

Case No. 17-2406 (L) (Consolidated with 17-2433)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SIERRA CLUB et al, *Petitioners*

and

DEL. SAM RASOUL, et. al., *Petitioners,*

v.

STATE WATER CONTROL BOARD, et al., *Respondents*

and

MOUNTAIN VALLEY PIPELINE, LLC, *Respondent-Intervenor.*

Petition for Review from the Virginia Department of Environmental
Quality's State 401 Water Quality Certification, WQC-17-001

**PROPOSED BRIEF *AMICI CURIAE* OF CHESAPEAKE BAY
FOUNDATION IN SUPPORT OF PETITIONERS**

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Chesapeake Bay Foundation's Disclosure of Corporate Affiliations Statement

Pursuant to Federal Rule of Appellate Procedure 26.1 and FRAP 26.1, the Chesapeake Bay Foundation makes the following disclosures:

Chesapeake Bay Foundation: Chesapeake Bay Foundation is not a publicly held corporation or entity; has no parent companies; and there are no publicly held companies that have a ten percent or greater ownership interest in the Chesapeake Bay Foundation or a direct financial interest in the outcome of this litigation.

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The Chesapeake Bay Foundation, Inc. (CBF) submits the following brief *amicus curiae* in support of the Petitioners.

INTRODUCTION

This matter concerns the Virginia State Water Control Board's (the "Board") decision to "certify" that the construction and operation of the Mountain Valley Pipeline (MVP) will not harm the quality of state waters. The proposed pipeline is a 42-inch natural gas pipeline that will cut a 303.5 mile swath across the land from Wetzel County, West Virginia, to Pittsylvania County, Virginia. MVP 007156. The pipeline will cross numerous mountains and valleys as well as creeks, streams and rivers. In areas away from wetlands, the pipeline scar will be 125 feet wide. In wetlands, it would be 75 feet wide. *Id.*; MVP 007172.

On December 8, 2017, the Board, issued a Clean Water Act Section 401 certification to MVP. MVP 000100. In its decision to grant the certification, the Board segregated upland water "runoff" impacts to bodies of water from impacts caused by the pipeline crossing water bodies and wetlands. *Id.* The Board concluded that all water runoff (stormwater) associated with upland construction and operation of the pipeline would be controlled by state erosion and sediment control and stormwater management regulations. The Board further determined that pipeline water crossings would be subject to U.S. Army Corps of Engineers' Nationwide Permit 12 standards and those would be sufficient to prevent harm to

aquatic life and water quality. MVP 000105.¹ Petitioners are correct that these decisions are erroneous and should be set aside.

Section 401 Requires an Assessment of Combined Impacts to Water Quality From the Entire Project

Section 401 of the Clean Water Act provides that any applicant for a federal license, *e.g.*, construction of an interstate natural gas pipeline, which may result in any discharge into navigable waters shall provide a certification from the state water pollution control agency that any discharge associated with the project “will comply with the applicable provisions of sections 301, 302, 303, 306, and 307.” 33 U.S.C. § 1341(a)(1). Section 303 concerns state water quality standards. 33 U.S.C. § 1313. Thus, “any discharge” of a pollutant into a waterway of the state must not exceed water quality standards. In reaching that conclusion, a state must determine that it has “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)(2).

A fundamental tenet of water quality science and regulation is that multiple sources of pollutants, even if they have individually minimal effects, can combine to cause significant harm to water quality. *See, e.g., Klamath-Siskiyou Wildlands*

¹ While these individual assumptions are erroneous, we focus here on the Board’s failure to consider the combined impacts of upland construction with water crossing impacts.

Ctr. v. Bureau of Land Mgmt., 387 F.3d 989, 994 (9th Cir. 2004) (describing how small additions of sediment into a waterway at various points can combine to have a significant effect on fish survival); 40 C.F.R. § 230.11(g)(1) (recognizing that the “cumulative effect of numerous [] piecemeal changes can result in a major impairment” of water quality); 33 U.S.C. § 1344(e) (authorizing general permits for the discharge of dredged or fill material if the covered activities “will have only minimal cumulative adverse effect on the environment”).

This principle is reflected in the structure of Section 401, the regulations that implement the section, and the requirements of other federal statutes that specify the consideration of combined or cumulative effects in environmental reviews. *See* 33 U.S.C. § 1341; *see also, Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992) (explaining that water quality standards “supplement effluent limitations ‘so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels.’”) (quoting *EPA v. Cal. ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 205 n. 12 (1976); 40 C.F.R. § 1508.7 (defining “cumulative impact” under National Environmental Policy Act, 42 U.S.C. § 4321, *et seq.*); 50 C.F.R. § 400.14(g)(3) (requiring the Fish and Wildlife Service to evaluate the “cumulative effect” of a proposed action on species listed under the Endangered Species Act).

Here, the relevant federal permit is the Certificate of Public Convenience and Necessity issued by the Federal Energy Regulatory Commission. The “activity” covered by the permit which may result in a discharge into navigable waters is construction and operation of the entire Mountain Valley Pipeline—*not* merely a subset of the proposed activity like construction of the pipeline in specific “upland areas.”

Once the Board embarked on a Section 401 certification review for this proposed pipeline, it did not have the discretion to narrow that scope of review to only some categories of effects, and it cannot ignore the combined effects of the project on water quality. The scope of a state’s Section 401 review must match the scope of the activity authorized by the relevant federal permit—in this case, all construction and operation of the Mountain Valley Pipeline, including pipeline crossings and upland activities such as tree clearing, earth grading, trenching, and road building.

The structure of the Clean Water Act also supports Petitioners’ claim. Under the Act, the purpose of state-established water quality standards is to provide a backstop to ensure that multiple discharges, even though they individually meet acceptable pollutant levels, do not combine to harm downstream water quality. *See PUD No. 1 of Jeff. Cty. v. Wash. Dep’t of Ecology*, 511 U.S. 700, 704 (1994). *See also, W. Va. Highlands Conservancy, Inc. v. Huffman*, 651 F. Supp. 2d 512, 516

(D. W. Va. 2009) (quoting *Arkansas v. Oklahoma*, 503 U.S. at 101). The Act subjects individual point sources to technology-based pollutant limits established by the U.S. EPA. *See id.* But, Congress envisioned a different role for states to protect their waters and those of the nation within their respective borders. That is, they are to institute “comprehensive water quality standards” to address the reality that many point sources could combine to harm water quality despite compliance with EPA’s technology-based limits. *Id.* (“These water quality standards provide a supplementary basis . . . so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels.”) (internal quotations and citations omitted).

Moreover, regulations implementing the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), and the Clean Water Act recognize the importance of including the combined effects of proposed actions as part of the environmental review required by these statutes. *See, e.g.*, 40 C.F.R. § 1508.7 (defining “cumulative impact” under NEPA); 50 C.F.R. § 400.14(g)(3) (requiring the Fish and Wildlife Service to evaluate the “cumulative effect” of a proposed action on species listed under the ESA); *see also* 40 C.F.R. § 230.11(g)(2) (requiring the Corps of Engineers to consider the “cumulative effect” of the discharge of dredged or fill material into waterways under the Clean Water Act).

Importantly, these environmental laws also recognize that actions which separately may have a minimal effect on the environment can combine to significantly harm environmental resources. *See, e.g.*, 40 C.F.R. § 1508.7 (“Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.”); 40 C.F.R. § 230.11(g)(1) (“Although the impact of a particular discharge may constitute a minor change in itself, the cumulative effect of numerous such piecemeal changes can result in a major impairment of the water resources and interfere with the productivity and water quality of existing aquatic ecosystems.”). Thus, it is well-established that agencies must assess combined effects of proposed activities in order to fully understand the environmental impact of a proposed project. *See, e.g., Delaware Riverkeeper Network v. FERC*, 753 F.3d 1304, 1308 (D.C. Cir. 2014) (holding that FERC impermissibly segmented its review of a natural gas pipeline, in violation of NEPA, by failing to consider the combined impacts of three “physically, functionally, and financially connected and interdependent” pipeline upgrade projects).

Against this backdrop, the Board and the Department of Environmental Quality (collectively the “Virginia Agencies”) undertook a review of the effects of the proposed Mountain Valley Pipeline on Virginia’s water quality standards as authorized by Section 401 of the Clean Water Act. *See* 33 U.S.C. § 1341. The Virginia Agencies only considered the effects of construction of the Mountain

Valley Pipeline on water quality of a single isolated category—the effects associated with upland construction activities. That is, areas where the pipeline does not cross bodies of water or wetlands. The agencies deferred consideration of the effects of the pipeline’s waterbody crossings to the Army Corps of Engineers, did not evaluate how waterbody crossings and upland effects will combine to degrade downstream water quality, and did not evaluate how multiple areas of disturbance within a stream or river watershed² will have a combined effect on downstream water quality. Moreover, they ignored evidence from the pipeline owner’s contractor that over 705 miles of streams in the pipeline’s wake would suffer a 10% increase in sediment (dirt) loading from construction and operation of the pipeline. MVP007426.

In effect, the Virginia Agencies designed a “review” process that merely assessed the control technology and requirements at individual discharge sources (upland construction activities) but failed to determine whether multiple inputs would result in water quality violations in affected waters. As a result, the agencies did not “consider an important aspect” of the water quality problems—the combined effects of multiple categories of activities in multiple locations—created by construction and operation of the Mountain Valley Pipeline when they approved and issued a Section 401 water quality certification for the project. *See Motor*

² A watershed is the area of land that drains to a specific body of water.

Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983) (federal highway agency “failed to supply the requisite reasoned analysis” to support its change in course and the agency action was thus arbitrary and capricious) (internal citation and quotation omitted); *see also, Precon Dev. Corp. v. U.S. Army Corps of Engineers*, 633 F.3d 278, 297 (4th Cir. 2011) (finding Army Corps action arbitrary and capricious for lack of documentation and explaining, “[s]uch documentation need not take the form of any particular measurements, but should include some comparative information that allows us to meaningfully review the significance of the wetlands’ impacts on downstream water quality”).

Thus, the Board’s certification is arbitrary and capricious and should be rejected.³

The Pipeline Construction Process

To understand how construction and operation of the pipeline can cause multiple pollution pathways to surface waters in the path of or adjacent to the pipeline route, knowledge of the pipeline construction process is necessary. *See* MVP 003141.

³ *See* Petitioners’ statement of the issues 1. “The SWCB certification segregates potential impacts to water quality and thus fails to adequately assess whether the project, as a whole, will cause adverse impacts to water quality.”

Access Roads

Before construction can begin, roads for trucks and heavy equipment to access the pipeline path are built through forests and pasture land. MVP 007416-18. As with pipeline construction, trees are cut down, earth moving equipment grades the soil flat and large machines compact the soil which is either left bare or covered in gravel. Exhibit A. Alongside those roads, ditches are built to capture rainfall washing off the road. MVP 003151. The ditches flow to local creeks and rivers. Streams are rechanneled to flow through culverts under the roads. MVP 003152; Exhibit B. While some form of stormwater control is presumed, sediment will be discharged into local water bodies.⁴

MVP would use a combination of both temporary and permanent private roads to access the construction right-of-way. Existing roads would be “improved” to handle heavy equipment used in construction of the pipeline. MVP 007156.

Staging yards

During construction of the pipeline, staging “yards” several acres in size are built to store sections of pipe, pieces of heavy equipment such as bulldozers and trucks, and materials like fuel. Some are constructed in farm fields, others in forests. MVP 004305, 007156; *see, e.g.*, Exhibit C. In either case, the grass or trees

⁴ The Virginia Agencies have not identified the erosion and sediment or stormwater controls that will be required during construction and operation of the pipeline.

are ripped off the ground and the soil is laid bare to rain or snow fall. Gravel or crushed rock is installed. The yards are graded to allow the rain or snow melt to run off into an adjacent ditch or channel that flows to a local water way. While these storage lots are temporary, those constructed in forest land are not replanted. They are left to “recruit” new trees over many years. MVP 007156.

MVP plans to build two staging yards in Virginia; one 22.8 acres in Montgomery County near pipeline milepost 234.2 and another 15 acre yard in Franklin County, milepost 264.3. MVP 007164.

Pipeline Construction

Where the pipeline runs through forests, swaths of trees are cut down, piled up, and either left to rot or hauled away. MVP 007418. The now unvegetated land is scraped by huge bulldozers and leveled. Exhibits D and E. Earth is stockpiled nearby. *Id.* Ditches are built parallel to the pipeline path to direct sediment containing rain water from the denuded land to collection ponds or to streams and rivers. MVP 003151.

A giant digging device excavates a trench up to 10 feet deep and several feet across. Exhibit F. This trenching occurs up and down hills and mountains, adjacent to bodies of water, and eventually up to stream or river crossings. Permanent drains are installed within the trench that allows ground water entering the trench to be discharged to the land. MVP 002797.

To cross streams or rivers, either large drills dig a tunnel under the creek for the pipe to pass through or coffer dams are built to divert the stream so the trenching device can excavate the stream bottom. MVP 003154. Either excavation disturbs soil on the banks and in the stream bed. This sediment washes downstream, in some cases for miles. MVP 007425-6. MVP plans to use coffer dams (“dry-ditch open-cut method) at the majority of stream crossings and directional drilling only for major waterbodies. MVP 013869. The Commonwealth recognizes that many of these stream crossings will harm water quality. MVP 013863; 013865.

Construction of the MVP pipeline would affect about 2,115 acres of land in Virginia. MVP 007169. Long term operation of the pipeline would affect approximately 725 acres in Virginia. While the Board notes that erosion and sediment control measures will be required during construction, the U.S. Environmental Protection Agency has estimated that the effectiveness of such measures ranges between 10 and 90 percent. MVP 007421. As a contractor for MVP put it, while the company will use such measures they “are unlikely to prevent all sediment inputs.” MVP 007415.

While there are hundreds of locations where sediment laden runoff could leave the pipeline path and enter waterways, the Court is directed to one specific example to hone the point.

The Board Ignored Evidence of Specific Harm to Water Quality From the Pipeline: Bottom Creek, Virginia

Bottom Creek flows through Montgomery and Roanoke Counties just south of Roanoke, Virginia.⁵ The pipeline is proposed to run within feet of Bottom Creek at mile post 239.8, cross the creek at mile post 240.4, and cross Mill Creek, a tributary to Bottom Creek, at mile post 243. MVP 004306; 007227, and 007393.

Access roads will also impact the creek. MVP 004306 (red dotted lines are temporary roads, blue dotted lines are permanent roads); 007393 (thin red lines).⁶ As explained above, the access roads are constructed to drain rain water and snow melt to ditches and culverts that will discharge sediment to adjacent creeks. However, in its decision making, the Board did not consider the combined impacts to aquatic species or water quality caused by the stream crossings, upland pipeline construction, and the permanent access roads.

A portion of Bottom Creek is a Tier III water – that means it is rated by the state as of exceptional water quality and is not to be degraded.⁷ There are only 30

⁵ Petitioners' Brief at 4-5 and declarations.

⁶ The pipeline will also discharge sediment to several other creeks in this region including Mill Creek, Green Creek and the North Fork of the Blackwater River. *Id.*

⁷[http://www.deq.virginia.gov/Programs/Water/WaterQualityInformationTMDLs/WaterQualityStandards/ExceptionalStateWaters\(TierIII\).aspx](http://www.deq.virginia.gov/Programs/Water/WaterQualityInformationTMDLs/WaterQualityStandards/ExceptionalStateWaters(TierIII).aspx).

such waters within the Commonwealth. This segment is downstream of where the pipeline and access roads will cross the creek.

According to the state,

the Exceptional State Water designation maintains high water quality in select Virginia waters. It prohibits permanent new or increased discharges from pipes or other point sources. Activities that involve the release of pollutants from a point source into water protected with the designation will not be allowed.

Id.

The Board's decision to allow the pipeline to be constructed in this region runs directly counter to that designation.

Sediment, dirt run off, is a pollutant that is especially damaging to high quality fresh water streams like Bottom Creek. The dirt suffocates fish like trout, smothers their eggs and the bottom living organisms like caddis, may, and stoneflies that the trout feed upon.⁸

The region surrounding Bottom Creek, its watershed, is comprised of steep hills and mountains. Exhibit G. Thus, where the pipeline travels up and down those areas, runoff will flow down the pipeline path at a high velocity. The higher the velocity, the more dirt the water will scour.

⁸http://www.deq.virginia.gov/Portals/0/DEQ/Water/WaterQualityStandards/T3BO_TTCRK_SITEVISIT_002.pdf.

The pipeline will cross Bottom Creek just north of a Nature Conservancy preserve. According to the Conservancy,

Bottom Creek is critical habitat for four species of fish native to the headwaters of the Roanoke River: the orangefin madtom, the bigeye jumprock, the riverweed darter, and the Roanoke darter. It also contains approximately 10 percent of all fish species known from Virginia, including native brook trout.⁹

This means sediment runoff will flow downstream from the pipeline crossing and access roads into the Preserve.

In assessing the pipeline's potential impact on endangered or threatened species, MVP determined the "action area" created by the project. An action area is any distance beyond the construction area where impacts may occur that impair the health and survival of animal or plant life. MVP 007172. The project owner's contractor, considered the potential for water quality degradation due to increases in sediment discharges to creeks associated with the pipeline. MVP 007180. The contractor stated that "[i]ncreased sedimentation and turbidity resulting from instream and adjacent construction activities would displace and impact fisheries and aquatic resources. MVP 007181.

⁹<https://www.nature.org/ourinitiatives/regions/northamerica/unitedstates/virginia/placesweprotect/bottom-creek-gorge.xml>; *see also*, <https://www.hikingupward.com/OVH/BentMountainFalls/>

Another MVP contractor noted that while there is no national standard for the permissible amount of sediment to enter waterways, a common threshold is one that increases sedimentation or water turbidity by 10 percent or more above baseline. MVP used this metric to identify “action areas” where a 10 percent increase in sediment load would be expected. The contractor determined that, in total, over 705 miles of stream reaches would be expected to experience a 10 percent increase. MVP 007426. Although the contractor did not provide information on how many streams in Virginia would be affected, the contractor did provide detailed maps identifying which streams would experience such an increased sediment load.¹⁰ *See* MVP 007390-98 (Virginia maps).

Bottom Creek, a Tier III Exceptional Value Water, is identified as such a waterbody as is Mill Creek which discharges into Bottom Creek. MVP 007393(the orange swath and lines represent the “action area”). *See also*, MVP 004306. In fact, numerous stream reaches are identified as expected to suffer such a fate if the pipeline and access roads are built. *See* MVP 007390 (Clendennin Creek, Curve Branch, Kimballton Branch, Dry Branch)(an access road would cross Clendennin

¹⁰ While this discussion focuses on increased sediment loading due to the pipeline and access roads, the loss of tree cover near waterbodies will cause the temperature of the water to rise. Some species of fish and other aquatic organisms are sensitive to increases in temperature. Although the Commonwealth has regulations governing the water temperature of trout waters such as Bottom Creek, the Board did not fully address this issue in its certification.

Creek six times); MVP 007391 (Greenbrier Branch and several unnamed tributaries); MVP 007392 (Craig Creek, Dry Run, Mill Creek, Flatwoods Branch, Womack Branch); MVP 00794 (North Fork Blackwater River, Little Creek, Teels Creek); MVP 007395 (pink shaded limits of disturbance identifies the Franklin County staging yard that is expected to impact a nearby unnamed tributary); MVP 007396 (Jacks Creek, Little Jacks Creek, Turkey Creek, Dinner Creek, Polecat Creek, Owens Creek, Parrott Branch, Jonniken Creek, Rocky Creek); MVP 007397 (Harpen Creek, Cherrystone Creek, Pole Bridge Branch, Little Cherrystone Creek); MVP 007398 (Little Cherrystone Creek).

All totaled, 24 different creeks and many more unnamed tributaries are expected to be damaged by upland runoff and stream crossings associated with the pipeline. The Board did not explain why this potential for harm was not addressed in its certification. The absence of such an explanation makes the Board's decision to issue the certification arbitrary and capricious.

Moreover, the Board did not analyze how each of these separate harms might combine to harm downstream water quality. For example, many of those 24 named streams that will carry a 10% increased sediment load due to the pipeline

flow to the Roanoke River. Nowhere does the Board address how those new loadings of sediment might harm trout populations in those streams or the river.¹¹

The absence of any discussion on this issue not only violates section 401, it also violates the Virginia Constitution. Section 1 of Article XI provides:

To the end that the people have clean air, pure water, and the use and enjoyment for recreation of adequate public lands, waters, and other natural resources, it shall be the policy of the Commonwealth to conserve, develop, and utilize its natural resources, its public lands, and its historical sites and buildings. Further, it shall be the Commonwealth's policy to protect its atmosphere, lands, and waters from pollution, impairment, or destruction, for the benefit, enjoyment, and general welfare of the people of the Commonwealth.

The Board's decision does not support this constitutional policy.

CONCLUSION

The Board's decision to grant section 401 certification to MVP ignores the direct and combined impacts to state waters from increased sediment loads due to construction and operation of the pipeline. Thus, the Board's decision should be overturned.

¹¹ While impacts to endangered or threatened species are considered there is no analysis of how, for example, these new sediment loads will affect local populations of wild trout. Many of these streams are identified by the state as trout waters (*see* MVP 003166-67); however, neither DEQ nor the Board consider pipeline stream crossing and upland sediment discharge combined impacts on those populations or the benthic organisms necessary for their survival. *See* MVP 007509-10.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to Fed. R. App. P. 32(g), this Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) as it contains 3,796 words.

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CERTIFICATE OF SERVICE

I hereby certify that on February 23, 2018, I electronically filed the foregoing Proposed Brief of *Amici Curiae* Chesapeake Bay Foundation, Inc. with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using 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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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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