

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

_____)	
Mountain Valley Pipeline, LLC)	CP16-10-000
Equitrans, L.P.)	CP16-13-000
_____)	

**REQUEST BY THE NATURE CONSERVANCY FOR REHEARING
OF ORDER ISSUING CERTIFICATES AND STAY**

Pursuant to 18 C.F.R. § 385.713, The Nature Conservancy (“TNC”) hereby requests rehearing of the Commission’s “Order Issuing Certificates and Granting Abandonment Authority” (October 13, 2017), and for a stay of the effectiveness of that order.¹ TNC addresses the Commission’s treatment of the Woltz conservation easement located between MPs 239.7 and 241 in Roanoke County, Virginia.

**I.
PETITIONER’S INTERESTS**

TNC is a non-profit corporation whose mission is to “conserve the lands and waters on which all life depends.” We work in all states and more than 35 nations. Collaborating with public and private partners, TNC has conserved more than 15 million acres in the United States and 118 million acres globally.² Pursuant to this mission, TNC is undertaking a Central Appalachians Whole System Project to protect large and interconnected habitats across six states, ranging from Pennsylvania to Tennessee, in the face of regional development and climate change trends. The deciduous forest and fish and wildlife assemblages there rank among the most diverse in the nation.³ Relevant to this proceeding, and since the mid-1980s, TNC has acquired fee title and conservation easements in ten tracts comprising 5,489 acres in the Bottom Creek watershed in Montgomery and Roanoke Counties, Virginia. TNC holds these property interests (including the Woltz conservation easement, which is the focus of this rehearing) to protect the upland and riparian forests, that safeguard the creek’s water quality. Virginia Department of Environmental Quality (“VDEQ”) has designated a downstream reach of Bottom

¹ eLibrary no. 20171013-4002.

² TNC, “Comments on Draft Environmental Impact Statement,” eLibrary no.20161219-5368 (December 19, 2016) (“DEIS Comments”), p. 1.

³ TNC, “Response to Notice of Intent to Prepare an Environmental Impact Statement for the Mountain Valley Pipeline and Request for Comments on Environmental Issues,” eLibrary no. 20150617-5045 (June 16, 2015) (“Scoping Comments”), p. 2.

Creek as an Exceptional State Water under authority of Virginia law and the federal Clean Water Act. The pipeline, as approved by the Certificate Order, would bisect the Woltz conservation easement and cross the headwaters of Bottom Creek within this easement.⁴ We timely intervened and have actively participated in this proceeding to protect these values.⁵

II. STATEMENT OF FACTS

The pipeline route, as proposed in the October 23, 2015 application, would cross the Woltz conservation easement, including the headwaters of Bottom Creek. In our scoping comments, TNC requested consideration of alternative routes that avoid all of TNC's preserves and conservation easements, as well as implementation of other mitigation measures.⁶ In September 2016, the DEIS stated that the pipeline would cross Bottom Creek 3 miles above the Exceptional State Water but did not analyze specific impacts to water quality resulting from clearing of upland or riparian forests and the crossing of the creek headwaters on the Woltz conservation easement.⁷ In our DEIS comments, TNC showed that the pipeline crossing could impair the water quality of Bottom Creek and would violate easement terms.⁸ On January 26, 2017, Staff directed Mountain Valley to assess a Poor Mountain Variation, which would move the route eastward of this easement between MPs 238 and 242.⁹ In April 2017, Mountain Valley responded to this Environmental Information Request.¹⁰ This submittal included what the applicant called "crossing plans," again showing the proposed route across Woltz conservation easement.¹¹ In June 2017, the FEIS recommended this proposed route, finding that the Poor Mountain Variation "does not offer a significant environmental advantage" due to impacts on

⁴ FERC, "Mountain Valley Project and Equitrans Expansion Project Final Environmental Impact Statement," eLibrary no. 20170623-4000 (June 2017) ("FEIS"), pp. 4-170 – 4-171.

⁵ TNC, "Motion to Intervene of The Nature Conservancy Under CP16-10-000," eLibrary no. 20151125-5143 (November 25, 2015).

⁶ TNC, Scoping Comments, p. 6.

⁷ Office of Energy Projects, "Mountain Valley Project and Equitrans Expansion Project Draft Environmental Impact Statement," eLibrary 20160916-4001 (September 2016) ("DEIS"), pp. 4-90, 4-173, 4-180, 4-188.

⁸ TNC, DEIS Comments, pp. 2-3

⁹ FEIS, pp. 3-76 – 3-77.

¹⁰ Mountain Valley, "Responses to FERC Environmental Information Request Dated March 31, 2016," eLibrary no. 20160421-5195 (April 21, 2016) ("April 21, 2016 EIR Response"), pp. 158-159.

¹¹ *Id.*, "Attachment DR2 RR8-2," eLibrary no. 20160422-5012 (April 21, 2016).

lands other than TNC's.¹² Staff also considered Alternative 682 for this segment of the pipeline route, finding that it is "not constructible."¹³

In the Certificate Order's Environmental Condition 32, the Commission requires Mountain Valley to document that it provided the "TNC Property Crossing Plan" for our review and comment prior to construction.¹⁴ On November 1, 2017, Mountain Valley filed its Implementation Plan pursuant to Environmental Condition 6.¹⁵ The plan includes Attachment IP-32, which compiles July 12, 2017 emails between NextEra and TNC focused exclusively on GIS shapefiles of the proposed route. The plan also includes a table showing that Environmental Condition 32 is "complete."¹⁶ TNC has not received any communication from Mountain Valley proposing mitigation measures to avoid, minimize, or mitigate impacts on the Woltz conservation easement.

III. STATEMENT OF ISSUES

Issue 1. The EIS did not take a hard look at adverse impacts on Bottom Creek or conflicts with the Woltz conservation easement, as required by National Environmental Policy Act ("NEPA") section 102(2)(C).

Constitution

Constitution of the Commonwealth of Virginia, Article XI § 1

Statutes

42 U.S.C. § 4332(C)

Va. Code §§ 10.1-1800 *et seq.*

Va. Code §§ 10.1-1009 *et seq.*

Va. Code §§ 10.1-1700 *et seq.*

Va. Code §§ 58.1-510 *et seq.*

¹² FEIS, pp. 3-76 – 3-77, 4-319 – 4-320.

¹³ *Id.*, pp. 3-80 – 3-83.

¹⁴ Certificate Order, Appendix C, p. 10.

¹⁵ Mountain Valley, "Implementation Plan (Public)," eLibrary no. 20171101-5042 (Nov. 1, 2017).

¹⁶ *Id.*, "Status of Environmental Conditions – October 31, 2017," p. 2.

Rules

40 C.F.R. § 1502.16(a), (b), (c)

Cases

Marble Mountain Audubon Society v. Rice, 914 F.2d 179 (9th Cir. 1990)

Monroe County Conservation Council, Inc. v. Volpe, 472 F.2d 693 (2nd Cir. 1972)

National Audubon Society v. U.S. Department of Navy, 422 F.3d 174 (4th Cir. 2005)

Natural Resources Defense Council v. Hodel, 865 F.2d 288 (D.C. Cir. 1988)

Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989)

Silva v. Lynn, 482 F.2d 1282 (1st Cir. 1973)

Issue 2. The EIS did not take a hard look at site-specific measures to avoid, minimize, mitigate, or compensate for the pipeline’s adverse impacts on Bottom Creek, as required by NEPA section 102(2)(C).

Statutes

42 U.S.C. § 4332(C)

Rules

18 CFR § 380.12(e)

18 C.F.R. § 380.15(a), (b)

40 C.F.R. § 1500.2(f)

40 C.F.R. § 1501.6

40 C.F.R. § 1502.14(f)

40 C.F.R. § 1508.20

Policy

FERC, “Statement of Policy: Certification of New Interstate Natural Gas Pipelines” (1999), Docket No. PL99-3-000

Cases

Coalition for Canyon Preservation v. Bowers, 632 F.2d 774 (9th Cir. 1980)

Ilio'ulaokalani Coalition v. Rumsfeld, 464 F.3d 1083 (9th Cir. 2006)

Methow Valley Citizens Council v. Regional Forester, 833 F.2d 810 (9th Cir. 1987), *rev'd on other grounds*, 490 U.S. 332 (1989)

Treatise

Daniel R. Mandelker, *NEPA Law and Litigation* (Thompson West 2003)

Issue 3. The Commission did not consider any site-specific measures to protect the water quality of Bottom Creek, as required by the Clean Water Act.

Statutes

33 U.S.C. § 1313(c)

Rules

40 C.F.R. § 131.12(a)

40 C.F.R. § 1502.16(c)

9 VAC 25-260-30.A.3

Issue 4. The Commission did not respond to TNC's comments regarding violation of the Woltz conservation easement, as required by NEPA and Administrative Procedure Act, sections 555(e), 557(c), and 706(2).

Statutes

5 U.S.C. § 555(e)

5 U.S.C. § 557(c)

5 U.S.C. § 706(2)(A), (E)

*TNC, Rehearing Request
Mountain Valley Pipeline et al., CP16-10-000 and CP16-13-000*

Rules

40 C.F.R. § 1503.4(a)

Cases

Burlington Truck Lines v. U.S., 371 U.S. 156 (1962)

Butte County v. Hogen, 613 F.3d 190 (D.C. Cir. 2010)

Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company, 463 U.S. 29 (1983)

Roelofs v. Secretary of Air Force, 628 F.2d 594 (D.C. Cir. 1980)

IV. **ARGUMENT**

A. THE FEIS DID NOT TAKE A HARD LOOK AT THE ADVERSE IMPACTS ON BOTTOM CREEK OR CONFLICTS WITH THE WOLTZ CONSERVATION EASEMENT, AS REQUIRED BY THE NATIONAL ENVIRONMENTAL POLICY ACT SECTION 102(2)(C).

The FEIS found that the environmental impacts of the Poor Mountain Variation are greater than the impacts of the proposed route between MP 238 and 242.¹⁷ The finding is based on comparative acreage by land type and use. The FEIS did not analyze specific impacts on the water quality and upland forests of Bottom Creek crossed by the pipeline route. It acknowledged that the pipeline would cross the creek 3 miles upstream of the Exceptional State Water but incorrectly located that crossing at MP 245.1.¹⁸ As shown in Attachment 1,¹⁹ that location is on Mill Creek. The FEIS did not correctly locate the two crossings of Bottom Creek: (1) within the Woltz conservation easement at MP 240.8 and (2) downstream at MP 242.5. The FEIS did not

¹⁷ FEIS, Table 3.5.1-12.

¹⁸ *Id.* at 4-121.

¹⁹ Prepared by Bruce Conrad Mahr, Conservation Law Center (November 10, 2017), using as sources: FEIS; Mountain Valley, April 21, 2016 EIR Response; VDEQ, *Exceptional State Waters (Tier III)*, available at [http://www.deq.virginia.gov/Programs/Water/WaterQualityInformationTMDLs/WaterQualityStandards/ExceptionalStateWaters\(TierIII\).aspx](http://www.deq.virginia.gov/Programs/Water/WaterQualityInformationTMDLs/WaterQualityStandards/ExceptionalStateWaters(TierIII).aspx) (last accessed Nov. 13, 2017); and VDEQ, *Virginia Water Quality Assessment: 305(b)/(303(d) Integrated Report (2016)*, available at http://www.deq.virginia.gov/Portals/0/DEQ/Water/WaterQualityAssessments/IntegratedReport/2016/ir16_Integrated_Report_Full_Draft.pdf (last accessed Nov. 13, 2017).

contain any site-specific analysis of the impacts on the water quality, upland forests, or fisheries, of Bottom Creek at these locations. For example, while the FEIS categorically described potential impacts on native fishes (including brook trout, Roanoke logperch, and orangefin madtom),²⁰ Staff did not acknowledge that brook trout are present in the headwaters of Bottom Creek within the Woltz easement, and each of these fish species are present downstream,²¹ or provide a site-specific analysis of potential impacts on turbidity, water temperature, or other water quality parameters resulting from creek crossings or from construction, excavation, and clearing of upland and riparian forest adjacent to this creek.²²

This categorical approach to impact analysis is inconsistent with the Commission's rules for environmental review of Natural Gas Act applications,²³ as well as NEPA section 102(2)(C), requiring a "detailed statement" of the environmental impacts under each alternative, including specifically "any adverse environmental impacts which cannot be avoided should the proposal be implemented . . ."²⁴ Implementing rules require discussion of direct and indirect impacts of each alternative, to form the "scientific and analytic basis for the comparisons" that are the essential

²⁰ FEIS, p. 3-47, 4-213 4-253.

²¹ TNC, DEIS Comments, p. 3, listed Roanoke logperch and orangefin madtom as two of the rare native fish species present in Bottom Creek. These comments further show that this creek has extraordinary biodiversity, including 10% of the fish species endemic to Virginia.

²² For example, the Certificate Order does not directly address the request by Roanoke and Giles County for hydrologic analysis of sedimentation for the entire MVP Project route in order to evaluate project impacts on sedimentation. It does not explain why hydrological sedimentation analysis was only required for the Jefferson National Forest. The U.S. Environmental Protection Agency recommended that "the same parameters used for streams and waterbodies within the Jefferson National Forest be used for those resources outside of the Forest." See U.S. Environmental Protection Agency, "Mountain Valley Project and Equitrans Expansion Project Draft Environmental Impact Statement; Pennsylvania, West Virginia, and Virginia," eLibrary no. 20161229-0033 (December 20, 2016), Enc. 1, pp. 9-10. Dr. Pamela Dodds also provided her expert opinion that:

"the Revised Universal Soil Loss Equation, has been used to quantify the amount of sediment that will be released during the proposed construction in the National Forest, but has not been applied in any other areas along the proposed MVP construction corridor. Calculations of increased stormwater discharge and of sediment released during construction are critical to an evaluation of increased sediment to streams from Best Management Practices structures, vertical stream bed scour, and downstream stream bank erosion."

Preserve Bent Mountain, "Hydrogeological Assessment of Proposed Mountain Valley Pipeline Construction Impacts to Mill Creek, Bent Mountain Area, Roanoke County, Virginia" eLibrary no. 20170622-5028 (June 22, 2017), pp. 41-42.

²³ 18 C.F.R. § 380.12. For example, Section 380.12(b)(6) provides that the applicant's impact analysis may be specific to mileposts, not just general to the project vicinity; and Section 380.12(e)(4) provides for site-specific surveys of significant habitats.

²⁴ 42 U.S.C. § 4332(C)(i) – (ii).

purpose of an EIS.²⁵ NEPA requires a “hard look” at specific impacts, not just a categorical treatment, in order to provide a basis for balancing costs and benefits in determining whether the proposal is in the public interest.²⁶

Further, the FEIS acknowledged that the route would cross the Woltz conservation easement and would, according to TNC, violate specific easement terms.²⁷ However, it did not address the substance of these alleged violations,²⁸ merely requiring Mountain Valley to consult with TNC on a crossing plan.²⁹

The Woltz conservation easement advances public policy. The state Constitution establishes a “policy to protect its atmosphere, lands, and waters from pollution, impairment, or destruction, for the benefit, enjoyment and general welfare of the people...”³⁰ This policy is implemented through conservation easements, as well as other mechanisms, authorized by the Open Space Land Act,³¹ the law establishing the Virginia Outdoors Foundation,³² the Virginia Conservation Easement Act,³³ and the Lands Conservation Incentives Act.³⁴ Together, these statutes establish mechanisms, incentives and institutions to ensure that conservation values on specific properties will be protected in perpetuity. The FEIS did not acknowledge conflicts with this public policy, as expressed in the Woltz conservation easement. This omission violates the

²⁵ 40 C.F.R. § 1502.16(a)-(b).

²⁶ *National Audubon Society v. U.S. Department of Navy*, 422 F.3d 174, 187 (4th Cir. 2005), citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); *Natural Resources Defense Council v. Hodel*, 865 F.2d 288, 295-6 (D.C. Cir. 1988); *Marble Mountain Audubon Society v. Rice*, 914 F.2d 179, 182 (9th Cir. 1990); *Silva v. Lynn*, 482 F.2d 1282, 1285 (1st Cir. 1973); *Monroe County Conservation Council, Inc. v. Volpe*, 472 F.2d 693, 697-8 (2nd Cir. 1972). A “hard look” means more than a perfunctory listing of impacts. *Natural Resources Defense Council*, 865 F.2d at 299.

²⁷ FEIS, p. 185.

²⁸ TNC, DEIS Comments, pp. 3-4. The crossing would violate Term 2.1 (no construction), 2.2 (no excavation), 2.3 (no cutting), and 2.6 (no pollution).

²⁹ FEIS, p. 185; *see also* FEIS Appendix AA, responses to CO35. As stated above, Mountain Valley now claims to have completed its consultation with TNC merely by providing shapefiles showing the pipeline route through the Woltz conservation easement.

³⁰ Constitution of the Commonwealth of Virginia, Article XI § 1.

³¹ Va. Code §§ 10.1-1700 *et seq.*

³² Va. Code §§ 10.1-1800 *et seq.*

³³ Va. Code §§ 10.1-1009 *et seq.*

³⁴ Va. Code §§ 58.1-510 *et seq.*

Commission’s NEPA duty to address “potential conflicts between the proposed action and the objectives of ... State ... land use plans, policies, and controls for the area concerned.”³⁵

B. THE FEIS DID NOT TAKE A HARD LOOK AT SITE-SPECIFIC MEASURES TO AVOID, MINIMIZE, MITIGATE, OR COMPENSATE FOR ADVERSE IMPACTS ON BOTTOM CREEK, AS REQUIRED BY NEPA SECTION 102(2)(C).

The FEIS described standard mitigation measures for watercourse crossings,³⁶ and the Certificate Order, through its Environmental Conditions, now requires them.³⁷ The FEIS did not state any analysis to show the effectiveness of these measures to avoid or minimize impacts on water quality, including sedimentation or increases in water temperature. Staff could have consulted with U.S. Environmental Protection Agency, which is a cooperating agency, on such analysis.³⁸

Further, other than considering alternative routes (Poor Mountain Variation and Alternative 682),³⁹ the FEIS did not consider any mitigation measures specific to the Woltz conservation easement. While requiring consultation on a TNC Crossing Plan, the Certificate Order does not provide any standards or other guidance as to substantive content.⁴⁰ The order does not provide any remedy if TNC considers the crossing plan to be inadequate. Mountain Valley now claims to have satisfied this requirement merely by providing shapefiles delineating the proposed route.⁴¹

³⁵ 40 C.F.R. § 1502.16(c).

³⁶ FEIS, pp. 2-42 – 2-44 (watercourse crossings).

³⁷ *See* Environmental Condition 6.

³⁸ 40 C.F.R. § 1501.6 establishes the procedures for cooperation between lead and cooperating agencies in preparing an environmental impact statement.

“(a) The lead agency shall:

(1) Request the participation of each cooperating agency in the NEPA process at the earliest possible time.

(2) Use the environmental analysis and proposals of cooperating agencies with jurisdiction by law or special expertise, to the maximum extent possible consistent with its responsibility as lead agency.”

³⁹ FEIS, pp. 3-76 – 3-77.

⁴⁰ Environmental Condition 32.

⁴¹ Mountain Valley, Implementation Plan, “Status of Environmental Conditions – October 31, 2017,” p. 2.

By limiting analysis of mitigation to standard measures and alternative routes, the Commission did not comply with its duty to consider and use "... all practicable means, consistent with the requirements of the Act and other essential considerations of national policy, to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of their actions upon the quality of the human environment."⁴² The Commission did not consider other mitigation types as required by the Council on Environmental Quality in its mitigation hierarchy:

- “(a) Avoiding the impact altogether by not taking a certain action or parts of an action.
- (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.
- (c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.
- (d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.
- (e) Compensating for the impact by replacing or providing substitute resources or environments.”⁴³

In its generalized treatment of the Woltz conservation easement, the Commission did not comply with its own NEPA rules, which also require site-specific mitigation:

- “(a) *Avoidance or minimization of effects.* The siting, construction, and maintenance of facilities shall be undertaken in a way that avoids or minimizes effects on scenic, historic, wildlife, and recreational values.
- (b) *Landowner consideration.* The desires of landowners should be taken into account in the planning, locating, clearing, and maintenance of rights-of-way and the construction of facilities on their property, so long as the result is consistent with

⁴² 40 C.F.R. § 1500.2(f). Similarly, 40 C.F.R. § 1502.14(f) requires consideration of "... appropriate mitigation measures not already included in the proposed action or alternatives. See *Methow Valley Citizens Council v. Regional Forester*, 833 F.2d 810 (9th Cir. 1987), *rev'd on other grounds*, 490 U.S. 332 (1989); *Coalition for Canyon Preservation v. Bowers*, 632 F.2d 774 (9th Cir. 1980); *Ilio'ulaokalani Coalition v. Rumsfeld*, 464 F.3d 1083 (9th Cir. 2006); Daniel R. Mandelker, *NEPA Law and Litigation* (Thompson West 2003), § 9:18, p. 9-43 (describing alternatives to include not only a "different location for a project, but also project changes that mitigate harmful environmental impacts").

⁴³ 40 C.F.R. § 1508.20.

applicable requirements of law, including laws relating to land-use and any requirements imposed by the Commission.”⁴⁴

C. THE COMMISSION DID NOT CONSIDER ANY SITE-SPECIFIC MEASURE TO PROTECT BOTTOM CREEK’S WATER QUALITY AS REQUIRED BY THE CLEAN WATER ACT.

The proposed route would cross the headwaters of Bottom Creek on the Woltz conservation easement, and the mainstem of Bottom Creek at a downstream location. See Attachments 1 and 2.⁴⁵ VDEQ has designated a reach of this creek (roughly 3 miles downstream of the mainstem crossings) as an Exceptional State Water, relying on delegated authority under the Clean Water Act’s antidegradation policy.⁴⁶ The antidegradation policy prohibits any permanent impairment of an Exceptional State Water.⁴⁷ Further, VDEQ has listed this same reach as impaired under Clean Water Act section 303(d), with respect to water temperature, probably due to natural conditions.⁴⁸ The antidegradation policy also prohibits any further degradation of an impaired water.⁴⁹

⁴⁴ 18 C.F.R. § 380.15(a) – (b). See also 18 CFR § 380.12(e)(7) (requiring applicant to describe site-specific mitigation measures to minimize impacts on fish and wildlife); FERC, “Statement of Policy: Certification of New Interstate Natural Gas Pipelines” (1999), Docket No. PL99-3-000, p. 15 (“As part of its environmental review of pipeline projects, the Commission’s environmental staff works to take ... landowners’ concerns into account, and to mitigate adverse impacts where possible and feasible”).

⁴⁵ Prepared by Chris Bruce, The Nature Conservancy (Nov. 13, 2017), drawing on the same sources listed in footnote 19.

⁴⁶ The Exceptional State Water program implements the state’s antidegradation policy stated at 9 VAC 25-260-30.A.3(b). That policy, which the U.S. Environmental Protection Agency has approved under Clean Water Act section 303(c)(2)(A), 33 U.S.C. § 1313(c)(2)(A), implements the federal counterpart, 40 C.F.R. § 131.12. Subsection (a)(3) of this federal rule states: “Where high quality waters constitute an outstanding National resource, such as waters of National and State parks and wildlife refuges and waters of exceptional recreational or ecological significance, that water quality shall be maintained and protected.”

⁴⁷ 9 VAC 25-260-30.A.3(b) provides: “(1) The quality of waters designated in subdivision 3 c of this subsection shall be maintained and protected to prevent permanent or long-term degradation or impairment. (2) No new, additional, or increased discharge of sewage, industrial wastes or other pollution into waters designated in subdivision 3 c of this subsection shall be allowed.” See also: <http://www.deq.virginia.gov/Portals/0/DEQ/Resources/Factsheets/ExceptionalWaters2010.pdf> (last accessed Nov. 13, 2017).

⁴⁸ VDEQ, *Virginia Water Quality Assessment: 305(b)/303(d) Integrated Report* (2016), pp. 4, Appendix 5-660, available at http://www.deq.virginia.gov/Portals/0/DEQ/Water/WaterQualityAssessments/IntegratedReport/2016/ir16_Integrated_Report_Full_Draft.pdf (last accessed Nov. 13, 2017).

⁴⁹ 40 C.F.R. § 131.12(a).

The FEIS did not find that standard mitigation measures at the crossings of Bottom Creek would be sufficient to prevent any long-term degradation of the downstream designated both as Exceptional State Water and as impaired under the Clean Water Act. This omission violates the Commission’s NEPA duty to address “potential conflicts between the proposed action and the objectives of . . . Federal [and] State . . . land use plans, policies, and controls for the area concerned.”⁵⁰

D. THE COMMISSION DID NOT RESPOND TO TNC’S COMMENTS REGARDING VIOLATION OF THE WOLTZ CONSERVATION EASEMENT, AS REQUIRED BY NEPA AND ADMINISTRATIVE PROCEDURE ACT SECTIONS 555(E), 557, AND 706.

The Commission did not respond to the merits of TNC’s comments that the proposed route would violate terms of the Woltz conservation easement, and that a crossing plan for this tract must include mitigation measures demonstrated to have been effective in similar terrain, climate, and scale.⁵¹ This non-response is at odds with the Commission’s NEPA duty to “ . . . assess and consider comments both individually and collectively,” and to supplement the analysis or explain why further analysis is not warranted.⁵² It does not comply with the Commission’s duty under the Administrative Procedure Act (“APA”) section 557(c) to “ . . . show the ruling on each finding, conclusion, or exception presented [by a party],”⁵³ or under APA section 555(e) to provide “prompt notice” of the denial, in whole or part, of any request by an interested party.⁵⁴ Finally, under APA section 706(2), the non-response is “ . . . arbitrary,

⁵⁰ 40 C.F.R. § 1502.16(c).

⁵¹ TNC, Scoping Comments, p. 12; DEIS Comments, pp. 2-4.

⁵² 40 C.F.R. § 1503.4(a).

⁵³ 5 U.S.C. § 557(c).

⁵⁴ 5 U.S.C. § 555(e). “Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.” *Id.*

“[The requirement of] . . . a brief statement of the grounds for denial obtains even though the request pertains to a matter of discretion or grace, not one of entitlement The legislative history of section 555(e) supports its applicability, and thus with the requirement of a statement of the basis for denying a request, even where there is no formal proceeding or hearing. The requirement of a statement of grounds of denial comports with the purposes of the APA, and abets the understanding and perception, by both the individual affected and the public, that the official or agency has made a considered disposition.”

Roelofs v. Secretary of Air Force, 628 F.2d 594, 600 (D.C. Cir. 1980) (internal citations and quotation marks omitted). Indeed, the statement “ . . . must be one of reasoning; it must not be just a conclusion; it must articulate a satisfactory explanation for its action A response [that] provides no basis . . . [has] all of the explanatory power of the reply of Bartleby the Scrivener to his employer: ‘I would prefer not to.’” *Butte County v. Hogen*, 613 F.3d 190, 194-5 (D.C. Cir. 2010) (internal citations and quotation marks omitted).

capricious, abuse of discretion, or otherwise not in accordance with the law ... [and] unsupported by substantial evidence ...,”⁵⁵ since it does disclose a ‘rational connection between the facts found and the choice made.’”⁵⁶

V. REQUEST FOR STAY

The Commission reviews requests for a stay under the standard established by the APA, 5 U.S.C. § 705, and will grant a stay when "justice so requires."⁵⁷

In assessing a request for stay, the Commission considers several factors, including:

(1) whether the party requesting the stay will suffer irreparable injury without a stay; (2) whether issuing the stay may substantially harm other parties; and (3) whether a stay is in the public interest. The most important element of the stay standard is a showing that the movant will be irreparably injured without a stay. If the party requesting the stay is unable to demonstrate that it will suffer irreparable harm absent a stay, we need not examine other factors.⁵⁸

As discussed below, TNC satisfies the criteria for a stay under the APA.

A. TNC WILL SUFFER IRREPARABLE HARM FOR WHICH THERE IS NO ADEQUATE LEGAL REMEDY IF THEY PREVAIL ON APPEAL.

The D.C. Circuit has held that the “basis for injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies.”⁵⁹ Mere injuries, in terms of money, time, and energy necessarily expended absent a stay, are not enough. However, the possibility that corrective relief will not be available if the project is allowed to proceed weighs heavily in favor of a finding of irreparable harm.⁶⁰

⁵⁵ 5 U.S.C. § 706(2)(A), (E).

⁵⁶ *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company*, 463 U.S. 29, 43 (1983), quoting *Burlington Truck Lines v. U.S.*, 371 U.S. 156, 168 (1962).

⁵⁷ 5 U.S.C. § 705; see *Florida Se. Connection, LLC Transcon. Gas Pipe Line Co., LLC Sabal Trail Transmission, LLC*, 154 FERC ¶ 61264 (Mar. 30, 2016) (finding justice did not require a stay).

⁵⁸ *Florida Southeast Connection, LLC Transcontinental Gas Pipe Line Company, LLC Sabal Trail Transmission, LLC*, 154 FERC ¶ 61264.

⁵⁹ *Wisconsin Gas Co. v. F.E.R.C.*, 758 F.2d 669 (D.C. Cir. 1985) (“*Wisconsin Gas*”).

⁶⁰ *Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958).

In *National Fuel*, a citizens group requested a stay of construction of a compressor station, arguing that impacts on air and water quality constituted irreparable harm.⁶¹ The Commission denied the request. It found that even if the compressor station were built, so long as the developer complied with the terms of the certificate, the anticipated harm would be fully mitigated. That is not the case here. As described below, the Certificate Order does not fully mitigate the potential impacts to forested lands and groundwater supplies.

The MVP Project will remove acres of forest, including interior forest located on the Woltz easement. These impacts are considered permanent.⁶² Even if the Certificate Order is later vacated and the forest is allowed to regenerate, “it would take many years for trees to mature.”⁶³ In the meantime these lands would no longer provide habitat or vital ecosystem services, including serving as a vegetated buffer to the Bottom Creek headwaters. Given the Certificate Order does not fully mitigate the loss of forest on the Woltz easement, the potential harm caused by the MVP Project is irreparable. Further, Mountain Valley did not consult with TNC regarding its crossing plan for the easement. Irreparable harm to the riparian conservation values protected by the Woltz conservation easement (such as brook trout habitat) could result from construction that does not use appropriate measures to minimize impacts on the creek.

B. MOUNTAIN VALLEY WOULD NOT BE SUBSTANTIALLY HARMED IF A STAY WERE GRANTED.

While the potential harm to TNC is irreparable in the absence of a stay, Mountain Valley would not be substantially harmed if a stay were granted. Mountain Valley is seeking to proceed to construction to meet the anticipated-service date of November 2018 under its precedent agreements.⁶⁴ However, even if Mountain Valley does not make the anticipated-service date, it will not face financial liability under the precedent agreements.⁶⁵ Regardless, potential harm to Mountain Valley from breach of the precedent agreements would be an economic loss and does not constitute irreparable harm.⁶⁶

⁶¹ *National Fuel*, 139 FERC ¶ 61,037 (2012) (denying stay where not showing of irreparable harm).

⁶² FEIS, App. AA, FA10-1.

⁶³ Certificate Order, ¶ 192; *see also* letter from Clyde E. Cristman to Secretary Kimberly D. Bose, eLibrary no. 20170721-5183 (July 21, 2017), p. 3.

⁶⁴ *See, e.g.*, Precedent Agreement between Mountain Valley and Consolidated Edison Company of New York, Inc., eLibrary no. 20160127-5200 (Jan. 21, 2016).

⁶⁵ *See id.* at ¶ 16.

⁶⁶ *Wisconsin Gas*, 758 F.2d at 674 (“It is also well settled that economic loss does not, in and of itself, constitute irreparable harm.”). “Recoverable monetary loss may constitute irreparable harm only where the loss threatens the very existence of the movant's business.” *Id.* (citing *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 n. 2 (D.C.Cir.1977)).

C. JUSTICE REQUIRES A STAY.

TNC meets the criteria for a stay under the Commission's standards. Allowing the MVP Project to proceed in advance of remedying the errors identified in the TNC's rehearing will result in unnecessary and irreparable harm. By contrast, a stay will not substantially harm Mountain Valley.

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V.
CONCLUSION

The Nature Conservancy respectfully requests that the Commission remand the Certificate Order to Staff to undertake further analysis, including supplementing the FEIS, to address the pipeline's adverse impacts on Bottom Creek and the Woltz conservation easement consistent with the requirements addressed above.

Dated: November 13, 2017

Respectfully submitted,



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Attorneys for THE NATURE CONSERVANCY

DECLARATION OF SERVICE

Mountain Valley Pipeline, LLC, Mountain Valley Pipeline Project (CP16-10-000)
Equitrans, L.P., Equitrans Expansion Project (CP16-13-000)

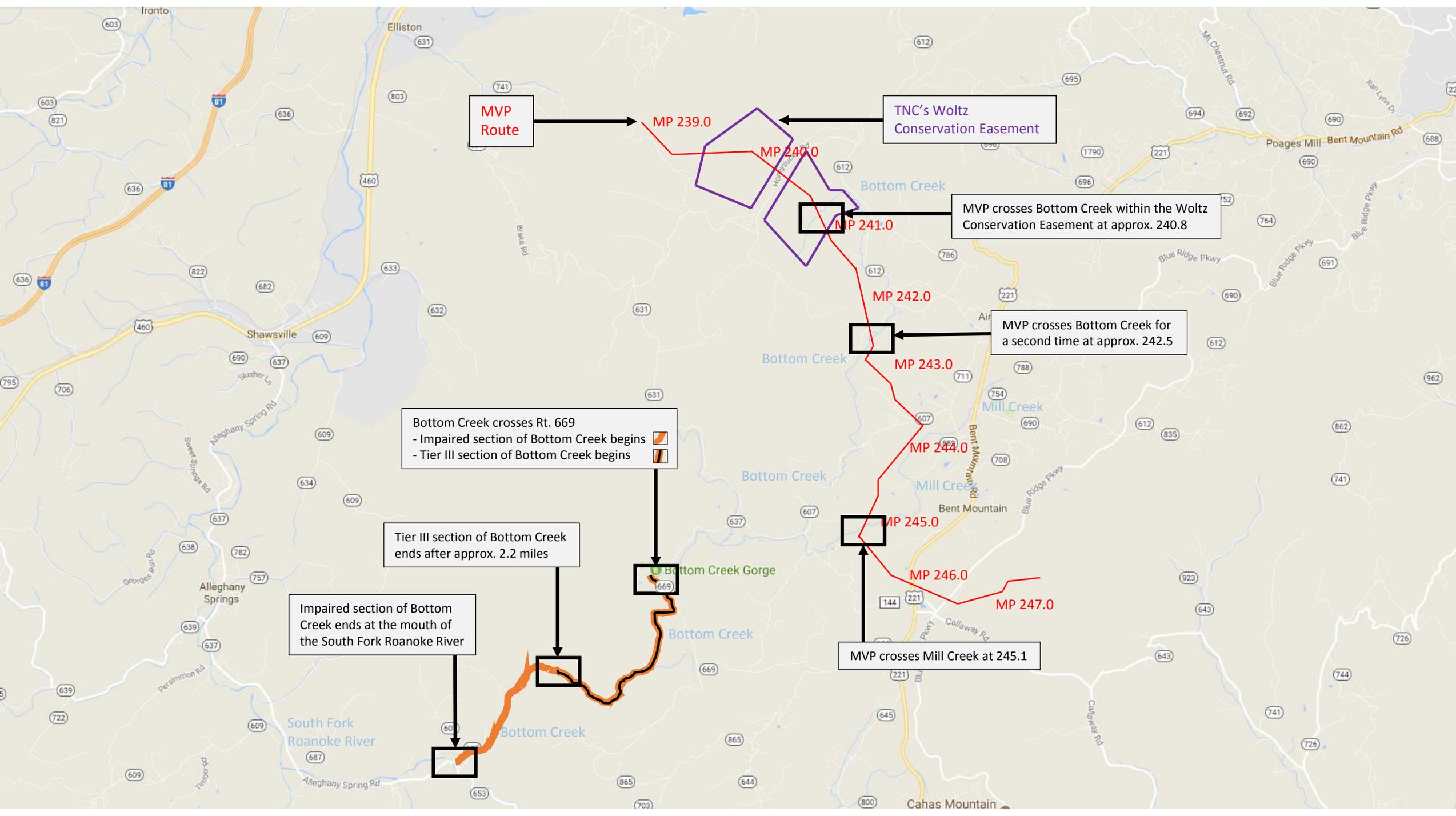
I, Emma Roos-Collins, declare that I today served the attached “Request by The Nature Conservancy for Rehearing of Order Issuing Certificates and Stay,” by electronic mail, or by first-class mail if no e-mail address is provided, to each person on the official service list compiled by the Secretary in these proceedings.

Dated: November 13, 2017

By:



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MVP Route

TNC's Woltz Conservation Easement

MP 239.0

MP 240.0

MP 241.0

MVP crosses Bottom Creek within the Woltz Conservation Easement at approx. 240.8

MP 242.0

MVP crosses Bottom Creek for a second time at approx. 242.5

MP 243.0

Bottom Creek crosses Rt. 669
- Impaired section of Bottom Creek begins
- Tier III section of Bottom Creek begins

MP 244.0

Tier III section of Bottom Creek ends after approx. 2.2 miles

MP 245.0

Impaired section of Bottom Creek ends at the mouth of the South Fork Roanoke River

MP 246.0

MVP crosses Mill Creek at 245.1

MP 247.0

South Fork Roanoke River

Bottom Creek

Bottom Creek Gorge

Bottom Creek

Cahas Mountain

Woltz Conservation Easement and Mountain Valley Pipeline

