that the Agencies' position is unreasonable. Section 62.1-44.15:81(H) provides that "[n]othing in this section shall be construed to prohibit [DEQ] or the Board from taking action to deny a certification in accordance with the provisions of §401 of the federal Clean Water Act." That language alone could end the Court's inquiry. It explicitly states that the General Assembly did not intend to limit, through Section 62.1-44.15:81(F) or otherwise, the Agencies' authority to deny a §401 certification where an application does not demonstrate that the proposed project would sufficiently avoid or minimize adverse impacts to state waters.

In short, the only interpretation of Section 62.1-44.15:81(F) that comports with the rest of the statute is that, at most, it limits the Agencies' ability to

affirmatively require route realignments through conditions imposed in a certification. But restricting the Agencies' ability to affirmatively require realignments neither eliminates the need for an alternatives analysis nor revokes the Agencies' obligation *to deny* an application that does not demonstrate the project will avoid and minimize adverse impacts to the maximum extent practicable.

Even DEQ seemed to understand that difference at the Board hearing on MVP's application. A DEQ official told the Board that "the energy regulatory authorities have the call on siting and alignment, and then we can't change that through *the issuance* of a Virginia Water Protection Permit."[17] What that statement leaves unsaid is precisely the point: the Agencies retain their obligation *to deny* an application for a project that does not avoid and minimize adverse impacts, including where alternative crossing sites would be the LEDPA. *See* 9 Va. Admin. Code §25-210-230(A)(3) ("Basis [*sic*] for denial include … "[t]he project that the applicant proposed fails to adequately avoid and minimize impacts to state waters to the maximum extent practicable."). Consequently, the Agencies must at least ask and attempt to answer whether alternative crossing sites would be practicable and less environmentally damaging. Their categorical refusal to do so here was arbitrary, capricious, and contrary to law.

17 Ex. 10 at 21 (emphasis added).

2. The Agencies' Legal Error Was Prejudicial.

Based on its erroneous statutory interpretation, and in the face of MVP's deficient alternative crossing locations analysis,[18] DEQ concluded in its Final Fact Sheet (which the Board adopted) that "[g]iven the … prohibitions under §62.1-44.15:81, DEQ has determined the proposed project is the LEDPA."[19] That legal error will have consequences.

MVP's proposed Blackwater River crossing perfectly illustrates the significance of that legal error to water quality. The Blackwater River is an important recreational waterbody in Franklin County through which MVP intends to trench.[20] The Environmental Protection Agency has at least twice objected to using an open-cut, dry-ditch crossing through the Blackwater because a trenchless method would avoid or minimize impacts.[21]

Importantly, DEQ itself agrees that MVP should relocate its Blackwater crossing.[22] Because of the Blackwater's status as a tributary of Smith Mountain Lake, and because the river is subject to a total maximum daily load for sediment under CWA §303, DEQ submitted comments to FERC recommending that MVP

18 *See* Ex. 8 at 21-32; Ex. 11 at 9-10.

19 Ex. 11 at 13.

20 Ex. 9 at 39.

21 Ex. 12 at 5; Ex. 13 at 3.

22 Ex. 14, att. A at 14.

"[r]eevaluate the location of the Blackwater River crossing and move it to a location that permits the trenchless crossing technique."[23] Yet DEQ told the Board that neither DEQ nor the Board could consider alternative crossing locations, and the Board certified the Blackwater crossing location and method to which EPA and DEQ had objected without further consideration.

Virginia law required examination of alternative locations for the Blackwater River and other crossings. But neither the Board nor DEQ did so, despite DEQ's own acknowledgement that relocating the Blackwater River crossing could be environmentally preferable. Consequently, the Certification is arbitrary, capricious, and otherwise not in accordance with law, and Petitioners are likely to succeed on the merits.

B. The Agencies' Acceptance Of MVP's Crossing-Method Alternatives Analysis Was Arbitrary And Capricious.

Virginia's regulations require consideration of construction-method alternatives. 9 Va. Admin. Code §25-210-80(B)(1)(g) (requiring review of "specific on-site and off-site measures taken to reduce the size, scope, configuration, or density of the proposed project"). The applicant bears the burden to demonstrate that its proposed alternative is the LEDPA. *Id.* (requiring the applicant to "demonstrate to the satisfaction of the board that avoidance and minimization opportunities have

23 *Id.*

been identified and measures have been applied to the proposed activity such that the proposed activity … is the least environmentally damaging practicable alternative").

Moreover, "LEDPA" is a CWA term-of-art, and the federal courts have held that, in identifying the LEDPA, the reviewing agency has "an obligation to independently verify the information supplied to it." *Friends of the Earth*, 800 F.2d at 835. The language of the Virginia program imposes a heightened obligation on the Board's LEDPA review, because it requires the Board's "satisfaction." 9 Va. Admin. Code §25-210-80(B)(1)(g). "To demonstrate a fact to the satisfaction of the factfinder means to *persuade* the actual factfinder, not merely to demonstrate the plausibility of the proffered fact to a sufficient degree that any rational factfinder *could be persuaded*." *Cent. Va. Obstetrics & Gynecology Assocs. v. Whitfield*, 590 S.E.2d 631, 638 (Va. Ct. App. 2004) (emphasis original). The term "satisfaction" is an admonishment to the Board that the LEDPA "is not lightly to be inferred but to be established by proof which convinces in the sense of inducing belief." *United States v. Jefferson Elec. Mfg. Co.*, 291 U.S. 386, 398 (1934).

Petitioners explained to the Agencies that MVP lacks credibility about whether trenchless technologies are practicable at any particular location given its previous inconsistent statements and about-faces on that issue.[24] Over the years

24 Ex. 15 at 22-36.

MVP has rejected as impracticable many trenchless crossings that it now proposes to construct[25] and has previously proposed trenchless crossings for locations that it today rejects. For example, in November 2020, MVP told FERC that 38 crossings in West Virginia are "well suited for conventional bores,"[26] only to abandon that plan and tell the Corps just three months later that conventional bores at those very crossings are impracticable.[27] In short, MVP has a demonstrated history of saying whatever it needs to say about alternative crossing methods in order to gain approval of its preferred methods. Because of MVP's pattern of such behavior, the Agencies could not simply accept MVP's statements at face value, but rather had a heightened obligation to verify MVP's statements about crossing-method feasibility. *See, e.g.*, *Colo. Fire Sprinkler, Inc. v. N.L.R.B.*, 891 F.3d 1031, 1041 (D.C. Cir. 2018) (holding agency decision to be arbitrary and capricious because of its reliance on untrustworthy information).

Neither of the Agencies addressed MVP's lack of credibility about crossing-method feasibility. In and of itself, that renders the Certification arbitrary and

25 For example, MVP told FERC in 2016 that trenching under three of the rivers at issue in *Sierra Club v. U.S.A.C.O.E.*, 909 F.3d 635 (4th Cir. 2018)—the Elk, Gauley, and Greenbrier Rivers—"pose[s] a risk of failure that is likely insurmountable." Ex. 16 at 8-11. MVP now admits that trenchless crossings of those rivers is the LEDPA for those waterbodies. Ex. 8 at 34.

26 Ex. 17 at 1-2 & app. A.

27 Ex. 9 at 1-5 (designating open-cut crossings as the LEDPA for 38 of the 41 proposed trenchless crossings in Appendix A of Ex. 17).

capricious because the Agencies entirely failed to either address an important aspect of the problem, *Sierra Club v. U.S.F.S.*, 897 F.3d at 605, or resolve the evidentiary conflict before them, *Friends of Buckingham v. State Air Pollution Control Bd.*, 947 F.3d 68, 87-90 (4th Cir. 2020).

Moreover, DEQ did not apply any technical expertise whatsoever to evaluate MVP's statements. At the December 14, 2021 meeting where the Board voted to adopt DEQ's recommendation, DEQ's permit writer—to whom DEQ assigned the evaluation of MVP's crossing-method alternatives analysis—admitted that "at some point" he had to simply "accept" MVP's crossing-method alternative analysis because he—a permit writer whose expertise is in wetlands and waterbodies, not civil engineering—was "not particularly qualified" to assess them independently.[28]

As this Court observed when reviewing a Virginia §401 certification for a different pipeline, "[t]o survive review under the arbitrary and capricious standard, an agency decision must show that the agency examined the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Appalachian Voices v. State Water Control Bd.*, 912 F.3d 746, 753 (4th Cir. 2019) (cleaned up). Although courts will allow agencies "to rely on the reasonable opinions of [their] own qualified experts," *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989), here the agency staffer's

28 Ex. 10 at 78-80.

conclusion was *not* reasonable and he *was not* qualified. Rather, the staffer failed to scrutinize the assertions of a company with a history of inconsistent feasibility statements because he did not feel qualified to do so. If DEQ's assigned staffer was not qualified to evaluate MVP's application, it was incumbent on DEQ to get the input of a qualified person. By refusing to apply expert scrutiny to MVP's suspect claims of infeasibility, the Agencies failed to "examine[] the relevant data" at all. *Appalachian Voices*, 912 F.3d at 753 (cleaned up). "If an agency affirmatively gives an irrational explanation for its decision, [this court's] analysis is straightforward: unless the error was harmless, [the court] must vacate the decision. *W. Va. Coal Workers' Pneumoconiosis Fund v. Bell*, 781 F. App'x 214, 229 (4th Cir. 2019); *cf. Kisor v. Wilkie*, 139 S.Ct. 2400, 2414 (2019) (holding agency deference unwarranted where the action "does not reflect an agency's authoritative, expertise-based, fair or considered judgment" (cleaned up)). Consequently, Petitioners are likely to succeed on the merits because the Agencies failed to competently examine the relevant data, resulting in an arbitrary and capricious action.

II. Petitioners Will Suffer Irreparable Harm.

Absent a stay, MVP will complete its stream crossings before resolution of this petition. MVP's operator announced in November 2021 that MVP intends to "ramp up" construction in February 2022 to complete the Pipeline by summer

2022.[29] Those circumstances justify a stay pending review. *See Sierra Club*, 981 F.3d at 264.

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." *Amoco Prod. Co. v. Vill. Of Gambell*, 480 U.S. 531, 545 (1987). And this Court has observed that "[t]he dredging … that may occur while the Court decides the case cannot be undone and, if the end result is that [the permit should not have issued], irreparable harm will have occurred in the meantime." *Sierra Club*, 981 F.3d at 264 (cleaned up).

Petitioners' members have interests in streams throughout Virginia that MVP's plans for trenching and/or blasting threaten with irreparable harm. For example, Elizabeth Garst can see one of MVP's proposed crossings of Teels Creek from her backyard. Ex. 19, ¶¶13-14. MVP intends to trench through Teels Creek at least five times, *id.*, ¶13, and multiple crossings on the same stream can cause permanent detrimental impacts to that stream, Ex. 20 at 13.

Bonnie Law has a lifelong connection to the Blackwater River, including the segment downstream of MVP's proposed crossing that flows into Smith Mountain

29 Ex. 2 at 7. MVP's operator has previously maintained that it intends to trench through "critical" streams "as quickly as possible before anything is challenged." Ex. 18 at 12.

Lake. Ex. 21, ¶¶9-13. The construction of an open-cut, dry-ditch crossing threatens irreparable harm to that river. *Id.*, ¶¶19-23.

Mary Coffey owns two wetlands through which MVP intends to trench. Ex. 22, ¶¶9-15. No amount of money could make Ms. Coffey whole for the adverse impacts that trenching through her wetlands will cause. *Id.*, ¶24.

David Sligh has a long history with many streams MVP intends to cross, including the Craig and Bottom Creek watersheds, through which MVP intends to trench multiple times. Ex. 23, ¶¶7-13, 19-25. MVP's activities in those watersheds will cause lasting and/or permanent damage. *Id.*, ¶¶13, 22, 36

Roberta Johnson will be irreparably harmed by the Pipeline's stream crossings near her home on Bent Mountain in Virginia. Ex. 24, ¶¶7-21. Ms. Johnson has worked for nearly a decade to protect Bottom Creek—a stream designated as an Exceptional State Water bordering her property. *Id.*, ¶7-9. Blasting through the Bottom Creek watershed will irreparably alter the high-quality streams that Ms. Johnson values. *Id.*, ¶13, 15, 20.

Steve Powers has a PhD in biology and researches the evolution and ecology of stream fishes in the Southeast. Ex. 25, ¶5. He is an avid kayaker, and "two of [his] very favorite places to kayak are in the path of the MVP"—Bottom Creek Gorge and the Roanoke River. *Id.*, ¶¶8-10. Sedimentation from open-cut crossings will cause

long-lasting sedimentation effects on the streams Dr. Powers kayaks, fishes, and snorkels and on the fishes he studies. *Id.*, ¶¶ 11-16.

III. Preliminary Relief Will Not Substantially Harm The Agencies Or MVP.

Equitable relief would pose only minimal injury to the Agencies. Although an agency has interests in defending its permits, "the effect of an injunction on these interests seems rather inconsequential." *Ohio Valley Envtl. Coalition v. U.S.A.C.O.E.*, 528 F. Supp. 2d 625, 632 (S.D.W.Va. 2007). Moreover, any economic harm to MVP from a stay does not outweigh the irreparable harm to the environment in the balance of the equities. *Sierra Club*, 981 F.3d at 264-65.

IV. The Public Interest Favors Preliminary Relief.

The "public has an interest in the integrity of the waters of the United States, and in seeing that administrative agencies act within their statutory authorizations and abide by their own regulations." *Ohio Valley Envtl. Coalition v. Bulen*, 315 F.Supp.2d 821, 831 (S.D.W.Va. 2004). Moreover, in the public interest analysis, "the NGA yields to the CWA." *Sierra Club*, 981 F.3d at 264-65.

CONCLUSION

For the foregoing reasons, this Court should stay the Certification pending review.

DATED: January 4, 2022

Respectfully submitted,

/s/ BENJAMIN A. LUCKETT
BENJAMIN A. LUCKETT
DEREK O. TEANEY
APPALACHIAN MOUNTAIN ADVOCATES, INC.
P.O. Box 507
Lewisburg, WV 24901
Telephone: (304) 873-6080
Email: bluckett@appalmad.org
Counsel for Sierra Club; Appalachian Voices; Chesapeake Climate Action Network; Wild Virginia; Preserve Craig, Inc.; Blue Ridge Environmental Defense League; and Preserve Franklin

/s/ GREGORY BUPPERT
GREGORY BUPPERT
SPENCER GALL
CLAIRE HORAN
SOUTHERN ENVIRONMENTAL LAW CENTER
201 West Main Street, Suite 14
Charlottesville, VA 22902
Telephone: (434) 977-4090
Email: gbuppert@selcva.org
Counsel for Preserve Bent Mountain and Preserve Giles County

CERTIFICATE OF COMPLIANCE WITH TYPE VOLUME LIMIT

This motion complies with the type-volume limits because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f) (cover page, disclosure statement, table of contents, table of citations, statement regarding oral argument, signature block, certificates of counsel, addendum, attachments), this brief contains 5,162 words. This brief has been prepared in a proportionally spaced typeface using Microsoft Word for Mac 2019 in Times New Roman, 14 point.

/s/ BENJAMIN A. LUCKETT

BENJAMIN A. LUCKETT
DEREK O. TEANEY
APPALACHIAN MOUNTAIN ADVOCATES, INC.
P.O. Box 507
Lewisburg, WV 24901
Telephone: (304) 873-6080
Email: bluckett@appalmad.org

CERTIFICATE OF SERVICE

I hereby certify that, on January 4, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ BENJAMIN A. LUCKETT
BENJAMIN A. LUCKETT
APPALACHIAN MOUNTAIN ADVOCATES, INC.
P.O. Box 507
Lewisburg, WV 24901
Telephone: (304) 873-6080
Email: bluckett@appalmad.org

PETITIONERS' EXHIBIT LIST

EXHIBIT NO.	DESCRIPTION
1	December 20, 2021 VWP Individual Permit Number 21-0416
2	Equitrans Midstream Corporation (ETRN) Q3 2021 Earnings Call Transcript (Nov. 2, 2021)
3	Letter from Derek Teaney and Spencer Gall, Counsel for Petitioners, to Heather Wood, Chair, State Water Control Board, and David Paylor, Director, Dep't of Envtl. Quality, Re: Request for Administrative Stay of VQP Individual Permit No. 21-0416 and Section 401 Water Quality Certification for Mountain Valley Pipeline, LLC (Dec. 22, 2021)
4	Letter from David K. Paylor, Director, Va. Dept' of Envtl. Quality, to Derek Teaney, Appalachian Mountain Advocates (Jan. 4, 2021).
5	Letter from Todd Normane, Deputy General Counsel, Mountain Valley Pipeline, LLC, to Service List Re: Mountain Valley Pipeline Project (Jan. 26, 2021)
6	Letter from Matthew Eggerding, Assistant General Counsel, Mountain Valley Pipeline, LLC, to Kimberly D. Bose, Secretary, Fed. Energy Regul. Comm'n, Re: Mountain Valley Pipeline, LLC, Docket N. CP21-57-000, Revocation Letters – Nationwide Permit 12 (Mar. 4, 2021)
7	Mountain Valley Pipeline Project, Individual Permit Application, Attachment B: Virginia Department of Environmental Quality 401 Water Quality Certification Information and Virginia Water Protection Permit Application (Feb. 2021)
8	Tetra Tech, Inc., Mountain Valley Pipeline Project: Individual Permit Application (Feb. 2021)
9	Table 15: Crossing Method Determination Summary, Individual Permit Application, Mountain Valley Pipeline Project (Feb. 2021)
10	Virginia Water Control Bd., In RE: Virginia Water Protection Individual permit number 21-0146, Transcript of Recorded Proceedings (Dec. 14, 2021)
11	Final Fact Sheet, Virginia Water Protection (VWP) Individual Permit No. 21-0416 (12/20/2021 Revised)

12	Letter from Jeffrey D. Lapp, Chief, Wetlands Branch, Region 3, U.S. Envtl. Protection Agency, to Michael Hatten, Chief, Regulatory Branch, Huntington District , U.S. Army Corps of Eng'rs, Re: LRH-2015-00952-GBR, LRP-2015-798, NAO-2015-0898, Mountain Valley Pipeline, LLC, Mountain Valley Pipeline, Wetzel County, West Virginia to Pittsylvania County, Virginia (May 27, 2021)
13	Letter from Stepan Nevshehirlian, Environmental Assessment Branch Chief, Region 3, U.S. Envtl. Protection Agency, to Kimberly D. Bose, Secretary, Fed. Energy Regul. Comm'n, Re: Mountain Valley Pipeline Amendment Project Envtl. Assessment, August 2021: West Virginia, and Virginia (FERC Docket Nos. CP21-57-000) (Sept. 13, 2021)
14	Letter from Bettina Rayfield, Virginia Dep't of Envtl. Quality, to Kimberly D. Bose, Fed. Energy Regul. Comm'n, Re: Federal Energy Regulatory Commission Draft Environmental Assessment for the Mountain Valley Pipeline Amendment Project (OEP/DG2E/Gas 3, Mountain Valley Pipeline, LLC, Docket No. CP21-57-000, DEQ 21-102F) (Sept. 8, 2021)
15	Letter from Benjamin A Luckett, Appalachian Mountain Advocates, Inc., et al., to Steve Hardwick, Va. Dep't of Envtl. Quality, Re: Public Comments on Mountain Valley Pipeline, LLC's Application for Virginia Water Protection Permit Pursuant to Va. Code 62.1-44.15:20.D and State Water Quality Certification Pursuant to Section 401 of the Clean Water Act (33 U.S.C. § 1341) (Oct. 27, 2021)
16	Mountain Valley Pipeline, LLC, Waterbody Crossing Review (Apr. 2016)
17	Mountain Valley Pipeline, LLC, Supplemental Envtl. Report for Proposed Conventional Bore Waterbody and Wetland Crossings from Mileposts 0 to 77 (Nov. 2020)
18	Equitrans Midstream Corp (ETRN) Q2 2020 Earnings Call Transcript (Aug. 4, 2020)
19	Declaration of Elizabeth Garst
20	Lévesque & Dubé, *Review of the Effects of In-stream Pipeline Crossing Construction on Aquatic Ecosystems and Examination of Canadian Methodologies for Impact Assessment*, 132 ENVTL. MONITORING & ASSESSMENT 395 (2007)

21	Declaration of Bonnie Law
22	Declaration of Mary Elisabeth Coffey
23	Declaration of David Sligh
24	Declaration of Roberta Carpenter Johnson
25	Declaration of Steven Powers