
No. 22-1008

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SIERRA CLUB, et al.
Petitioners

v.

WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION,
et al.

Respondents

and

MOUNTAIN VALLEY PIPELINE, LLC

Intervenor

On Petition for Review from the
West Virginia Department of Environmental Protection's
State §401 Water Quality Certification No. WQC-21-005 (December 30, 2021)

PETITIONERS' MOTION FOR STAY PENDING REVIEW

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TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
BACKGROUND	2
STANDARD OF REVIEW	7
ARGUMENT	7
I. Petitioners Are Likely To Succeed On The Merits.	7
A. WVDEP’s Explanation Of Its Reliance On BMPs Is Arbitrary And Capricious.	8
1. EPA Has Never Determined That BMPs Used During Instream Construction Control Discharges Sufficiently To Protect Water Quality Standards.	9
2. MVP’s Construction Methods Do Not Comply With WVDEP’s BMP Manual.	12
a. MVP’s Crossing Methods Are Inconsistent With The BMP Manual Because MVP Has Failed To Credibly Establish The Impracticability Of Trenchless Methods.	13
b. MVP’s Crossing Plans Are Inconsistent With The BMP Manual Because MVP Intends To Trench Through Streams With Drainage Areas Greater Than One Square Mile.	15
c. MVP’s Open-Cut Crossings Are Inconsistent With The BMP Manual Because They Are Neither Restricted To Low-Flow Periods, Nor Do They Implement Appropriate Structural Measures During High-Flow Periods.	17
3. WVDEP Arbitrarily and Capriciously Refused to Conduct Site- Specific Antidegradation Reviews.	18
B. WVDEP Arbitrarily and Capriciously Dismissed MVP’s History of Noncompliance.	20
II. Petitioners Will Suffer Irreparable Harm.....	23
III. Preliminary Relief Will Not Substantially Harm WVDEP Or MVP.....	24
IV. The Public Interest Favors Preliminary Relief.....	25

CONCLUSION.....25

CERTIFICATES

EXHIBIT LIST

TABLE OF AUTHORITIES

Cases

<i>Amoco Production Co. v. Village of Gambell, AK</i> , 480 U.S. 531 (1987).....	23
<i>Animal Legal Def. Fund v. Purdue</i> , 872 F.3d 602 (D.C. Cir. 2017).....	20, 22
<i>Coeur Alaska, Inc. v. Southeast Alaska Conservation Council</i> , 557 U.S. 261 (2009)	10
<i>Colo. Fire Sprinkler, Inc. v. N.L.R.B.</i> , 891 F.3d 1031 (D.C. Cir. 2018).....	14
<i>Defs. of Wildlife v. U.S.D.O.I.</i> , 931 F.3d 339 (4th Cir. 2019).....	22
<i>Friends of Buckingham v. State Air Pollution Control Bd.</i> , 947 F.3d 68 (4th Cir. 2020)	14
<i>Gen. Land Off. v. U.S.D.O.I.</i> , 947 F.3d 309 (5th Cir. 2020).....	20
<i>Hilton v. Braunskill</i> , 481 U.S. 770 (1987)	7
<i>Hoyt v. Russell</i> , 117 U.S. 401 (1886).....	16
<i>Mountain Valley Pipeline, LLC v. N.C.D.E.Q.</i> , 990 F.3d 818 (4th Cir. 2021).....	5
<i>O.V.E.C. v. Bulen</i> , 315 F.Supp.2d 821 (S.D.W.Va. 2004)	25
<i>O.V.E.C. v. Horinko</i> , 279 F.Supp.2d 732 (S.D.W.Va. 2003)	5, 19
<i>O.V.E.C. v. Pruitt</i> , 893 F.3d 225 (4th Cir. 2018).....	1
<i>O.V.E.C. v. U.S.A.C.O.E.</i> , 528 F.Supp.2d 625 (S.D.W.Va. 2007)	25
<i>O.V.E.C. v. U.S.A.C.O.E.</i> , 716 F.3d 119 (4th Cir. 2013).....	19
<i>Sierra Club v. U.S.A.C.O.E.</i> , 909 F.3d 635 (4th Cir. 2018).....	1, 13
<i>Sierra Club v. U.S.A.C.O.E.</i> , 981 F.3d 251 (4th Cir. 2020).....	2, 23, 25
<i>Sierra Club v. U.S.F.S.</i> , 897 F.3d 582 (4th Cir. 2018).....	8, 15, 16, 17, 22
<i>Southern Appalachian Mountain Stewards v. A&G Coal Corp.</i> , 758 F.3d 560 (4th Cir. 2014)	6

<i>State of S.C. ex rel. Tindal v. Block</i> , 717 F.2d 874 (4th Cir. 1983)	15
<i>Transp., Inc. v. Arkansas-Best Freight Sys., Inc.</i> , 419 U.S. 281 (1974)	20
<i>U.S. v. Johnson</i> , 726 F.2d 1018 (4th Cir. 1984)	16

Statutes

33 U.S.C. §1341	1
33 U.S.C. §1341(a)(1).....	3
33 U.S.C. §1342(a)(1).....	10
33 U.S.C. §1342(p)	10
33 U.S.C. §1344.....	10
5 U.S.C. §706(2)(A).....	7

Regulations

40 C.F.R. §121.2(a)(3).....	3, 21, 22
40 C.F.R. §122.26(b)(15)(i).....	10
40 C.F.R. §122.64(a)(1).....	20
W. Va. C.S.R. §47-5A-5.1.e	6, 15
W. Va. C.S.R. §§47-2-3.2.a to -3.2.i.....	4
W. Va. C.S.R. §47-2.3.2.b	4
W. Va. C.S.R. §47-2-3	4
W. Va. C.S.R. §47-2-3.2.a	4
W. Va. C.S.R. §47-2-3.2.e	4
W. Va. C.S.R. §47-2-3.2.i.....	4
W. Va. C.S.R. §47-2-4.....	4
W. Va. C.S.R. §47-2-4.1	4

W. Va. C.S.R. §47-5A-4.2 5

W. Va. C.S.R. §60-5-1 *et seq.*..... 4, 5

W. Va. C.S.R. §60-5-3.3 to -3.5 5

W. Va. C.S.R. §60-5-5.6.c 19

Administrative Cases

161 FERC ¶ 61,043 (Oct. 13, 2017) 21

Other Authorities

63 Fed. Reg. 36,742 (July 7, 1998)..... 19

INTRODUCTION

“West Virginia has long resisted the requirements of the Clean Water Act.” *O.V.E.C. v. Pruitt*, 893 F.3d 225, 227 (4th Cir. 2018). For example, rather than defend the Clean Water Act (“CWA”) Section 401¹ certification issued in 2017 to Mountain Valley Pipeline, LLC (“MVP”) for the proposed Mountain Valley Pipeline project (the “Pipeline”), West Virginia “sought voluntary remand with vacatur ... , contending that the information used to issue the Section 401 Certification needs to be further evaluated and possibly enhanced and that it needs to reconsider its antidegradation analysis[.]” *Sierra Club v. U.S.A.C.O.E.*, 909 F.3d 635, 641 (4th Cir. 2018) (cleaned up). On remand West Virginia *did not* reconsider its antidegradation analysis per its commitment to this Court, but instead abdicated its CWA §401 responsibilities and waived its authority to certify the relevant permits. *Id.*; Ex. 1 at 2.

The State’s resistance to the CWA’s requirements continues with the action at issue here: the December 30, 2021 CWA §401 certification (the “Certification”) of the individual CWA §404 permit that MVP seeks from the United States Army Corps of Engineers (the “Corps”) for the Pipeline’s waterbody crossings.² The West Virginia Department of Environmental Protection (“WVDEP”) has once more failed

1 33 U.S.C. §1341.

2 Ex. 1.

to ensure protection of West Virginia's water quality standards, resulting in an arbitrary and capricious decision.

A stay is necessary to prevent irreparable harm from activities authorized by the Certification. Although MVP has committed to deferring such activities until January 31, 2022,³ it intends to "ramp up" construction in February 2022 to complete the Pipeline by summer 2022.⁴ MVP's haste necessitates this stay motion. Respondents and MVP oppose the motion.⁵

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.⁶ MVP purported to evaluate each of its crossings to

3 Doc. #22, ¶4.

4 Ex. 2 at 7.

5 On January 4, 2022, Petitioners asked Respondents to stay the Certification. Ex. 3. They did not respond.

6 Ex. 4 at 1-2.

determine whether it wanted to trench *through* the waterbody using an open-cut crossing (which would require a CWA §404 permit), or bore *under* the waterbody using a trenchless crossing (which would not require a CWA §404 permit).⁷ MVP decided to seek an individual CWA §404 permit from the Corps for waterbodies it wants to trench *through*, and asked the Corps to revoke its nationwide permit authorizations.⁸ Contemporaneously, MVP sought approval from the Federal Energy Regulatory Commission (“FERC”) for waterbodies it wants to bore *under*.⁹

Under CWA §401, a Corps individual permit requires certification from the affected states that permitted activities will comply with water quality standards. 33 U.S.C. §1341(a)(1). To satisfy that requirement, MVP submitted an application for a CWA §401 certification to WVDEP on March 4, 2021.¹⁰

Under regulations promulgated by the Environmental Protection Agency (“EPA”), to issue §401 certifications states must conclude “that there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards.” 40 C.F.R. §121.2(a)(3) (2019).¹¹

⁷ *Id.* at 2.

⁸ Ex. 5.

⁹ Ex. 4 at 2.

¹⁰ Ex. 1 at 1.

¹¹ The 2019 regulation is applicable here because EPA’s 2020 §401 regulations have been vacated. Ex. 1 at 2.

The water quality standards at issue here include West Virginia's narrative water quality criteria and West Virginia's antidegradation policy. W. Va. C.S.R. §§47-2-3.2.a to -3.2.i, 47-2-4.1; *id.* §60-5-1 *et seq.*

West Virginia's narrative water quality criteria prohibit discharges that cause or contribute to, among other things, (1) “[d]istinctly visible floating or settleable solids, suspended solids, scum, foam or oily slicks” (*id.* §47-2-3.2.a); (2) “[d]eposits or sludge banks on the bottom” (*id.* §47-2.3.2.b); (3) “[m]aterials in concentrations which are harmful, hazardous or toxic to man, animal or aquatic life” (*id.* §47-2-3.2.e); or “[a]ny other condition ... which adversely alters the integrity of the waters of the State, including wetlands” (*id.* §47-2-3.2.i). West Virginia describes those as “conditions not allowable” or “CNA.” *See id.* §47-2-3 (entitled “Conditions Not Allowable In State Waters”).

West Virginia's antidegradation policy is codified at W. Va. C.S.R. §47-2-4. It assigns three tiers of protection to West Virginia's waters, depending on their existing quality and national significance: Tier 1, Tier 2, and Tier 3. *Id.* §47-2-4.1. Existing uses must be maintained in Tier 1 waters; the existing high-quality of Tier 2 waters must be protected absent socio-economic justification through an alternatives analysis; and the degradation of outstanding national resource waters in Tier 3 streams is prohibited. *Id.*

West Virginia’s antidegradation implementation procedures are codified at W. Va. C.S.R. §60-5-1 *et seq.*¹² An antidegradation review requires WVDEP to determine (1) the existing uses of waterbodies associated with the proposed activity, (2) the baseline water quality for those waterbodies, and (3) the tier of protection applicable to the waterbodies. W. Va. C.S.R. §60-5-3.3 to -3.5.

Moreover, 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), West Virginia’s CWA §401 program requires an alternatives analysis to avoid and minimize impacts. W. Va. C.S.R. §47-5A-4.2 (requiring the applicant to submit an alternatives analysis). To implement that regulation, WVDEP’s §401 certification application requires submission of a “No Practical Alternative Demonstration.”¹³ WVDEP’s instructions require applicants to

[s]ubmit a *conclusive* demonstration to justify the proposed activity (ies). If more than one activity is involved in the project (fills, culverting, stream relocations, etc.), justify the need for *each activity* by providing the following:

- Show that other alternatives were considered and why they were eliminated.

12 Although EPA lawfully approved portions of that rule, EPA’s approval of certain provisions was judicially vacated in 2003, and EPA has not taken action on some of those provisions since that time. *O.V.E.C. v. Horinko*, 279 F.Supp.2d 732, 777 (S.D.W.Va. 2003).

13 Ex. 6, application at 4.

- Show that the activity will impact Waters of the U.S. *no more than is necessary* to accommodate its proper construction and operations.
- Provide drawings, mapping, plans, specifications and design analysis of the preferred site or plan.¹⁴

States have broad authority to impose requirements in CWA permit applications, and this Court gives them meaning and effect. *Southern Appalachian Mountain Stewards v. A&G Coal Corp.*, 758 F.3d 560, 564, 566-69 (4th Cir. 2014).

On December 30, 2021, WVDEP granted the Certification to MVP, determining that “there is a reasonable assurance that the activity will be conducted in a manner which does not violate water quality standards,” and purporting to respond to public comments.¹⁵ WVDEP’s determination rests heavily on its belief that MVP will comply with WVDEP’s “Erosion and Sediment Control Best Management Practice Manual” (“BMP Manual”), which prescribes best management practices (“BMPs”) for instream construction.¹⁶ Three requirements of the BMP Manual’s Instream BMPs are relevant here: (1) the Construction Criteria specify that boring under a stream is the “least damaging and preferred method,” (2) the General Design Criteria require that the drainage area upstream from a crossing “be no greater than one square mile,” and (3) the Minimum

14 Ex. 7 at 3 (emphasis added).

15 Ex. 1 at 2, att. C. A legislative rule requires WVDEP to respond to significant comments. W. Va. C.S.R. §47-5A-5.1.e.

16 Ex. 8, §3.21.

Standards require instream construction to occur during low-flow periods, unless enhanced structural measures are used to protect the worksite.¹⁷

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. *Sierra Club v. State Water Control Bd.*, 898 F.3d 383, 403 (4th Cir. 2018). Under that 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, WVDEP’s explanation for its conclusion that the permitted activities will comply with water quality standards runs counter the record and fails to examine important

¹⁷ *Id.* at 3.21-3, -4, -26.

aspects of the problem. Second, WVDEP applied the wrong legal standard when it dismissed MVP's demonstrated history of water quality standards violations.

A. WVDEP's Explanation Of Its Reliance On BMPs Is Arbitrary And Capricious.

WVDEP's determination that MVP's instream activities will comply with water quality standards rests on at least two fundamental errors that render it arbitrary and capricious. First, WVDEP relied heavily on EPA's statements regarding the effectiveness of certain BMPs *used in upland construction* to make conclusions regarding the impacts of *instream construction*.¹⁸ Second, WVDEP relied on compliance with its BMP Manual despite MVP's plans' inconsistency with several of that manual's requirements.¹⁹ WVDEP's explanations arbitrarily and capriciously run counter to the record and fail to consider important aspects of the problem. *Sierra Club v. U.S.F.S.*, 897 F.3d 582, 594 (4th Cir. 2018). Moreover, they led WVDEP to impermissibly forego important site-specific reviews of each affected stream.

18 Ex. 1 at 5, 7, 10-11, att. C at 2-3, 8, 10, 12-13, 14-15.

19 *Id.* at 6-7, att. C at 13.

1. EPA Has Never Determined That BMPs Used During Instream Construction Control Discharges Sufficiently To Protect Water Quality Standards.

WVDEP's explanations run counter to the record because EPA has *never* determined that BMPs, including those proposed by MVP, control discharges sufficiently during instream construction to protect water quality standards. Nonetheless, WVDEP turned to EPA "first"—and repeatedly—to conclude that MVP's crossing methods would protect water quality standards.²⁰ WVDEP's mistaken belief that EPA has endorsed construction stormwater BMPs as a method to ensure water-quality compliance during instream construction was fundamental to its issuance of the Certification. Because EPA has done no such thing, WVDEP's reliance on EPA was arbitrary and capricious.

EPA's 2012 and 2017 Construction General Permits ("CGPs") cited by WVDEP apply to construction *on land*.²¹ They do not authorize discharges from instream construction.²²

EPA's CGPs' silence about BMPs for instream construction is unsurprising. EPA's CGPs are products of EPA's CWA §402 authority.²³ CWA §402 establishes

²⁰ *Id.* at 4, 7, 11, att. C at 3, 8, 10-15.

²¹ Ex. 9 at 15; Ex. 10 at 13 (same).

²² Ex. 9 at 28-29; Ex. 10 at 16-19.

²³ *See, e.g.*, Ex. 10 at 5.

a permitting program for the discharge of pollutants that are not dredged or fill material. 33 U.S.C. §1342(a)(1). CWA §402(p) requires regulation of certain stormwater discharges—*i.e.*, overland runoff that picks up pollutants and is conveyed to a waterbody²⁴—under that program. *Id.* §1342(p). Stormwater discharges from land disturbance related to construction activities require a §402 permit. 40 C.F.R. §122.26(b)(15)(i). EPA’s CGPs—and their state equivalents—satisfy that requirement.

Instream construction, however, results in discharges of dredged or fill material, and is therefore regulated by the Corps under CWA §404.²⁵ The Supreme Court has held “that if the Corps has authority to issue a permit for a discharge under §404, then the EPA lacks authority to do so under §402.” *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 557 U.S. 261, 273-74 (2009). Upland construction requiring a §402 permit for stormwater discharges may occur in conjunction with §404 instream construction, but that does not give EPA authority

²⁴ See, e.g., <https://www.epa.gov/npdes/npdes-stormwater-program>.

²⁵ Ex. 1 at 1; see generally 33 U.S.C. §1344.

over instream construction.²⁶ Indeed, EPA's CGPs' reference §404-regulated activities only to clarify that they are exempt from the CGPs' 50-foot stream buffer.²⁷

Instream construction is a far different beast from upland construction, both in regulation and in real-world stream impacts. Even WVDEP's BMP Manual acknowledges that "[t]he production of significant amounts of sediment is inevitable when conducting construction activities in a stream."²⁸ And articles WVDEP reviewed acknowledge that, because of a paucity of data, "defensible statements ... regarding the level of environmental protection provided" by open-cut, dry-ditch methods cannot be made.²⁹

26 The projects WVDEP cites to insinuate that EPA's CGPs regulate instream construction are unavailing. Ex. 1, att. C at 12 n.5. Neither the Massachusetts nor the New Hampshire project cited by WVDEP included open-cut crossing methodologies among their prescribed erosion and sediment controls or pollution prevention requirements. Ex. 11 at 10-25; Ex. 12 at 15-22. To the extent the project proponents addressed open-cut methodologies, it was in their general project descriptions. Ex. 11 at 3; Ex. 12 at 10-11. But description of an aspect of a project in a permit document does not equate to regulation of that aspect by the permit. For example, MVP's Corps application describes its upland construction (Ex. 13 at 3), but that does not give the Corps authority over those activities.

In short, nothing in the project-proponent created documents WVDEP cites represents an assertion of regulatory jurisdiction by EPA or an EPA-conclusion that BMPs alone are sufficient to protect water quality standards from instream construction.

27 Ex. 14 at G-3; Ex. 15 at G-3.

28 Ex. 8 at 3.21-1.

29 Ex. 16 at 82; *see also* Ex. 17 at 714.

In short, EPA did not—and *could* not—regulate instream construction through its CGPs. Accordingly, it did not conclude that those permits’ BMPs would protect water quality standards during instream construction.³⁰ WVDEP’s reliance on EPA’s CGPs as a basis for its determination that the Pipeline’s waterbody crossings will comply with water quality standards was thus arbitrary and capricious.

2. MVP’s Construction Methods Do Not Comply With WVDEP’s BMP Manual.

In addition to relying on EPA’s permits, WVDEP also relied heavily on its determination that MVP’s waterbody-crossing methods “are consistent with” WVDEP’s BMP Manual.³¹ Unlike the EPA permits, the BMP Manual does directly address instream construction. Contrary to WVDEP’s claims, however, MVP’s proposed crossing methods fail to meet the BMP Manual’s requirements in three important ways. Because WVDEP’s reliance on MVP’s compliance with the BMP Manual runs counter to the record, the Certification is arbitrary and capricious.

30 Indeed, the state-of-the-science will not allow defensible statements in that regard. See note 29, *supra*, and accompanying text.

31 Ex. 1 at 7, att. C at 2.

a. MVP's Crossing Methods Are Inconsistent With The BMP Manual Because MVP Has Failed To Credibly Establish The Impracticability Of Trenchless Methods.

The BMP Manual specifies trenchless methods as the least damaging and preferred alternatives for its Instream BMPs.³² MVP submitted an alternatives analysis in its application, but rejected trenchless methods for hundreds of crossings.³³ WVDEP determined that MVP's alternatives analysis was "reasonable" and sufficiently demonstrated that "trenchless crossings were impracticable," resulting in the selection of "the least environmentally damaging alternative."³⁴

WVDEP's acceptance of MVP's alternatives analysis was unreasonable because MVP lacks credibility about whether trenchless technologies are practicable at any particular location given its previous inconsistent statements on that issue.³⁵ Over the years, MVP has rejected as impracticable many trenchless crossings that it now proposes to construct,³⁶ and has previously proposed trenchless crossings for

32 Ex. 8 at 3.21-2 and -4.

33 Ex. 6, application at 4; Ex. 18.

34 Ex. 1, att. C at 2-4.

35 Ex. 19 at 8-20.

36 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. 20 at 8-10. MVP now admits that trenchless crossings of those rivers is practicable. Ex. 1 at 11.

locations that it today rejects. In November 2020, MVP told FERC that 38 crossings in West Virginia were “well suited for conventional bores,”³⁷ only to abandon that plan and tell the Corps just three months later that conventional bores at those very crossings are impracticable.³⁸ In short, MVP has a demonstrated history of saying whatever it needs to say about alternative crossing methods to gain approval of its preferred methods. Because of MVP’s pattern of such behavior, WVDEP could not simply accept MVP’s statements, but rather had a heightened obligation to verify MVP’s assertions 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) (vacating agency decision because of its reliance on untrustworthy information).

But WVDEP utterly failed to address MVP’s lack of credibility about crossing-method feasibility. That renders the Certification arbitrary and capricious because WVDEP entirely failed either to address an important aspect of the problem, *U.S.F.S.*, 897 F.3d at 594, or resolve the evidentiary conflict before it, *Friends of Buckingham v. State Air Pollution Control Bd.*, 947 F.3d 68, 87-90 (4th Cir. 2020). It also violated WVDEP’s obligation to respond to significant comments, W. Va.

37 Ex. 21 at 1-2, app. A.

38 Ex. 18 at 1-5 (rejecting trenchless crossings as impracticable for 38 of the 41 proposed trenchless crossings in Appendix A of Ex. 21).

C.S.R. §47-5A-5.1.e, rendering the Certification arbitrary and capricious. *State of S.C. ex rel. Tindal v. Block*, 717 F.2d 874, 886 (4th Cir. 1983).

b. MVP's Crossing Plans Are Inconsistent With The BMP Manual Because MVP Intends To Trench Through Streams With Drainage Areas Greater Than One Square Mile.

One of the BMP Manual's General Design Criteria for Instream BMPs provides that "[t]he drainage area [above the crossing location] should be no greater than one square mile[.]"³⁹ WVDEP entirely failed to evaluate the drainage areas of MVP's crossings. Consequently, WVDEP failed to consider an important aspect of the problem before concluding that MVP's plans are consistent with the BMP Manual. Had it evaluated the drainage areas, it would have recognized that many of MVP's proposed open-cut crossings are at locations where upstream drainage areas exceed one square mile. Accordingly, the Certification is arbitrary and capricious. *Sierra Club*, 897 F.3d at 594.

WVDEP has an online tool available to calculate the drainage area upstream of the crossing locations.⁴⁰ Applying that tool to a small sample of MVP's stream

39 Ex. 8 at 3.21-3.

40 Ex. 22 at 65.

crossings reveals at least nine instances where the upstream drainage area exceeds one square mile.⁴¹

Table 1

Stream Crossing	Latitude	Longitude	Drainage Area
Hungard Creek	37.692868	-80.734247	11.433 mi ²
Buffalo Creek	37.863065	-80.757391	3.688 mi ²
Hominy Creek	38.178889	-80.72979	48.193 mi ²
Lost Run	38.483002	-80.556464	2.781 mi ²
Right Fork Holly Creek	38.648021	-80.489704	56.589 mi ²
Falls Run	38.778955	-80.525862	8.025 mi ²
Knawl Creek	38.823595	-80.525342	3.777 mi ²
Left Fork Knawl Creek	38.824034	-80.524988	2.640 mi ²
Oil Creek	38.893014	-80.556192	7.208 mi ²

Nonetheless, WVDEP did not even attempt to determine the upstream drainage areas before it concluded that MVP's proposed crossings were consistent with the BMP Manual and its restriction on drainage area size. As a result, the Certification is arbitrary and capricious. *Sierra Club*, 897 F.3d at 594.

⁴¹ Table 1 is based on Exhibit 23, which consists of screenshots of the results generated by inputting the coordinates of MVP's proposed crossings into WVDEP's drainage area tool. Petitioners request that the Court take judicial notice of the results of the application of WVDEP's tool to the streams in Table 1 because "geographical information is especially appropriate for judicial notice." *U.S. v. Johnson*, 726 F.2d 1018, 1021 (4th Cir. 1984); *see also Hoyt v. Russell*, 117 U.S. 401, 404-05 (1886) (holding judicial notice appropriate even where "calculations and inquiries on the subject [are] necessary").

c. MVP's Open-Cut Crossings Are Inconsistent With The BMP Manual Because They Are Neither Restricted To Low-Flow Periods, Nor Do They Implement Appropriate Structural Measures During High-Flow Periods.

Among the BMP Manual's minimum standards for instream construction is

[a]ll instream construction should be scheduled to occur during the low flow periods, typically during the summer and fall months. If construction must be accomplished during higher flows, the work area must be isolated from the stream by a structural measure such as a non-erodible cofferdam or sheet piling.⁴²

MVP's open-cut crossings are inconsistent with that requirement.

WVDEP knew MVP has no intention of restricting its instream construction to low-flow periods in summer and fall. In its §404 permit application, MVP announced "plans to complete all USACE-regulated activities before March 2022."⁴³ And MVP has publicly stated its intention to "ramp up" instream construction in February 2022 to complete the Pipeline by summer 2022.⁴⁴ Accordingly, WVDEP's lynchpin conclusion that MVP's plans are consistent with the BMP Manual runs counter to the evidence and, hence, is arbitrary and capricious. *Sierra Club*, 897 F.3d at 594.

⁴² Ex. 8 at 3.21-26.

⁴³ Ex. 13 at 2.

⁴⁴ Ex. 2 at 7.

That is so notwithstanding the Certification’s “Condition 1.” That condition first purports to restrict instream construction to low-flow periods, but then opens a gaping loophole absent from the BMP Manual by limiting the restriction to “when practical.”⁴⁵ Such an exception is inconsistent with the BMP Manual that WVDEP insists will ensure compliance with water quality standards. Moreover, Condition 1 fails to require “structural measures such as a non-erodible cofferdam or sheet piling” during high-flow periods.⁴⁶ Accordingly, Condition 1 cannot salvage WVDEP’s arbitrary and capricious conclusion that MVP’s open-cut crossings are consistent with the BMP Manual.

3. WVDEP Arbitrarily and Capriciously Refused to Conduct Site-Specific Antidegradation Reviews.

In addition to relying on MVP’s instream BMPs to conclude that water quality standards would be protected generally,⁴⁷ WVDEP also relied on its mistaken BMP conclusions to justify its refusal to conduct individual antidegradation reviews for each affected waterbody.⁴⁸ As WVDEP concedes, the State’s antidegradation policy “generally contemplates the collection of baseline water quality data” and

45 Ex. 1, att. A at 1.

46 Compare *id.* with Ex. 8 at 3.21-26.

47 Ex. 1 at 2-3, 7, 11, att. C at 13, 15, 23-24.

48 *Id.*, att. C at 3, 10, 13.

predictions of the impacts of discharges on those baselines.⁴⁹ For example, antidegradation review of Tier 2 waters requires a site-specific review of baseline conditions and a determination of the additional pollution that would result from proposed activities. W. Va. C.S.R. §60-5-5.6.c; *Horinko*, 279 F.Supp.2d at 761-62 (holding that West Virginia’s antidegradation review must be “location-specific”); *id.* at 752 (“[I]t is generally accepted that a new or increased volume of discharge will result in the lowering of water quality for a Tier [2] water body[.]” (quoting EPA)). WVDEP refused to conduct that review, however, based on its erroneous BMP conclusions. Consequently, the Certification is arbitrary and capricious.

⁴⁹ *Id.*, att. C at 11. WVDEP also rejected individualized review because (1) “that type of analysis is not prescribed or appropriate for ... discharges of ‘dredged or fill’ material,” (2) baseline data “would not provide the information necessary to evaluate” impacts of future discharges, and (3) “there is no required or readily performable method for predicting the effect of ... filling activities” on the streams at issue. *Id.* Those three explanations are contrary to law and contradicted by evidence.

First, EPA has determined that “States ... must apply antidegradation requirements to ... any activity that requires a permit or water quality certification ... such as ... CWA §404 dredge and fill permits[.]” 63 Fed. Reg. 36,742, 36,780 (July 7, 1998).

Second, baseline data (including, *inter alia*, benthic assessments) were necessary to avoid failing to consider important aspects of the problem. Ex. 19 at 60-62, 82-86; *cf. O.V.E.C. v. U.S.A.C.O.E.*, 716 F.3d 119, 124-27 (4th Cir. 2013).

Third, as WVDEP knows, it is possible to predict turbidity and sediment loads from instream construction, as evidenced by MVP’s modeling of sedimentation effects of its previously-proposed open-cut crossings of the Elk, Gauley, and Greenbrier Rivers. Ex. 24 at 4-139.

B. WVDEP Arbitrarily and Capriciously Dismissed MVP's History of Noncompliance.

Agency action is arbitrary and capricious if the agency applies an incorrect legal standard, *Gen. Land Off. v. U.S.D.O.I.*, 947 F.3d 309, 320 (5th Cir. 2020), or ignores relevant factors. *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974). Moreover, an applicant's history of noncompliance must be considered by a reviewing agency, and it is arbitrary and capricious for an agency to predict compliance in the face of such a history. *Animal Legal Def. Fund v. Purdue*, 872 F.3d 602, 620 (D.C. Cir. 2017). Indeed, EPA—which WVDEP purports to “mirror”⁵⁰—will deny permit applications based on past noncompliance. 40 C.F.R. §122.64(a)(1). Here, WVDEP violated those principles and applied the wrong legal standard by focusing on the *severity* of MVP's water quality standards violations, rather than their existence.

WVDEP has cited MVP for more than twenty violations of water quality standards in approximately fifty different streams.⁵¹ And at least one of those violations resulted from a Corps-regulated stream crossing completed before this Court's vacatur of MVP's nationwide permit authorizations.⁵² In the Certification,

⁵⁰ Ex. 1, att. C at 14.

⁵¹ Ex. 25 at 4, tbl. 1.

⁵² MVP constructed a pipeline right-of-way crossing through stream S-IJ64 (an unnamed tributary of Little Stony Creek in Monroe County), and its attendant right-of-way bridge, in May 2018. Ex. 26.

however, WVDEP did not contest that MVP has caused water quality standards violations, indeed conceding that “there were several ... violations.”⁵³ Instead, WVDEP dismissed the violations as “minor”⁵⁴ and expected on a project of this nature.⁵⁵ In WVDEP’s view, the violations were tolerable because “none alleged any significant adverse impacts to the aquatic ecosystem.”⁵⁶

But that is not the relevant standard. To issue the Certification, WVDEP had to be reasonably assured that the proposed activities *will not violate* water quality standards. 40 C.F.R. §121.2(a)(3). That is, WVDEP had to be reasonably assured that there will be *no* water quality standards violations. *Id.*; *see also* 161 FERC ¶ 61,043, ¶187 (Oct. 13, 2017) (stating in MVP’s NGA Certificate Order that FERC expects “strict compliance” with state water quality requirements). A determination that only *minor* or *insignificant* (in WVDEP’s view) water quality standards

In a May 9, 2018 inspection, a WVDEP inspector documented “conditions not allowable” (*i.e.*, a narrative water quality standards violation) resulting from MVP’s neglect of “[b]ridge matting [that] failed contributing to sediment laden water” at the right-of-way crossing at S-IJ64. *Id.* The inspector concluded that the resulting sediment deposits caused the “conditions not allowable.” *Id.*

53 Ex. 1 at 9.

54 *Id.*

55 *Id.*, att. C at 16.

56 *Id.*

violations will occur cannot suffice, leaving WVDEP's Certification arbitrary and capricious. *Sierra Club*, 897 F.3d at 604-05.

Given MVP's demonstrated history of water quality standards violations⁵⁷ and improper implementation of erosion and sediment control measures,⁵⁸ WVDEP could not rationally be assured of compliance with water quality standards or assume that MVP will flawlessly construct hundreds of open-cut crossings. 40 C.F.R. §121.2(a)(3); *cf. Animal Legal Def. Fund*, 872 F.3d at 620. Rather, WVDEP should have (and does)⁵⁹ expect multiple violations.

Beyond WVDEP's application of the wrong legal standard, its acceptance of MVP's history of noncompliance is also arbitrary and capricious because it renders its explanation so implausible it cannot be the product of agency expertise. *Def's. of Wildlife v. U.S.D.O.I.*, 931 F.3d 339, 365 (4th Cir. 2019). WVDEP's expectation of water quality standards violations because of "the size of the project" is wholly inconsistent with its conclusion that compliance with water quality standards is reasonably assured. And WVDEP's expectation of noncompliant implementation and maintenance of BMPs on a large pipeline project is wholly inconsistent with its

⁵⁷ Ex. 25 at 4, tbl. 1.

⁵⁸ WVDEP has entered two administrative consent orders with Mountain Valley, assessing hundreds of thousands of dollars in fines for violations of water quality protection requirements. Ex. 27; Ex. 28.

⁵⁹ Ex. 1, att. C at 16.

explanation that MVP's anticipated compliance with BMPs will prevent water quality standards violations. Those inconsistencies alone render the Certification arbitrary and capricious. Accordingly, Petitioners are likely to succeed on the merits.

II. Petitioners Will Suffer Irreparable Harm.

Absent a stay, MVP will complete its stream crossings before this petition's resolution. MVP's operator announced in November 2021 that MVP intends to "ramp up" construction in February 2022 to complete the Pipeline by summer 2022.⁶⁰ Those circumstances justify a stay pending review.

"Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable." *Amoco Production Co. v. Village of Gambell, AK*, 480 U.S. 531, 545 (1987). This Court has stated "[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.

Petitioners' members have interests in streams throughout West Virginia that MVP's plans threaten with irreparable harm.

Thomas Bouldin lives along Hungard Creek, which forms the western boundary of his property. Ex. 29, ¶6. MVP intends to construct thirteen open-cut stream crossings in the Hungard Creek watershed. *Id.*, ¶16. Those crossings are all

⁶⁰ Ex. 2 at 7.

upstream of his property, and his reach of Hungard Creek will suffer the cumulative impacts. *Id.*, ¶18. Multiple crossings in a watershed will cause permanent and irreparable harm to Hungard Creek. *Id.*, ¶¶19-22; Ex. 30 at 407.

Suzanne Vance owns a farm along Oil Creek, and Second Big Run (a tributary of Oil Creek) flows across her property. Ex. 31, ¶4. MVP has already built stream crossings on Ms. Vance's property, resulting in environmental harm. *Id.*, ¶¶7-14. MVP plans to construct two new open-cut crossings near where Second Big Run flows onto her property. *Id.*, ¶17. Those crossings threaten irreparable harm to Ms. Vance and her stream. *Id.*, ¶19.

Paula and Herman Mann will also suffer irreparable harm from MVP's pipeline construction. MVP's plans to trench through the Narrows of Hans Creek and Indian Creek will irreparably harm those streams, both of which the Manns frequently use and have used for most of their lives. Ex. 32, ¶¶10-15, 20-23; Ex. 33, ¶¶9-15. Moreover, the Pipeline's proximity to Ms. Mann's lifelong home is a constant worry; if the Pipeline becomes operational, the Manns will likely move from their farm because of threats the Pipeline poses to their lives and lifestyle. Ex. 32, ¶9; Ex. 33, ¶8. Such displacement is permanent and irreparable.

III. Preliminary Relief Will Not Substantially Harm WVDEP Or MVP.

Equitable relief would pose only minimal injury to WVDEP. Although an agency has interests in defending its permits, "the effect of an injunction on these

interests seems rather inconsequential.” *O.V.E.C. 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.” *O.V.E.C. 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 11, 2022

Respectfully submitted,

Respectfully submitted,

/s/ **DEREK O. TEANEY**

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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 5,198 words. This brief has been prepared in a proportionally spaced typeface using Microsoft Word for Mac 2019 in Times New Roman, 14 point.

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CERTIFICATE OF SERVICE

I hereby certify that, on January 11, 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.

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PETITIONERS' EXHIBIT LIST

EXHIBIT NO.	DESCRIPTION
1	December 30, 2021 West Virginia State §401 Water Quality Certification Number WQC-21-005.
2	Equitrans Midstream Corporation (ETRN) Q3 2021 Earnings Call Transcript (Nov. 2, 2021)
3	Letter from Derek Teaney, Counsel for Petitioners, to Jason E. Wandling, Counsel for Respondents, Re: Request for Administrative Stay Pending Judicial Review of West Virginia §401 Water Quality Certification No. WQC-21-005 for Mountain Valley Pipeline, LLC (Jan. 4, 2024)
4	Letter from Todd Normane, Deputy General Counsel, Mountain Valley Pipeline, LLC, to Service List Re: Mountain Valley Pipeline Project (Jan. 26, 2021)
5	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)
6	Letter from Todd Normane, Deputy General Counsel, Mountain Valley Pipeline, LLC, to Brian Bridgewater, 401 Program Manager, W. Va. Dept. of Env'tl. Prot., Re: Water Quality Certification Request (Mar. 4, 2021)
7	State of West Virginia, Dept. of Env'tl. Prot., Water Quality State 401 Certification Application Instructions
8	Excerpts from W. Va. Dept. of Env'tl. Prot., Erosion and Sediment Control Best Management Practice Manual (2006, rev. 2016)
9	U.S. Env'tl. Prot. Agency, 2012 Construction General Permit (CGP) – Fact Sheet
10	U.S. Env'tl. Prot. Agency, 2017 Construction General Permit (CGP) – Fact Sheet (as modified)
11	Scott Jordan, EcoTec, Inc., N.P.D.E.S. Construction Stormwater Pollution Prevention Plan ("SWPPP"): The Village at Bailey's Pond, Route 150 & Summit Ave., Amesbury, Massachusetts (2017)

12	Normandeau Assocs., Inc. Stormwater Pollution Prevention Plan: Eversource Energy, Seacoast Reliability Project, Transmission Line F107 Installation, Madbury, Durham, Newington and Portsmouth, NH (2019)
13	Tetra Tech, Inc., Mountain Valley Pipeline Project: Individual Permit Application (Feb. 2021)
14	U.S. Env'tl. Prot. Agency, 2012 Construction General Permit (CGP), Appendix G – Buffer Guidance
15	U.S. Env'tl. Prot. Agency, 2017 Construction General Permit (CGP), Appendix G – Buffer Requirements
16	S.M. Reid, et al., <i>Sediment Entrainment During Pipeline Water Crossing Construction: Predictive Models & Crossing Method Comparison</i> , 3 J. ENVIRON. ENG. SCI 82 (2004)
17	Reid et al., <i>Overview of the River and Stream Crossings Study</i> , in Proceedings of the Symposium at the 8th International Symposium of Environmental Concerns in Rights-of-Way Management 711 (Elsevier 2008).
18	Table 15: Crossing Method Determination Summary, Individual Permit Application, Mountain Valley Pipeline Project (Feb. 2021)
19	Letter from Derek O. Teaney, Appalachian Mountain Advocates, Inc., to Brian L. Bridgewater, 401 WQC Program Manager, W. Va. Dept. of Env'tl. Prot., Re: Public Comments on Mountain Valley Pipeline, LLC's Application for a State Water Quality Certification Pursuant to Section 401 of the Clean Water Act (33 U.S.C. 1341) (June 22, 2021)
20	Mountain Valley Pipeline, LLC, Waterbody Crossing Review (Apr. 2016)
21	Mountain Valley Pipeline, LLC, Supplemental Env'tl. Report for Proposed Conventional Bore Waterbody and Wetland Crossings from Mileposts 0 to 77 (Nov. 2020)
22	W. Va. Dept. of Env'tl. Prot., Responsiveness Survey (Nov. 1, 2017)
23	Screenshots from the W. Va. Dept. of Env'tl. Prot.'s Online 7Q10 Flow Estimate Model

24	Excerpts from Fed. Energy Regul. Comm'n, Mountain Valley Project & Equitrans Expansion Project: Final Env'tl. Impact Statement (June 2017)
25	Letter from Angie Rosser, Executive Director, West Virginia Rivers Coalition et al., to W. Va. Dept. of Env'tl. Prot., Re: Section 401 Water Quality Certification for Mountain Valley Pipeline (June 22, 2021)
26	W. Va. Dept. of Env'tl. Prot., Inspection Report (May 9, 2018)
27	Administrative Consent Order No. 9925 (Dec. 17, 2020)
28	Administrative Consent Order No. 8951 (Apr. 19, 2019)
29	Declaration of Thomas T. Bouldin
30	Lévesque & Dubé, <i>Review of the Effects of In-stream Pipeline Crossing Construction on Aquatic Ecosystems and Examination of Canadian Methodologies for Impact Assessment</i> , 132 ENVTL. MONITORING & ASSESSMENT 395 (2007)
31	Declaration of Suzanne W. Vance
32	Declaration of Paula Mann
33	Declaration of Herman Mann