

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

Mountain Valley Pipeline, LLC)	Docket No. CP16-10
Equitrans LP)	Docket No. CP16-13

**COMMENTS OF MONTGOMERY COUNTY, VIRGINIA ON DRAFT ENVIRONMENTAL
IMPACT STATEMENT FOR THE MOUNTAIN VALLEY PROJECT/EQUITRANS EXPANSION
PROJECT, CHALLENGING LEGAL AND FACTUAL SUFFICIENCIES IN THE DEIS, OPPOSING
DEIS FINDING OF NO SIGNIFICANT IMPACT AND APPROVAL OF THE MVP PIPELINE BY
THE COMMISSION, THE FOREST SERVICE AND THE BUREAU OF LAND MANAGEMENT**

On September 16, 2016, the Federal Energy Regulatory Commission (Commission) released for public comment a combined draft environmental impact statement (DEIS) for two related projects -- the Mountain Valley Pipeline (MVP) Project Docket CP16-10 and the Equitrans Expansion Project (EEP) Docket CP16-13. Extending 301 miles from Wetzel County, West Virginia to Pittsylvania County Virginia, the 42-inch diameter, greenfield MVP crosses through Montgomery County, Virginia ("County") for nineteen miles -- razing 191.3 acres of forest -- 68.4 acres permanently -- and irreparably scarring the viewshed, destabilizing (through blasting of shallow bedrock, among other things) treacherous karst-ridden terrain already susceptible to landslides and seismic activity and forever encumbering numerous parcels of private property with unnecessary infrastructure that that will be abandoned in twenty years.

Notwithstanding the permanent damage that the MVP will bring to Montgomery County and presumably, dozens of other counties along its path, the Draft Environmental Impact Statement (DEIS) concluded that the MVP, if constructed in accordance with recommended mitigation measures, will have no significant impacts. Montgomery County, an intervenor in these proceedings, objects to the DEIS findings. Further, as it did in a November 2014 Resolution,¹ the County continues to oppose routing the MVP through both the County and Jefferson National Forest, given the substantial environmental, economic and safety harm to the County's resources and its residents. However, in the event that the Commission erroneously decides to approve this ill-

¹ Resolution of Montgomery County Board of Supervisors Opposing the MVP Pipeline (November 2014), online at <http://www.montva.com/filestorage/16277/16895/16995/Resolution.pdf>.

conceived project, the County considers the Slusser's Chapel route alternative proposed by the Virginia Department of Conservation and Recreation) to be the least environmentally damaging of the other options under consideration.

As discussed in these comments, significant portions of the DEIS are alternatively inadequate or inaccurate, thereby precluding meaningful public review in violation of the National Environmental Policy Act (NEPA). The DEIS is legally deficient as well: among other things, it lacks robust discussion of project need or public purpose² which is an integral part of NEPA review and the certificate approval process under the Natural Gas Act; fails to evaluate project impacts under the Commission's siting guidelines in 18 C.F.R. §380.15, relies on an incomplete assessment of karst along the pipeline route and does not address the adequacy of MVP's proposed mitigation of karst-impacts, does not consider climate change impacts as required by the recent CEQ guidance³ and ignores the substantial effects of the pipeline on directly impacted landowners and the surrounding community in the form of loss of property values, increased insurance premiums and heightened safety risks.

For all of these reasons, the Commission must rescind the DEIS and deny a certificate for the MVP project. Moreover, given the deficiencies in the DEIS, neither the Forest Service nor the Bureau of Land Management -- which are cooperating agencies -- cannot rely on the finding of no significant impact and as such, may not approve the Land Management Planning Requirement (LMRP) amendment and a ROW through forest service lands.

These comments are filed pursuant to the Commission's Notice of Availability of the DEIS issued September 16, 2016 [FR CITE] and the Joint Forest Service/BLM Notice of Availability of the DEIS which also invited comments on the proposed LRMP amendment

² As will be discussed, Equitrans Midstream is a partner in the MVP, its affiliate EQT Energy is the dominant subscriber, and its parent Equitrans, which is the sponsor of the EEP Project, will operate the MVP pipeline. Application 5, 16.

³ CEQ, *Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews*, 81 FR 51866 (August 5, 2016) online at <https://www.whitehouse.gov/administration/eop/ceq/initiatives/nepa/ghg-guidance> (last visited December 7, 2016).

and ROW and instructed the public to submit them to the Commission. Both notices established a deadline for comments as December 22, 2016.

I. BACKGROUND

A. Overview of Montgomery County, Virginia's Interest in Proceeding

Montgomery County, Virginia, an intervenor in this proceeding, is located in southwestern Virginia, with a population of approximately 98,000 residents. The pipeline will run through nineteen miles of the northeast section of the County, utilizing a 125-foot easement for construction and a permanent 50-foot easement for operation of the pipeline (DEIS 2-24).⁴



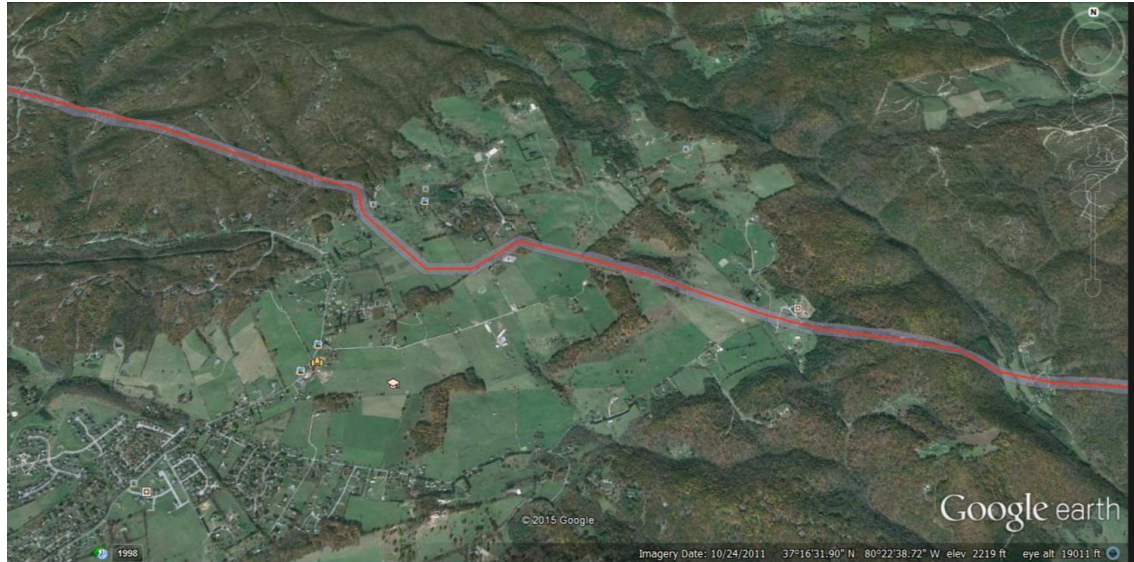
The pipeline crosses through 104 residential and agricultural properties, deflating the value. The pipeline also passes close to Blacksburg, the largest town in the County and home to Virginia Polytechnic Institute, a major university and research center with 33,000 students.

Montgomery County also enjoys a wealth of natural and cultural resources which contribute to the County's \$122 million tourism industry.⁵ Roughly sixty percent of the County is forested, with seven percent located in the Jefferson National Forest,

⁴ As discussed *infra* at XXX, the DEIS does not mention that the pipeline corridor through the Jefferson National Forest will be 500 feet in width. See Forest Service Notice of DEIS, 81 FR 66268-66271 at 66269 (September 27, 2016) online at <https://www.gpo.gov/fdsys/pkg/FR-2016-09-27/html/2016-23237.htm> (last visited November 24, 2016).

⁵ Tourism Strategy Plan for Montgomery County Virginia (2013), online at http://www.montgomerycountyva.gov/filestorage/16277/16344/16671/19450/TourismStrategicPlan_2013.pdf.

managed by the United States Forest Service.⁶ Some forested areas are also located in the Catawba Valley Special Project Area, also in Montgomery County - designated for special protection under Virginia Outdoors Foundation (VOF) due to its high conservation value.



A depiction of the pipeline crossing through Montgomery County, showing forested areas, steep terrain and proximity to population centers.

The pipeline will cut 191.3 acres of these forested areas, permanently destroying the conservation value and scarring the viewshed. DEIS Table 4.8.1-8. The pipeline will also plow through conservation sites in the County managed by the Virginia Department of Conservation and Recreation, including Craig Creek Conservation Unit, Slussers' Chapel Conservation Site and Old Mill Conservation Site (DEIS at 4-225).

Established in 1777, Montgomery County, not surprisingly, has many historic sites and structures, including the North Fork Valley Rural Historic District and the Greater Newport Rural Historic District. Both of these districts will be impacted by the pipeline.

Finally, a large portion of the County's topography is characterized by karst terrain, sink-holes and caves. As discussed in expert geologist Dr. Ernst Kastning's

⁶ See Virginia Department of Forestry Website, <http://www.dof.virginia.gov/locations/montgomery.htm> (last visiting November 21, 2016).

report, the pipeline will cross through this karst-ridden terrain -- including the M. Tabor Karst Sinkhole Plain - "perhaps the most intensive karst terrain along the entire route."⁷ Construction of the pipeline through this unstable and unsuitable terrain will give rise to numerous geologic hazards including potential groundwater contamination, accelerated erosion and slope instability. *Id.*⁸

In exchange for destruction of its natural resources, devaluation of property and endangerment of its residents, the County derives no benefits whatsoever from the pipeline. Instead, as discussed below, the pipeline appears to have been constructed largely for the benefit of Equitrans - a private corporation that through affiliates will profit in its multiple roles as an investor, subscriber and operator of the pipeline.

B. Description of Project and Sponsor

The MVP is a joint venture between affiliates of EQT Midstream Partners (the parent company of Equitrans, the company that will own the EEP),⁹ NextEra Energy, WGL Midstream, Vega Midstream, RGC Midstream. Application at 3. According to the application, the project will also be operated by Equitrans, which the application describes as having 125 years of pipeline operational experience (Application at 4), although the Operating Agreement for the Project (Exh. M to Application) states that EQM Gathering OPCO LLC -- a company incorporated in 2013¹⁰ -- will act as operator.

The MVP Project consists of 301 miles of 42-inch diameter greenfield pipeline, three new compressor stations totaling 171,600 horsepower of compression and various

⁷ Expert Report on Geologic Hazards in the Karst Regions of Virginia and West Virginia, Ernst Kastning, Phd. (dated July 3, 2016) at 4, FERC Accession # 20160713-5029 ("Kastning Report").

⁸ In addition to groundwater contamination, the report does not address the impact of the project on aquifers or headwaters. DEIS at 4-77, 4-116.

⁹ See Equitrans Project Website at <http://equitransproject.com/> (last visited November 20, 2016).

¹⁰ See Company Profile, online at <http://www.bloomberg.com/research/stocks/private/snapshot.asp?privcapId=262870409> (last visited November 22, 2016).

other facilities. Application at 2. The MVP pipeline will run from Wetzel County in West Virginia (which is also the point of interconnection with the EEP)¹¹ to Virginia, and will transport 2 million dekatherms/day (dth/d) of gas from the Appalachian Shale Region to growing markets in the Mid-Atlantic and southeastern United States. Application at 5. The Project is fully subscribed, with EQT Energy's share (1,290,000 dt/day) accounting for 65 percent of the capacity, and the remainder split roughly amongst three other shippers. Roanoke Gas Company, a local gas company subsidiary of RGC (one of the MVP joint venturers) contracted for the final 10,000 dt/day of capacity, to be delivered via a new tap that preliminarily, will be located in Franklin County, Virginia at MP 262. DEIS 2-14.

The MVP Pipeline will cost approximately \$3.7 billion. See Exh. K to Application. In its application, MVP seeks a 14 percent return on equity (ROE) for its shareholders based on a 60 percent equity/40 percent debt capital structure. Application at 37. MVP inaccurately asserts that its exorbitant ROE -- which purportedly reflects "large capital investment risk undertaken by sponsoring owners," *id.*-- is consistent with Commission policy. See Discussion *infra* at [Part XXX].¹²

MVP seeks both a certificate of public necessity and convenience under Section 7 of the Natural Gas Act, 15 U.S.C. §717f(e) to construct and operate the project as well as a blanket certificate under Part 157 of the Commission's regulations. The blanket certificate will give MVP the right for the duration of the certificate to further expand the project anywhere along the 301-mile portion with minimal notice and environmental review and use of eminent domain so long as the upgrade falls within applicable cost caps.¹³

B. Procedure Leading Up to and Following Issuance of DEIS

¹¹ See DEIS at 1-2. Although the EEP is also the subject of the DEIS, the County's comments principally focus on the MVP Project which runs through the County.

¹² Interestingly, MVP's proposed Financing Statement (Exh. L to application) proposes an ROE of 13 percent.

¹³ See 18 C.F.R. §157.208 and FERC Website at <http://www.ferc.gov/industries/gas/indus-act/blank-cert.asp> (explaining blanket certificate process); also FERC Project Cost Caps, online at <https://www.ferc.gov/industries/gas/indus-act/blank-cert/facilities/2015-cost-limits.pdf> (establishing \$32.4 million cost cap for blanket certificate activities for 2015).

On November 5, 2015, the Commission publicly noticed MVP's application, and the County timely intervened on November 17, 2015. Between October 2015, when MVP filed its application and September 2016 when the Commission released the DEIS, MVP submitted lengthy supplemental filings in response to 78 requests for additional information from staff. Because these constant, piecemeal supplements -- some several hundred pages in length -- made it difficult for many stakeholders to track changes to the application, several counties, including Montgomery County, asked the Commission to instruct MVP to organize its materials to facilitate meaningful public comment.¹⁴ In addition, the counties also asked the Commission to postpone release of the DEIS to allow stakeholders more time to review the 78 supplemental filings.

The Commission apparently ignored the counties' requests - because it released the DEIS as originally intended on September 16, 2016 without requiring MVP to organize its filings to minimize confusion. The Commission also rejected the County's request for a public hearing on the scoping session at a location in Montgomery County. Instead, Roanoke, Rocky Mount and Chatham Virginia - which are outside of Montgomery County. As a result, many County residents unable to travel to the other locations were deprived of an opportunity to express their concerns about the pipeline directly to Commission staff.

Meaningful participation in the DEIS process has been further compounded by the enormous information gaps that remain even after the DEIS was filed. Notwithstanding that a DEIS must be based on sufficient information to allow for meaningful public participation, as of the date of these comment, MVP made three supplemental, multi-part filings *after* the DEIS was released.¹⁵ One of the supplemental filings in October 2016 updated the route studied in the DEIS by formally adopting the "Mount Tabor Route

¹⁴ See Montgomery County Letter to FERC (August 23, 2016), Accession # 20160823-5022; also Giles County Letter Accession # 20160909-5383 (September 9, 2016) and Appalachian Mountain Advocates Letter (October 19 2016), Accession #20161019-5061 (providing comprehensive listing supplemental responses submitted and still outstanding).

¹⁵ See MVP Supplemental Information filings October 14, 20 and 27 (2016); see *also* Indian Creek Watershed Comments (December 16, 2016)(listing the numerous documents filed as part of the supplemental information).

variation” in Montgomery County¹⁶ -- even though MVP did not submit the feasibility studies that the Commission instructed MVP to submit in support of the the Mount Tabor Route variation. (DEIS at 3-52). If the route is not feasible, the County is concerned that MVP will choose an even more damaging approach. Further, because MVP is not required to submit the feasibility study until the close of comments for the DEIS, the County will be foreclosed from commenting on the study unless the Commission extends the deadline for comment.

In addition, the Mount Tabor Route variation route also changed the impacts to resources - in many instances, actually increasing the impacts.¹⁷ Yet the tables updating the DEIS resource impacts are difficult to find - and in any event, should the DEIS should be updated by Commission staff, not the applicant.

Finally, none of MVP’s supplemental filings address the information gaps identified by other parties. For example, as relevant to Montgomery County, the DEIS asked the applicant to provide information on the feasibility of other route alternatives (in addition to the Mount Tabor variation), including the Virginia Department of Conservation’s proposed Slusser Cave Avoidance Route.¹⁸ Again, because the Applicant is not required to provide this additional information on alternatives by the close of the comment period, the County will be deprived of its opportunity to respond to the newly submitted information.

C. Concurrent Review by Forest Service and BLM

Meanwhile, as the Commission certificate process moved forward, several other agencies sharing jurisdiction over the MVP pipeline initiated concurrent review. Because the pipeline runs through a national forest, MVP must obtain two additional authorizations from the Forest Service, which must amend its Land Resource

¹⁶ Originally proposed in MVP’s April 22, 2016 submission of “Second part of the data responses of Mountain Valley Pipeline LLC to the March 31, 2016 data requests under CP16-10” FERC Accession No. 20160422-5012.

¹⁷ See MVP Supplemental Filing (October 20, 2016) (Accession # 20161020-5175 (updating Tables 4.8.1 to show increased acreage of tree removal); see also discussion *infra* at XXX.

¹⁸ See Virginia Department of Conservation filing, (September 2016)(proposing Slusser Cave Avoidance Route).

Management Plan (LMRP) for the Jefferson National Forest and from BLM, which must grant MVP a right-of-way to construct and operate the project on federally-owned forest lands.

Both the Forest Service's LMRP amendment and the BLM's lease grant are federal actions subject to NEPA, thus, the Forest Service and BLM opted to act as cooperating agencies in preparation of the DEIS. On October 14, 2016, the Forest Service and the BLM published a joint notice of availability of the DEIS. *See* 81 *Fed. Reg.* 71041. The Notice invited comments on the DEIS, the BLM's review of a right-of-way grant and the Forest Service's proposed amendments to the LMRP, and instructed parties to submit all comments to the Commission by December 22, 2016, the deadline for comment.

II. PROCEDURAL DEFICIENCIES IN THE COMMISSION'S IMPLEMENTATION OF NEPA REQUIREMENTS PREPARATION OF A SUPPLEMENTAL DEIS OR EXTENSION OF THE COMMENT PERIOD TO ENSURE MEANINGFUL PUBLIC PARTICIPATION

A. The DEIS Contains Substantial Information Gaps That Preclude Meaningful Public Participation in Violation of NEPA.

A DEIS must contain sufficient information to allow for meaningful participation and to inform the eventual decision-makers.¹⁹ "When relevant information is not available during the [EIS] process and is not available to the public for comment, the [EIS] process cannot serve its larger informational role, and the public is deprived of its opportunity to play a role in the decision-making process."²⁰ Thus, when a draft statement is so inadequate as to preclude meaningful analysis, the CEQ regulations direct

¹⁹ "Draft environmental impact statements ... must fulfill and satisfy to the fullest extent possible the requirements established for final statements" in 42 U.S.C. § 4332(2)(C). 40 C.F.R §1502.9(a). *See Izaak Walton League of Am. v. Marsh*, 655 F.2d 346, 368–69 (D.C. Cir. 1981) ("The impact statement must be 'sufficient to enable those who did not have a part in its compilation to understand and consider meaningfully the factors involved.'") (quoting *Environmental Defense Fund, Inc. v. Corps of Engineers*, 492 F.2d 1123, 1136 (5th Cir. 1974)); *Nat'l Comm. for the New River v. F.E.R.C.*, 373 F.3d 1323, 1329 (D.C. Cir. 2004) "the purpose of a DEIS 'is to elicit suggestions for change.'" (quoting *City of Grapevine, Tex. v. Dep't of Transp.*, 17 F.3d 1502, 1507 (D.C.Cir.1994)).

²⁰ *NC Wildlife Federation v. NC Dept. of Transportation*, 677 3d. 596, 605 (4th Cir. 2012).

the agency to prepare and circulate a revised draft of the appropriate portion.” 40 C.F.R. §1502.9. The CEQ regulations further provide that “if the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.” 40 C.F.R. § 1502.22.

The MVP DEIS presents a textbook example of a DEIS lacking in sufficient information to allow for meaningful public comment and review by decision-makers - which include not only the Commission but also the Forest Service and Bureau of Land Management which must also rely on the DEIS to inform their decisions. As relevant to Montgomery County, the DEIS lacks adequate information regarding both the feasibility of the Mount Tabor Route variation (which has now been adopted by the Applicant in its October 14, 2016 filing)²¹ and the VA DCR Slussers’ Chapel modification. *See* Discussion of Alternatives, *infra* at [XXX]. And while Commission staff attempts to obtain this information by instructing MVP to “investigate route variations to avoid or reduce impacts on Canoe Creek and the Mount Tabor Sinkhole Plain (ES-4) and file results of on-site surveys for the Mount Tabor Route Alternative to assess constructability and identify karst features along the route (DEIS 5-20), the comments will be filed too late to allow for public comment. *See* Condition 35, DEIS 5-25 (requiring documentation of further consultation with VDCR regarding Slussers’ Chapel Alternative).

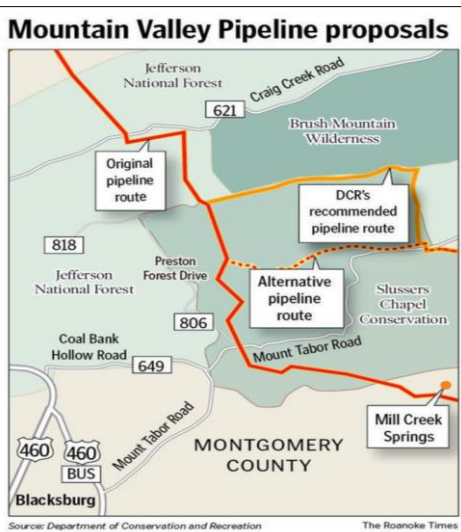
The DEIS provides even less information about an alternative proposed by the VDCR on September 9, 2016 to avoid damage to Slussers’ Chapel and other protected VDCR resources.²² The VDCR route, shown below, is not even described in the DEIS, which only makes reference to the applicant’s continued coordination with the Nature

²¹ MVP Supplemental Filing dated October 13, 2016, FERC Accession No. 20161014-5022 (October 14, 2016).

²² FERC Accession No. 20160909-5315.

Conservancy and VDCR “to assess alternative routes to allow the MVP to avoid important karst/sinkhole features of the Mill Creek Spring Natural Preserve.

In other instances -- such as with respect to groundwater -- the DEIS does not even bother to gather information regarding the number of wells in close proximity to the pipeline to assess the impacts, and instead directs MVP to collect the information *after* the certificate is issued and to provide mitigation if necessary. potential impacts to private wells and instead MVP to collect it after the certificate is issued. DEIS at 5-3. The lack of information regarding the number of wells makes assessment of the project’s impacts impossible.



Incredibly, the DEIS does not mention that the MVP will result in the establishment of a pipeline corridor through the Jefferson National Forest will be 500-foot wide.²³ As a result, the DEIS is deficient because it does not examine the potential environmental impacts associated with the future development that will be facilitated by the issuance of blanket certificate (*See infra*, at XXX) in a 500-foot corridor which is *ten* times the size of what is necessary for the MVP pipeline. It is impossible to

envision how the Forest Service could rationally rely on the DEIS to amend the LMRP to allow for a utility corridor when the DEIS doesn’t mention the corridor at all!

The information gaps just described are but four examples of the inadequacy of the DEIS. The Allegheny Defense filing lists another two dozen examples of information that MVP has not yet provided, that is not required until the comment deadline closes or in some instances, even after the certificate is issued.²⁴ These post-comment disclosures “do not assuage the harm incurred during the NEPA process.”²⁵ Unless the Commission gathers all of the outstanding information not provided and either prepares a

²³ Forest Service Notice of DEIS, *supra* <https://www.gpo.gov/fdsys/pkg/FR-2016-09-27/html/2016-23237.htm>.

²⁴ Allegheny Defense Project / Appalachian Mountain Advocates Letter to FERC, (October 19, 2016), Accession No. 20161019-5061

²⁵ NC Wildlife Federation, 677 F.3d at 605 (vacating DEIS where agency did not disclose information about the project until after the NEPA process had concluded).

supplemental DEIS, or at least extends the comment deadline by at least 45 days from the date that all of the outstanding information requests are deemed complete, the DEIS will violate NEPA and the CEQ regulations and deprive the public of a meaningful opportunity to participate.

B. The DEIS Not Discuss Impacts That Arise Out of A Grant of a Blanket Certificate

The Applicants seek a “blanket certificate” for the project which pre-authorizes a pipeline to undertake, on a self-implementing basis, certain routine upgrades and repairs post-certificate without having to go through a lengthy approval process or extensive environmental review.²⁶ Today, the Commission’s blanket certificate program has been expanded beyond that narrow purpose, and has been used to authorize substantial expansion projects -- such as a 14,000 hp compressor station or a 16-mile lateral pipelines²⁷ -- as well as “repairs and upgrades” located a half-mile from the original mainline project with minimal prior notice and reduced environmental scrutiny.²⁸

Moreover, not only do blanket certificates allow a pipeline to expand its system with limited procedural safeguards, but they may also rely on the finding of public necessity and convenience underlying the grant of the initial certificate to invoke eminent domain for structures authorized under the blanket certificate – whether they serve a public need or not.²⁹ What this means is that any property-owners either

²⁶ See Pipeline Certificates for Routine Transactions, 47 FR 24254 (1982); also 18 C.F.R. §157.

²⁷ See *Centerpoint Energy*, 121 F.E.R.C. P61,180 (2007)(authorizing 14,000 hp compressor station under blanket certificate); *Enable Gas Transmission*, 153 FERC ¶61,055 (2015)(affirming use of blanket certificate for 16-mile lateral transmission pipeline across multiple private properties with limited notice and environmental review).

²⁸ *Columbia Gas Transmission*, 768 F.3d 300 (3rd Cir. 2014)(affirming use of blanket certificate for repairs located one-half mile outside of easement and use of eminent domain).

²⁹ *Enable Gas, supra* (authorizing pipeline to construct 16-mile lateral line to new processing center under terms of a 30-year old blanket certificate, absent finding of need and with limited environmental review); *Columbia Gas, supra* (allowing pipeline to

currently subject to the pipeline easement or within the general vicinity now have a proverbial target on their back as potential sites for new infrastructure that are pre-authorized under the blanket certificate and allow for use of eminent domain to acquire property rights for construction.

Because a blanket certificate invites additional construction along the MVP system, the environmental impacts differ significantly from a traditional certificate that does not pre-authorize future upgrades or expansion. Yet, the DEIS does consider these impacts at all even though they are relevant to a cumulative impacts analysis under NEPA.³⁰ fails to consider the environment blanket certificate may attract future development. In fact the DEIS does not even describe what a blanket certificate is, or the types of activities that it may authorize, thus leaving the public with inadequate information to comment on the proposal. Accordingly, the Commission must address the impacts unique to a “blanket certificate” in the DEIS and provide substantial mitigation for future impacts, or it must deny the request for a blanket certificate altogether.

C. The DEIS Does Not Address Expert Scientific Opinions Submitted by Intervenors.

Section 1502.24 of the CEQ regulations emphasizes that “agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in the environmental impact statements.” An agency must evaluate the scientific evidence presented, respond to opposing viewpoints and provide reasons for rejecting an expert’s analysis. *See Protect Our Communities v. Salazar*, Case No. 12-cv-2211 (S.D. Cal. 2013)(finding that agency’s consideration of expert opinions by petitioners along with agency experts satisfied NEPA). Failure to address expert opinions will result in invalidation of the agency’s EIS. *See Western Watersheds v. Kraayenbrink*, 632 F.3d 472, 492 (9th Cir. 2010)(remanding EIS where BLM failed to address concerns about project’s impacts raised by its own experts as well as other federal and state agency experts); *Lands Council v. McNair*, 537 F.3d 981, 1001 (9th Cir. Idaho 2008)(reaffirming that agency “must acknowledge and respond to comments by outside parties that raise significant scientific uncertainties” with reasonable support).

invoke eminent domain under blanket certificate for upgrade outside pipeline easement).

³⁰ [cite cumulative impacts cases that give rise to future activity under NEPA]

The DEIS did not evaluate or respond to an expert opinion by Dr. Ernst Kastning, a retained expert on karst.³¹ The DEIS contains a single reference regarding water drainage in karst terrain (DEIS 4-72) to Kastning's Report that was filed at the Commission on July 13, 2016 - two months before the DEIS issued,³² and with enough time to allow ample consideration. Yet the DEIS does not take into account or even respond to Dr. Kastning's report, including his ultimate conclusion that the MVP pipeline should not be constructed given the risks associated with construction through karst terrain. The DEIS' failure to address a competing expert's opinion about karst - which is dominant along the route in Montgomery County and elsewhere in the region and poses substantial threats to health and safety - detracts from the scientific integrity of the document in violation of NEPA.

III. THE DEIS FAILS TO CONSIDER THE LACK OF NEED FOR THE PROJECT OR ANALYZE THE COSTS AND BENEFITS

A. Sources of Authority for Evaluation of Need

Under both NEPA, the NGA and the Forest Service Manual, an Applicant must establish that there is both a public need for the project and that it is in the present and future public necessity and convenience. The Applicant bears the burden of proof in demonstrating that it satisfies the requirements of Section 7. See *Michigan Consolidated Gas Co. v. Federal Power Comm'n.*, 283 F.2d 204, 214 (D.C. Cir. 1960).

1. NEPA

With respect to NEPA, project purpose and need are relevant because the lack of need for a project would justify selection of a no-action or less harmful alternatives. *1000 Friends of Wisconsin v. U.S. Department of Transportation*, Case No. 11—0545, (ED Wis. May 22, 2015)(finding that because highway was not needed, agency should have considered more benign alternative). Further, defining project purpose and need enables

³¹ In addition to reports by retained experts, the record also contains numerous and detailed comments submitted by County residents whose professions – such as engineers, environmental scientists, and real estate agents – would also qualify as experts and whose comments have been likewise ignored in the DEIS.

³² See FERC Accession # 20160713-5029

an agency to exclude from consideration those alternatives that will not achieve the purpose of the project.³³

Because a project's need and purpose define the range of viable alternatives to be considered, it is also important that an agency "not define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency's power would accomplish the goals of the agency's action, and the EIS would become a foreordained formality." (emphasis added).³⁴

2. Natural Gas Act

Proof of need is equally significant under the NGA which authorizes the Commission to grant certificates only if projects are "required by the present and future public necessity and convenience." 15 U.S.C. §717f(e). The Commission assigns the applicant the burden of proof to establish that a certificate is in the public necessity and convenience under Section 7 of the Natural Gas Act. See *Sunray Mid-Continent Oil v. FPC*, 364 U.S. 137, 158 (1960)(finding that Commission was reasonable to require applicant to prove need for a limited certificate).

To assess whether a project meets the statutory "public necessity and convenience" standard, the Commission, pursuant to its *Certificate Policy Statement*,³⁵ balances a project's benefits, such as need against burdens imposed on customers and

³³ See e.g., *Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 73 (D.C. Cir. 2011)(finding that BLM did not impermissibly narrow project goals to artificially limit consideration of alternatives); also *Fuel Safe v. FERC*, 389 F.3d 1313 (10th Cir. 2004)(accepting need for pipeline to provide electricity on Vancouver Island and finding purpose was not unduly narrow).

³⁴ *Friends*, [FIX CITE] 153 F.3d at 1066 (quoting *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C.Cir.1991), cert. denied, 502 U.S. 994, 112 S.Ct. 616, 116 L.Ed.2d 638 (1991)).

³⁵ Certification of New Interstate Natural Gas Pipelines, 88 FERC ¶61,227 (1999), clarified, 90 FERC ¶61,227 (1999), further clarified, 92 FERC 61,094 (2000) (Certificate Policy Statement).

property owners.³⁶ Finally, a showing of “public need” (as opposed to “private need”) is constitutionally imperative since the Section 7f(h) of the NGA empowers certificate holders to exercise the power of eminent domain. Absent public need, Section 7f(h) would violate the Fifth Amendment’s prohibition on takings of property for private gain.

Accurately assessing project need establishes a context for environmental review – a key factor in determining the significance of a project’s impacts.³⁷ evaluating a project under the *Certificate Policy Statement*, the Commission balances public need for the project with harm to the environment³⁸, landowners and captive ratepayers. The Commission adopts a “sliding scale” assessment – meaning that it may tolerate more significant environmental and landowner impacts associated with a project that meets a crucial need, whereas, these same impacts might not be considered acceptable for a project of only marginal necessity.³⁹ In other words, the need for the project establishes the lens through which environmental impacts are evaluated; absent an assessment of

³⁶ Certificate Policy Statement at 25 (“The amount of evidence necessary to establish the need for a proposed project will depend on the potential adverse effects of the proposed project on the relevant interests.”).

³⁷ See CEQ Regulations, 40 C.F.R. §1508.26 (defining significant impacts to be determined with respect to context and intensity; see also *infra* at XXX (discussing intensity)).

³⁸ Unlike NEPA, which is primarily procedural in nature, this is a substantive requirement under the NGA and not simply a perfunctory, procedural requirement. This means the Commission has to go beyond taking a hard look at the environmental harms and substantively ensure there has been a balancing of public need and the harms. Considering there has been no demonstration of need, the Commission has not and cannot complete this balancing.

³⁹ *Turtle Bayou Gas Storage Co., LLC*, 135 FERC ¶ 61233, 62301, P.34 (June 16, 2011) (“The generalized showing made by Turtle Bayou does not outweigh the impact on the landowner ... needed to develop the proposed project... Therefore, we cannot find that Turtle Bayou's proposed project is required by the public convenience and necessity, and we deny its request for certificate authority to construct and operate its project.”); *Pac. Connector Gas Pipeline, Lp Jordan Cove Energy Project, L.P.*, 139 FERC ¶ 61040, 61174 (Apr. 16, 2012) (vacating Certificate on the grounds that the need for the proposed facility no longer outweighed the impacts)

need in the DEIS, the context for measuring the significance of environmental impacts is lost.

3. Forest Service Manual

Project purpose and need are relevant to the findings that the Forest Service must make under Section 2703.2 in determining whether to authorize use of national forest for the MVP Project. Section 2703.2 permits authorization only if the proposed use is consistent with the Forest Service mission to manage NFS lands and resources in a manner that will best meet the *present and future needs* of the American people. Thus, absent a public need for the project, the Forest Service must deny use of its lands.

⁴⁰

The Forest Service was aware of the lack of information regarding project need early in the process. In March 2016, the Forest Service submitted comments asking the Commission to expand the description of project purpose and need in MVP's Resource Reports to include a discussion of the necessity to cross federal lands.⁴¹ Because the description of project purpose and need in the DEIS is not more extensive than what was submitted in the Resource Reports, the Forest Service will be unable to make the findings required to authorize use of NFS lands for the pipeline.

4. BLM Project Review

Finally, the project purpose and need are relevant to BLM's grant of an ROW. If the purpose of the ROW is inconsistent with the purpose of the federal lands that will be crossed, BLM "shall not grant" the ROW. *See* 30 U.S.C §185(a). In addition, BLM must also define project purpose as part of its NEPA analysis of an ROW grant - and is not permitted to rely solely on the applicant's private project goals to preclude consideration of alternatives that are more compatible with BLM's statutory obligations.

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⁴⁰ *National Parks v. Bureau of Land Management*, 606 F.3d 1058 (9th Cir. 2010) (vacating BLM DEIS which failed to consider all reasonable project alternatives due to BLM's narrowly drawn project objectives which required that private sponsor's needs be met).

⁴¹ FS Comments on Final Resource Reports (dated March 9, 2016), Accession # 20160311-5013 .

B. There Is No Public Need for the Pipeline

Although the Commission is legally required under both NEPA and the Natural Gas Act to evaluate the need for the MVP, the DEIS does not.⁴² Instead, the DEIS uncritically accepts the purpose of the MVP Project as stated in its application: to deliver 2 million dth/day of natural gas from the Appalachian Basin to markets in the Northeast, Mid-Atlantic and Southeastern states to five contracted shippers. DEIS 1-7.

That the MVP pipeline is fully subscribed does not end the inquiry of whether there is a need for the project. Here, there is a strong possibility that need for the project was manufactured by project investors given that every subscriber is an affiliate of an MVP joint venturer, as shown on the table below.⁴³

⁴² As discussed in Part XXX, *supra*, both the Forest Service and BLM must also consider project need as part of the LMRP amendment and ROW grant processes. Comments on the Forest Service and BLM proceedings are discussed separately in Part XXX, *infra*.

⁴³ See Institute for Energy Economics and Financial Analysis (IEEFA), *Risks Associated With Natural Gas Pipeline Expansion Across Appalachia* (April 27, 2016) (“IEEFA Report”) (concluding that the MVP and Atlantic Coast Pipeline, FERC Docket Nos. CP15-554 & CP15-555, are indicative of overbuilding by the natural gas industry). filed at FERC by C. Kunkel on September 12, 2016, Accession # 20160912-0036. The report was cited and linked in the Virginia chapter of the Sierra Club’s May 12, 2016 filing (Accession No. 20160512-5183).

Table 2. All of the shippers on the Mountain Valley Pipeline are affiliates of companies involved in developing the project.

Pipeline owner	Ownership Interest	Shipper	Capacity contracted (dekatherms/day)	Capacity contracted (%)
EQT Midstream Partners, LP	45.5%	EQT Energy, LLC	1,290,000	64.5%
NextEra Energy US Gas Assets, LLC	31%	USG Properties Marcellus Holdings, LLC	250,000	12.5%
Con Edison Gas Midstream, LLC	12.5%	Consolidated Edison Company of New York	250,000	12.5%
WGL Midstream, Inc.	7%	WGL Midstream, Inc.	200,000	10%
Vega Midstream MVP LLC	3%			
RGC Midstream LLC	1%	Roanoke Gas Company	10,000	0.5%

The Commission itself acknowledges in its Certificate Policy Statement that affiliate contracts are less probative of public need than those negotiated at arms length.⁴⁴

The DEIS also ignores credible and contrary evidence of potential for overbuild. A report released April 27, 2016, by the Institute for Energy Economics and Financial Analysis⁴⁵ demonstrates the recent pace of pipeline development, and documenting the potential risk of overbuild.

Even the gas industry has started to express concerns about overbuilt infrastructure. In June 2016, Rusty Braziel, president of RBN, an energy consulting firm expressed concerns at an energy conference about the “pipeline bubble:”

Braziel drew parallels between the current state of shale hydrocarbon commodities markets and the housing market crash during the Great Recession.

“What we’re really seeing is the tail end of a bubble, and what’s actually happened is that bubble attracted billions of dollars’ worth of infrastructure investment that now has to be worked off,” he said. “It’s entirely possible that that could be the world that we’re into now, that it’s this world of infrastructure investment that we’re dealing with right now

⁴⁴ Certificate Policy Statement at 88 FERC ¶ 61227, 61748 (discussing affiliate agreements).

⁴⁵ IEFPA Report, *supra* p. 12.

and that this has a lot to do with what we're seeing happening up in the Northeast."⁴⁶

The DEIS' failure to consider the lack of need for the project skews its alternatives analysis. The DEIS ultimately rejected several system alternatives because it found them inadequate to transport 2 million dth/day,⁴⁷ and it never seriously considered the possibility of a smaller or shorter pipeline that would not have the same devastating impacts on the environment and safety as a 42-inch line. But because the DEIS assumes not only that the project's purpose is to transport gas but specifically to transport 2 million dth/day, it disregarded or never considered other feasible and less impactful alternatives - including the no-action alternative.

The lack of demonstrated public need in the DEIS also raises questions regarding the constitutionality of use of eminent domain to acquire private property along the MVP route. The Commission recognizes that absent public need, a taking of property may violate the 5th Amendment's prohibition on taking of public land for private use.⁴⁸

C. The DEIS Does Not Evaluate the Cost of Allowing a 14 Percent Return on Equity for the Pipeline.

Rule 1502.23 of the CEQ regulations allow an agency to conduct a cost benefit analysis of a project⁴⁹. Here, the MVP Project is a \$3.7 billion project -- which that will be

⁴⁶ *Marcellus on Pace for Overbuild*, Natural Gas Daily (June 8, 2016), online at <http://www.naturalgasintel.com/articles/106695-marcellusutica-on-pace-for-pipeline-overbuild-says-brazil> (last visited October 10, 2016).

⁴⁷ See DEIS at 3-10 to 3-13 (rejecting numerous system alternatives, finding that they lack capacity to transport 2 million dth/day).

⁴⁸ See *Pac. Connector Gas Pipeline, Lp Jordan Cove Energy Project, L.P.*, 139 FERC ¶ 61040 (Apr. 16, 2012)

⁴⁹ *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1214 (9th Cir. 2004) ("A 'cost-benefit' analysis under the [CEQ] Guidelines consists of any analysis identifying and assessing the comparative benefits and/or costs of 'environmentally different alternatives.'") (quoting 40 C.F.R. § 1502.23).

in operation for just 20 years. Thus, it would be appropriate for the DEIS to compare the cost of the MVP, for the time that it will be in service, to alternative and less expensive resources.⁵⁰

Moreover, the DEIS should at least mention that the 14 percent ROE is excessive, even under the Commission's standards. Recently, in *Florida Southeast Market*, the Commission rejected a request for a 14 percent ROE when the company -- as here -- had a capital structure of 60 percent equity/40 percent debt. The Commission explained:

For new pipelines, the Commission has approved equity returns of 14 percent, but only where the equity component of the capitalization is no more than 50 percent. In MarkWest Pioneer, LLC (MarkWest), the Commission approved a greenfield pipeline's proposed 14 percent return on equity but rejected its cost-based rates capital structure of 60 percent equity and 40 percent debt. *The Commission found that imputing a capitalization containing such a large equity ratio is more costly to ratepayers, because equity financing is typically more costly than debt financing and the interest incurred on debt is tax deductible.*⁵¹

Because of MVP's capital structure, the return on equity of 14 percent is excessive and must be rejected.

Moreover, as described in the IEEFA Report, this high rate of return encourages often unnecessary infrastructure, burdening both ratepayers and landowners with the cost of higher rates and loss of property values.⁵² The DEIS should have considered whether the high ROE created a bias in favor of a larger-than-necessary pipeline when a smaller pipeline, a system alternative or no pipeline at all would have sufficed.

IV. THE DEIS FINDINGS OF NO SIGNIFICANT IMPACT ARE ERRONEOUS AND UNSUPPORTED BY SUBSTANTIAL EVIDENCE.

⁵⁰ See *Millennium Pipeline Company, L.L.C.*, FERC Docket No. CP11-515, 140 FERC ¶ 61,045 (July 17, 2012), Wellinghoff, Chairman, *dissenting* (comparing costs of benefits of alternative proposals]

⁵¹ *Florida Southeast Connection*, Docket CP14-554, 154 FERC ¶ 61,080 at P 117 (February 2, 2016) (footnotes and citations omitted).

⁵² IEEFA Report at 13-14.

Not only is the DEIS both procedurally and legally deficient, the DEIS finding that the MVP Project will have no significant impact is unsupported by substantial evidence and factually erroneous. Below, the County lists numerous instances where the DEIS either downplayed impacts or ignored them entirely, failed to consider feasible alternatives and provide adequate mitigation and repeatedly refused to incorporate protections for landowners that also make MVP accountable.

A. The MVP Project Will Have Significant Impacts on Forests Yet Neither Attempts to Avoid These Impacts or Provide Any Mitigation.

1. Description of Impacts to Forest

According to the DEIS, construction of the MVP pipeline will impact 4780 acres of forest during construction and 1689 acres during operation DEIS Table 4.8.1. The Applicant has since updated these tables in light of its recent route modifications, resulting in even larger impacts to forests - 4860 acres impacted during construction and 1702.2 acres impacted during operation⁵³.

Within Montgomery County, the pipeline will impact 501 acres of forested lands within recreational and special areas, including the Jefferson National Forest during construction and 189.37 acres during operation. DEIS Table 4.8.1-8. As updated by MVP's October 20, 2016 filings, the impacts to forested lands within recreational and special areas have been reduced to 197.3 acres during construction and 63.5 acres during operation. Yet these reductions -- though beneficial to resources within Montgomery County -- do not compensate for the overall increase in impacts to forest resulting from the the project. Moreover, even reduced, the project impacts to forests within Montgomery County are still substantial.

The DEIS repeatedly acknowledges that the impacts to forests are significant.⁵⁴ As the DEIS describes, more than half of the trees that will be removed are interior forest,

⁵³ Table 4.8.1-1 as modified in MVP Supplemental Filing (October 20, 2016), Accession # 20161020-5175.

⁵⁴ See, e.g., ES-5 (permanent conversion of forested wetland to scrub or emergent wetland); ES-6 ("Impacts on forest-dwelling species would be greater because forest would take a long time to regenerate in temporary workspaces and trees would be permanently removed from the operational pipeline easement."); ES-14("The

which has a higher habitat value for some wildlife species and is considered rarer than forest edges with lower habitat value. DEIS 4-131. The pipeline will destroy thousands of acres of upland forest, 938 acres of which is classified as “High to Outstanding Quality” in Virginia. (ES-6, 4-145). The removal of forest would contribute to edge effects and habitat fragmentation within 856 acres of core forest tracts in West Virginia and 195 acres of core forest tracts in Virginia. Destruction of forest will in-turn have consequences for viewshed (see discussion *infra* at XXX), and forest-dwelling species, including endangered species.

2. Given impacts to forest, the DEIS finding of no significant impact is unsupported by evidence.

Given that the MVP Project alone will raze 4909.1 acres of trees⁵⁵ -- an impact which the DEIS itself characterizes as significant -- the DEIS’ overall conclusion that the project will have no significant environmental impacts is internally inconsistent and unsupported by the evidence. Although the DEIS attempts to downplay the extent of impacts to forests by noting that those trees in the temporary right-of-way “would be allowed to regenerate after pipeline installation and restoration” (DEIS 4-214), even the DEIS acknowledges that “larger trees likely would not grow to maturity for many decades, making [tree removal] a long-term impact.” In turn, the lengthy regeneration period -of 30 years or longer will also have greater impacts on forest-dwelling wildlife species. DEIS 4-161.

3. The DEIS does not provide any mitigation for impacts to forests.

Even when as here, a project will have substantial adverse impacts, the DEIS may still rationally conclude that the impacts are not significant if adequate mitigation is provided. The MVP DEIS does not include any details regarding mitigation or evaluate the adequacy of the proposed measures.

Sec. 1502.14(f) of the CEQ regulations requires an EIS to “include appropriate mitigation measures not already included in the proposed action or alternatives” and to evaluate whether mitigation offers an effective means to remediate significant

construction and operation of the projects will result in limited adverse environmental impacts, with the exception of impacts on forests.”).

⁵⁵ The EEP Project will result in removal of an additional 74 forested acres. Updated MVP Table 4.8.1 (October 20, 2016). See FERC Accession No. 20161020-5175 at 107 – 108.

environmental impacts. See 40 C.F.R. §1508.25(3)(b). Section 1508.20 of the CEQ regulations define mitigation as: (a) avoiding the impact, (b) minimizing impacts by limiting the magnitude of the action, (c) rectifying the impact by repairing and rehabilitating the affected environment, (d) reducing or eliminating impacts over time by preservation and maintenance operations of (e) compensating for the impact by replacing or providing substitute resources. 40 C.F.R. §1508.2.

To satisfy the CEQ regulations, the DEIS must describe any proposed mitigation in sufficient detail to ensure that environmental consequences have been fairly evaluated.⁵⁶ *Carmel-By-the-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1154 (9th Cir.1997). “A mere listing of mitigation measures is insufficient to qualify as the reasoned discussion required by NEPA.” *Northwest Indian Cemetery Protective Ass'n. v. Peterson*, 795 F.2d 688, 697 (9th Cir.1986); *Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1380 (9th Cir. 1998)(finding Forest Service’s “perfunctory listing” of mitigation measures for the Redband trout improper under NEPA).

The discussion of mitigation measures in the DEIS falls far short of what is required under the CEQ and FERC regulations. First, the DEIS failed to fully consider avoidance of impacts, which is required before an Applicant may even begin to consider mitigation.⁵⁶ Although the DEIS considered - and rejected - collocation of a larger

⁵⁶ See 18 C.F.R. §380.15(a) (“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.”); *Webster v. U.S. Dep't of Agric.*, 685 F.3d 411, 431 (4th Cir. 2012) (“The statutory mandate that agencies detail ‘any adverse environmental effects which cannot be avoided should the proposal be implemented,’ 42 U.S.C. § 4332(C)(ii), implicitly assumes ‘that the EIS will discuss the extent to which adverse effects can be avoided.’”) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989)); *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1084–85 (9th Cir. 2011) (“Mitigation measures may help alleviate impact *after* construction, but do not help to evaluate and understand the impact before construction. In a way, reliance on mitigation measures presupposes approval. It assumes that—regardless of what effects construction may have on resources—there are mitigation measures that might counteract the effect without first understanding the extent of the problem.”) (emphasis in original)

portion of the MVP and EEP projects,⁵⁷ collocation is not the only option for avoiding impacts. Most obviously, the Commission could have considered a 25-foot, or even 50-foot construction easement, rather than the 75-foot construction easement currently proposed.⁵⁸ A narrower easement would have avoided the amount of tree removal necessary by between 40 and 60 percent. In addition, narrowing the width of the easement is consistent with Section 380.15(e)(4) of the Commission's siting regulations implementing NEPA which provide that a project should keep "rights-of-way clearing to the minimum width necessary." 18 C.F.R. §380(e)(4).

Likewise, the DEIS must evaluate whether reducing the size of the 500-foot utility corridor that MVP seeks from the Forest Service would avoid or reduce impacts to forests. Although initially, MVP's grant will be limited to a 125-foot easement within the utility corridor with future projects subject to NEPA review,⁵⁹ establishment of a 500-foot utility corridor invites the prospect of additional infrastructure development which will lead to removal of even more trees.

Even if it is not possible for the project to partially or fully avoid impacts to trees, NEPA allows for mitigation in the form of replacement. 40 C.F.R. §1508.20(c). Yet, the DEIS does not consider the option of requiring MVP to fully replant trees in the construction easement. To ensure that replanting is successful, the DEIS should require Applicants should to retain and consult with local arborists and tree experts, and monitor the replanting efforts for the next decade.

Tree replanting is not without precedent.⁶⁰ Moreover, it is illogical to excuse a multi-billion-dollar company like MVP from fully restoring land to its original condition

⁵⁷ Currently, 29 percent of the MVP is collocated with existing easements and 20 percent of the EEP is likewise collocated. [note - any basis for challenging lack of collocation]

⁵⁸ The combined construction and operation easement is 125 feet, with 50 feet of that to remain a permanent easement for pipeline operation.

⁵⁹ Forest Service FAQ Regarding FERC DEIS for Mountain Valley Pipeline (November 2, 2016), online at http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd523416.pdf.

⁶⁰ See, e.g., *Laguna Greenbelt, Inc. v. U.S. Dep't of Transp.*, 42 F.3d 517, 528 (9th Cir. 1994), *as amended on denial of reh'g* (Dec. 20, 1994) (EIS proposed re-planting

prior to installation of the pipeline when even the tiniest, run-of-the-mill home-improvement contractor would be obligated to do the same if they damaged a property. In a case where it is undisputed that the project will have significant and lasting impacts on forests, mitigation in the form of replanting is appropriate and justified by the evidence. That the Applicant itself did not propose replanting trees as mitigation does not foreclose the Commission from considering this option⁶¹ - since ultimately, the Commission and not the applicant bears the burden of complying with NEPA.

Not only does the DEIS fail to consider obvious and effective forms of mitigation, it fails to provide any details regarding the scant mitigation measures that were actually considered.⁶² The DEIS' sole reference to mitigation of tree removal comes at page 4-162, describing that MVP will restore the right of in using native seed mixes in accordance with its "Plans and Procedures" -- which are nowhere to be found in the

coastal sage scrub); *Surfrider Found. v. Dalton*, 989 F. Supp. 1309, 1320 (S.D. Cal. 1998), *aff'd sub nom. San Diego Chapter of the Surfrider Found. v. Dalton*, 196 F.3d 1057 (9th Cir. 1999) (mitigation measures for U.S. Marine Corps officer housing units included a tree planting program); *Mt. Lookout-Mt. Nebo Prop. Prot. Ass'n v. F.E.R.C.*, 143 F.3d 165, 169-170 (4th Cir. 1998) (the Commission required applicant to plant trees as part of its mitigation of adverse visual impacts); *Nw. Bypass Grp. v. U.S. Army Corps of Engineers*, 552 F. Supp. 2d 97, 131 (D.N.H. 2008) (U.S. Army Corps of Engineers developed mitigation requiring "trees, other plantings, and fencing ... to mitigate adverse visual and audible impacts.")

⁶¹ *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 503 (D.C. Cir. 2010) ("NEPA regulations... require *an agency* to discuss possible mitigation measures in the EIS and Record of Decision.") (citing 40 C.F.R. §§ 1508.25(b)(3), 1502.14(f), 1502.16(h), 1505.2(c)) (emphasis added).

⁶² See *Northwest Indian Cemetery Protective Ass'n v. Peterson*, 795 F.2d 688, 697, *supra* and *Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1380, *supra* (finding Forest Service's "perfunctory listing" of mitigation measures for the Redband trout improper under NEPA); *Carmel-By-the-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1154 (9th Cir.1997) ("Mitigation must 'be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated.'") (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 353 (1989))

DEIS.⁶³ The DEIS also states generally that MVP will minimize all project impacts (DEIS 2-33) by undertaking construction and restoration in accordance with the plans in Table 2.4-2.

The DEIS also accepts, without discussion, the mitigation measures prescribed in these manuals - even though they are completely irrelevant to tree restoration. One of the manuals listed - the *Upland Erosion Control, Revegetation and Maintenance Plan*⁶⁴ - prescribes general measures for restoration of a right-of-way - such as seeding, clean-up, rock removal, etc... none of these measures pertain to the replanting of trees. Merely referencing mitigation measures is insufficient under NEPA; the Commission must also evaluate whether the stated mitigation “offers an effective means to remediate significant environmental impacts.” 40 C.F.R. § 1502.14(f). Revegetating or reseeding rights-of-way obviously do not.

The only “mitigation” for tree removal in the DEIS -- if it can be called that -- comes in the form of wishful thinking that the trees will be permitted to “naturally regenerate” in the temporary construction easement once the pipeline is complete.⁶⁵ Yet the DEIS does not evaluate whether natural tree regeneration serves as effective mitigation for tree removal in the construction right of way. For example, the DEIS does not describe whether the natural factors that can play major role tree regeneration -

⁶³ *WildEarth Guardians v. Montana Snowmobile Ass'n*, 790 F.3d 920, 925 (9th Cir. 2015) (“To incorporate underlying data by reference, [an] agency must cite the source in the EIS and briefly describe the content. 40 C.F.R. § 1502.21. A source may be incorporated by reference only if ‘it is reasonably available for inspection by potentially interested persons within the time allowed for comment.’ *Id.*”); *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 100 n.12 (1983) (“incorporation by reference is permissible if it will not impede agency and public review of the action... NEPA requires an agency to do more than to scatter its evaluation of environmental damage among various public documents.”) (internal citations and quotations omitted).

⁶⁴ The Upland Erosion Control, Revegetation and Maintenance Plan is online at <https://www.ferc.gov/industries/gas/enviro/plan.pdf>.

⁶⁵ See DEIS at 4-138, also 4-144 – 4-147 (describing forest fragmentation); 4-150 (recommending “that Mountain Valley develop a mitigation plan in coordination with federal and state agencies for both long-term and permanent upland forest impacts.”).

such as stand size, boundary pattern, species composition, density and age class distribution of remaining trees, or sunlight, nutrients, moisture, soil characteristics, temperature and wind - are conducive to effective natural regeneration.⁶⁶ In fact, several commenters contend that given existing conditions, natural regeneration is unlikely to succeed.⁶⁷ As such, natural regeneration is ineffective as mitigation for impacts.

To sum, the DEIS cannot logically conclude that the project will not have significant impacts while at the same time, acknowledging that impacts to forests are significant and failing to provide any effective mitigation. Accordingly, the DEIS must be rescinded or revised in accordance with these comments.

B. The DEIS Does Not Adequately Assess Project Impacts to Visual and Aesthetic Resources.

⁶⁶ See Virginia Department of Forest Website, Natural Tree Regeneration, online at <http://www.dof.virginia.gov/manage/tree-regeneration.htm>.

⁶⁷ Comment by Carl E. Zipper regarding the Adverse Effects to Forest Resources are not Minimized under CP16-10 (November 20, 2016), Accession No. 20161121-5051, at 5-6; U.S. Forest Service Comments on the MVP June 2016 Draft Plan of Development (November 14, 2016), Accession No. 20161115-5013, at 23 (“The statement ‘Restoration in these areas will be determined successful if the seeded areas have germinated and are demonstrating that they will, over time, achieve a distribution and diversity similar to adjacent undisturbed areas or to targeted conditions’ is unrealistic and perhaps not achievable... it is highly unlikely that it will ever be restored.”)

Under NEPA, a DEIS must fully consider impacts to visual and aesthetic resources and if they are unavoidable, the agency must provide mitigation.⁶⁸ The DEIS must disclose the methodologies applied as part of its analysis. See 40 C.F.R. §1502.24⁶⁹

In addition, under the Commission's siting regulations implementing NEPA, a project must (a) avoid "long foreground views of cleared rights-of-way through wooded areas that are visible from areas of public view;" (b) avoid, where practicable, rights-of-way crossing hills and other high points at their crests where the crossing is in a forested area and the resulting notch is clearly visible in the foreground from areas of public view and (c) employ screen plantings where rights-of-way enter forested areas from a clearing that is plainly visible in the foreground. see 18 C.F.R. §380.15(e)(8)-(10).

The DEIS concludes that "construction and operation of the MVP and the EEP would result in limited adverse environmental impacts, with the exception of impacts on forested land" (DEIS 5-1), but that with implementation of the Applicant's' Plans, we conclude that overall impacts on ... visual resources would be adequately minimized." (DEIS 5-8) As shown, the DEIS lacks evidence to support this conclusion and fails to comply with NEPA nor evaluate projects consistently with the standards in Section 380.15.

First, as required by Section 1502.24 of the CEQ regulations, the DEIS does not describe the selection criteria by which MVP chose the 61 Key Observation Points (KOPs) listed in Table 4.8.1-10 And whatever selection criteria was applied was inadequate, because nothing was selected at Mt Tabor Road, Preston Forest or view points along I-81 where there is a greater potential of more people viewing where the sites where the right-of-way carves through the mountains.

Second, the DEIS also performed only a leaf-on analysis which minimizes the true extent of visual impacts. For this reason, the Forest Service requested a leaf-off analysis

⁶⁸*LaFlamme v. FERC*, 852 F.2d 389, 399-400 (9th Cir. 1988) (Commission's failure to evaluate visual and aesthetic impacts was arbitrary and capricious); *Young v. Gen. Servs. Admin.*, 99 F. Supp. 2d 59, 76 (D.D.C.), *aff'd*, 11 F. App'x 3 (D.C. Cir. 2000) (approving visual impact assessment which was based on "standard visual impact methodology;" methodology was detailed in EIS).

⁶⁹ *Izaak Walton League of Am. v. Marsh*, 655 F.2d 346, 368 (D.C. Cir. 1981) ("[T]he administrative record must disclose the studies and data used in compiling environmental impact statements. Moreover, any methodologies relied upon should be carefully described.")

of the pipeline in March 2016,⁷⁰ which MVP has not yet provided and which is necessary for full evaluation of the pipeline's impacts on forests.

Third, the DEIS visual simulations for highly sensitive KOPs reproduced in Appendix S are also inadequate. Again, there is no description of the tools used to develop the photos in Appendix S-1. Also, the visual "simulations" appear to be nothing more than photographs taken by the Applicant at a particular KOP and subsequently photoshopped to reflect the anticipated changes following the pipeline. This approach is far inferior to the visual impact assessment tools available today (such as GIS software) that can enable more comprehensive visibility evaluations⁷¹ and which in fact, are employed by other agencies to conduct visual assessments. At the very least, the DEIS should require the Applicant to perform a visual resource assessment using these more sophisticated tools, or Commission staff should have performed one itself.

Yet, even the Applicant's primitive approach to and leaf-cannot conceal the enormous gashes across the viewshed resulting from the pipeline, which remain in plain site on many of the photos.⁷² On other photos where impacts are better hidden, it is only because the "screening" (e.g., on Brush Mountain, Appendix S-1-4) or remediation (e.g., reseeded easements depicted in several photos) are depicted in the most optimistic light, with trees and grass lushly regenerated. At a minimum, the photos should also show how the landscape will look during the period that remediation is ongoing -- or if it is unsuccessful.

The Applicant's' photos also show that its siting of the project is incompatible with the Commission's siting regulations. Contrary to Section 380.15 (e)(8) and (9), the project

⁷⁰ See Forest Service Comments (March 2016).

⁷¹ See *Visual Impact Assessment: Where Have We Come and Where Are We Going?* (2016), online at http://file.scirp.org/pdf/JEP_2016092816171950.pdf (describing current visual evaluation tools employed by federal agencies such as BLM, Soil Conservation Service and Department of Transportation).

⁷² See Appendix S-1-1 (showing right of way atop Peters Mountain even at great distance), S-1-6 (showing pipeline easement highly visible although Bradshaw Compressor Station is concealed), S-1-10 (large bare easement in plain view from Interstate 79), S-1-12 (bare easement in plain view from roadway).

does not avoid long foreground public views of cleared rights of way and crosses “hills and other high points at their crests where the crossing is in a forested area and the resulting notch is clearly visible.” Although the DEIS attempts to minimize the project’s visual impacts by claiming that assessment of visual resources is largely subjective (DEIS at XXX), the Commission’s regulations establish objective standards for determining whether visual impacts are acceptable. Here, they are not.

The mitigation for impacts to visual resources -- which involves construction of the project in accordance with the Applicant's’ plans (DEIS at 4-256 – 4-259) is also vague⁷³ and non-responsive. The Applicant’s plans allow for regeneration of forest in the temporary rights-of-way, but absent specific measures to accelerate and ensure re-establishment of forest vegetation, this form of mitigation is inadequate to minimize visual effects. As described earlier, requiring the applicant to replant trees throughout the temporary easement and monitor growth for a decade might offset some of the damage to viewshed, but the DEIS does not even discuss this obvious solution. Likewise, certain alternative routes - such as the Slussers’ Chapel alternative, described in Section XXX below - offer the benefit of mitigating visual resources and if the pipeline is approved, this alternative should be adopted.

C. The DEIS Erroneously Minimizes or Ignores All of the Impacts of Constructing a Pipeline Through Karst Terrain and Other Geological Hazards

1. Description of Karst Hazards

Between mileposts 190 and 237, the MVP pipeline route will cross treacherous and highly unstable karst terrain, nineteen miles of which is located along the pipeline’s 19-mile path through Montgomery County (between MP 217 and 236).⁷⁴ In particular, a high concentration of sinkholes and karst terrain -- known as the Mount Tabor Sinkhole Plain -- is located in Montgomery County between MP 221.1 and 222.3.⁷⁵ Given the

⁷³ As with discussion of mitigation for impacts to forests (*supra* at XXX and caselaw), the description of mitigation for visual impacts is inadequate to allow decisionmakers to evaluate project impacts.

⁷⁴ [In addition, there may still be unknown karst features along the route that MVP has yet to identify. See DEIS 4-49 (requiring MVP to continue to investigate karst). Other commenters assert that MVP understates the extent of karst in the Mount Tabor area. See *e.g.*, Dr. Robert Jones Comments (November 23, 2016) at 7.

⁷⁵ DEIS at 3-52.

hazards of constructing a 42-inch pipeline in these challenging conditions, numerous commenters - including the County, state agencies, non-profits⁷⁶ and experts and residents with engineering or geology credentials - have raised serious concerns about the pipeline's route. Potential impacts resulting from karst include groundwater contamination, collapse and formation of sinkholes and erosion.⁷⁷

Blasting -- which is necessary to construct the pipeline in shallow bedrock (see DEIS 4-51, 5-2) -- can compound many of the adverse impacts presented by karst - heightening the probability groundwater contamination and contributing to erosion and soil instability.⁷⁸ More than half of the pipeline section that crosses the County will run through shallow bedrock and therefore blasting will be required. See DEIS Table 4.3.2-8 (listing waterbodies, including 12 in the County located in areas of shallow bedrock), Table 4.1.1-14 (listing Montgomery County as having 11 miles of shallow bedrock). Construction of the pipeline through blasting lead Dr. Kastning to conclude that "approximately 60 percent of the MVP route through West Virginia and Virginia is in karst...making it unsafe and unsuitable **for the type of construction** proposed in the application." Kastning at 45. Hydrostatic testing in the karst region poses additional dangers which the DEIS does not adequately address.

Presumably in recognition of the dangers of karst - particularly through the Mount Tabor Sinkhole Plain as MVP originally proposed, the DEIS included a recommendation

⁷⁶ -See, e.g., Indian Creek Watershed Association, "Karst-related Features on the Proposed MVP Corridor in Monroe County, WV Docket No. CP16-10," (November 13, 2015), Accession No. 20151113-5109; "Supplemental Information of Save Monroe, Inc under CP16-10" (November 25, 2015), Accession No. 20151125-5114; Report of The U.S. Fish and Wildlife Service-VAFO under CP16-10, (March 9, 2016), Accession no. 20160309-5173; "Hydrogeological Assessment of Watershed Impacts Caused by Constructing the Moain Valley Gas Pipeline Through Summers and Monroe Counties, West Virginia," (August 15, 2016), Accession No. 20160815-5135

⁷⁷ See Kastening Report at 24-32 (listing Karst impacts). For additional detail regarding hazards of karst, see U.S. Forest Service Staff, "Comments on Final Resource Reports for the Mountain Valley Pipeline Project," (Mar. 9, 2016), Accession no. 20160311-5013; Robert M. Jones, Ph.D., "Report on Why MVP Needs to Go Along the Ridge of Brush Mountain instead of in the Slusser's Chapel Conservation Site," (November 23, 2016), Accession No. 20161123-5080.

⁷⁸ Kastning at 45.

that MVP conduct on-site surveys of the Mount Tabor Route Variation to assess constructability and identify karst features prior to the end of the DEIS comment period. DEIS 4-49. On October 20, 2016, MVP adopted the Mount Tabor Route variation .

2. The DEIS does not adequately address the dangers of karst

As noted earlier, an agency must evaluate the scientific evidence presented, respond to opposing viewpoints and provide reasons for rejecting an expert’s analysis. Notwithstanding the numerous expert reports submitted on karst, the DEIS does not address any of the contrary arguments, including Dr. Kastning’s position that the Mt. Tabor region is a no-build zone for pipelines and that construction in karst threatens groundwater. Because the DEIS did not respond to opposing, credible and science-based opinions, the DEIS is deficient and should be supplemented or rejected.

Indeed, *had* the DEIS considered Dr. Kastning’s report, it would have recognized that MVP’s reports grossly underestimated karst features, by relying on aerial photography or topographic maps which may not capture the presence of small sinkholes which are also an indicator of karst.⁷⁹ According to Kastning, the true extent of karst may only be determined through high-resolution surveying and mapping, detailed geotechnical methods such as dye-tracing and exploration and surveying of area caves.⁸⁰

The mitigation proposed by the DEIS also falls short. For example, MVP claims that it mitigated potential harm with the Mount Tabor Route variation which avoids a massive sinkhole. However, the Mount Tabor Avoidance route variation lies within the Mount Tabor Karst Sinkhole Plain as defined by Dr. Ernst Kastning, and therefore does not abate any of the dangers.⁸¹

MVP’s other proposed mitigation in the Karst Mitigation Plan and the Karst-Specific Mitigation plan are too vague to allow for meaningful review. The plans provide for avoidance of karst if possible, stabilization of karst features and deployment of a karst specialist team “during land clearing and construction in karst terrain to directly assess karst hazards, inspect karst features encountered during construction and provide

⁷⁹ Kastning Report 12-14, as modified in December 2016 Report at 4-5.

⁸⁰ *Id.* at 7.

⁸¹ See Dr. Robert Jones Report (November 23, 2016) at 7.

recommendations.⁸² MVP's plans do not offer any further detail – such as the “karst expert” that may be selected, or the precise mitigation measures to be implemented.

Further, although the DEIS lists several mitigation measures, critically, the DEIS fails to evaluate the effectiveness of these measures. “A mitigation discussion without at least some evaluation of effectiveness is useless in making that determination.”⁸³ In *South Fork Band Council*, the Ninth Circuit criticized a DEIS inadequate because it stated only that “feasibility and success of mitigation would depend on site-specific conditions.” Here, the Commission’s DEIS does not even go that far: it is void of any mention of the effectiveness or likelihood of success of the MVP’s proposed mitigation measures. Moreover, Dr. Kastning has criticized MVP’s proposed mitigation measures for karst features as “contrary to accepted best management practices.” Kastning December 2016 Report at 10 (citing published works).

As discussed in more detail in Part XXX, one option that would provide more effective mitigation for karst associated with karst risks is the Slussers’ Chapel Alternative proposed by the VDCR. If the Commission decides to approve the pipeline, , the Slussers’ Chapel Avoidance Route must be adopted.

3. Other geological hazards

The DEIS also fails to adequately assess the prospect of landslides and seismic risks. Construction of pipelines along high ridges increases the likelihood of landslides if it occurs above the karst areas. However, the DEIS does not require stabilizing measures in high elevation areas. The DEIS must be corrected to address these issues as well.

D. The DEIS Fails to Evaluate Impacts To Water Wells

As management consultant Peter Drucker has remarked, “If you can’t measure it, you can’t manage it.” Drucker’s observation applies aptly with respect to the DEIS’ evaluation of impacts to private water wells. Because the DEIS does not measure the the number of wells impacted, it cannot rationally propose mitigation to manage those impacts.

Although the DEIS identifies the number of public wells within the vicinity of the pipeline, it does not do the same for private wells in Virginia and West Virginia. As the

⁸² See MVP Supplemental Response (February 26, 2016) at 5 (summarizing features of karst mitigation).

⁸³ *South Fork Band Council v. US Dept. of Interior*, 588 F. 3d 718, 727 (9th Cir. 2009).

DEIS explains, this is because “information on private wells is unavailable [for those two states]” and the Applicant has been unable to obtain the information through field surveys because many landowners have denied access. DEIS 4-75. Thus, to address the potential - but unknown scope of impacts -- the DEIS recommends that the Applicants file the location of private wells and springs within 150 feet of construction workspaces and within 500 feet in karst terrain before construction begins. The Applicant would then be required will perform two pre-construction evaluations of water quality and gather post-construction water quality/yield samples *if* the well owner lodges a complaint. If suitable water quality is no longer viable due to construction-related activities, MVP would provide adequate quantities of potable water or provide a temporary water source. DEIS at 4-81.

The DEIS’ approach to water wells is invalid under NEPA. Without information regarding the number of private wells near the project, it is impossible to determine from the record whether the project poses significant environmental harm as required by NEPA. A project located in close proximity to several dozen wells will logically have more significant adverse impacts on water supply and public health than a project near one or two wells. Yet without data on the number of wells, decisionmakers cannot evaluate the overall impact of the project.

Meanwhile, the DEIS’ excuse for the lack of data on private wells is laughable. Even if the Applicants could not perform field studies (which in reality, provide an excuse to harass landowners and pressure them into easement negotiations), surely they - or Commission staff could have contacted landowners and asked them to identify wells located on their property. Perhaps not all landowners would have responded, but at least a simple request would have generated additional information.

The Commission’s proposed mitigation is also inadequate under NEPA - because without data on wells and the extent of the potential impacts, there is no way of knowing whether avoidance of impacts or remediation is appropriate mitigation. In addition, there is no guarantee that the remediation proposed will be effective in preserving water quality. For starters, the preconstruction well testing will be performed by the Applicant which has a conflict of interest rather than an independent third-party, so the baseline levels established may be skewed. Second, the Applicant is not required to test all wells after construction to evaluate whether water quality or yield has been degraded -- instead, the onus lies with the landowner to bring a complaint and request post-construction re-testing. The fact that a landowner chooses, for whatever reason, not to seek re-testing does not mean that the water supply wasn’t damaged, it simply means that the damage will remain unknown. This solution is also incompatible with NEPA,

which imposes the onus of monitoring compliance on the agency or the applicant, not impacted owners.⁸⁴

Finally, even where an owner seeks re-testing, it will be performed by MVP which increases the chance of bias. A preferable alternative would be to require MVP to fund landowners so that they can seek an independent evaluation of water quality. Also, MVP can drag out disputes over complaints regarding water quality, which requires landowners to spend money to obtain relief for damage caused by MVP. At a minimum, the certificate should make clear that should MVP decline to address complaints regarding water quality, the landowner has the option of seeking relief through the Commission's dispute resolution office and MVP must comply with the dispute resolution process or face sanctions.⁸⁵

F. Lack of Protection for Property Owners

Both NEPA and the Commission's Certificate Policy Statement require evaluation of a project's impact to landowners.⁸⁶ The DEIS evaluation of impacts to landowners is inadequate, and fails to adequately mitigate impacts by providing protection to property owners.

1. Property Devaluation

⁸⁴ See *CEQ Guidance on Use of Mitigation Monitoring (January 14, 2011)*, online at https://ceq.doe.gov/current_developments/docs/Mitigation_and_Monitoring_Guidance_14Jan2011.pdf

⁸⁵ Because the Commission's dispute resolution process is voluntary, many pipelines decline to participate, thus rendering the process useless from a landowner's perspective.

⁸⁶ 40 C.F.R. 1506.6(b)(3)(viii) (duty to involve owners and occupants of nearby or affected property); Certificate Policy Statement at 23-24 (explaining that impacts to landowners are one of three major impacts evaluated under Certificate Policy Statement separate from consideration of environmental impacts)

In addition to damage to wells, forest and visual resources (discussed elsewhere in these comments), the MVP's most significant impact to landowners comes in the form of property devaluation.

Recent court decisions -- that are not discussed in the DEIS at all -- have recognized, and awarded damages for reduction in property damages caused by pipelines. For example, in *Portland Natural Gas Transmission v. 19.2 Acres of Land*, 318 F.3d 279, 284 (1st Cir. 2003), upheld a district court's finding that property encumbered by a FERC pipeline easement was "diminished by 75 percent" based in part on the easement requirements, with reduction in value to the remainder (*i.e.*, the overall property) of ten percent. Courts also recognize stigma -- that proximity to a pipeline may have an adverse effect on how people view the value, and consider it a valid consideration in reviewing overall reduction in property values.⁴⁵ Again, the DEIS does not acknowledge the potential for stigma.

Similarly, the KeyLog report submitted to the Commission in May 2016 estimated that the MVP would cause between \$42.2 million and \$53.3 million in diminished property values within eight counties impacted by the pipeline. See DEIS at 4-312. As support for this estimate, the KeyLog report cited Ohio and Wisconsin studies showing that a pipeline decreases property values on average of 12 to 15 percent. Yet, the DEIS ignores this, instead referencing a "preponderance" of contrary evidence largely sponsored by the gas industry, or experts working for the gas industry.⁸⁷ Not surprisingly, these studies are skewed to downplay the impacts of pipelines.

Consider, for example, the most recent 2016 INGAA study conducted by Interga Realty Resources.⁸⁸ Even the INGAA report concluded that the average sale price of properties in a Virginia development located adjacent to pipelines was 1.4 percent lower than properties further away. But even a cursory glance at the report would reveal several flaws that bias the results. First, since the pipelines had been constructed in the 1950s and 1960s, and the houses were constructed in 2000, it is very likely that buyers were unaware that the properties were encumbered because real estate developers are not required to disclose the presence of a pipeline.⁸⁹ Landowners impacted by the MVP will

⁸⁷ See Diskin, Fruits, etc.. cited at 4-312 (all connected to gas industry); also 4-286.

⁸⁸ Report online at <http://www.ingaa.org/PropertyValues.aspx>

⁸⁹ See Virginia Real Property Disclosure laws, Virginia Code § 55-518(A)(1) online at <http://law.lis.virginia.gov/vacode/55-518/>; see also <http://www.nolo.com/legal-encyclopedia/what-virginia-listing-agents-must-disclose-about-property.html>

not have this option, however, because the pipeline easement is visible throughout the area.

Second, the INGAA study defined encumbered properties to include properties directly crossed by a pipeline, as well as properties adjacent to or abutting tracts that are crossed by a pipeline. Logically, homeowners on properties next to other properties that have pipelines will not face the same degree of devaluation as a property crossed by a pipeline because they are unaffected by the same restrictions (such as prohibition on building on the easement, damage to wells, etc...) on use as an encumbered property owner. By lumping directly impacted properties with adjacent and abutting properties, the INGAA report dilutes the overall devaluation percentages. And in fact, as mentioned earlier, even with these built-in flaws, the INGAA Report still found properties reduced in value by 1.4 percent; correcting for these flaws would substantially increase the diminution percentage.

Finally, the DEIS does not whether the property valuation studies cited involve traditional Section 7 certificates or blanket certificates which carry the very real potential for future expansion of the pipeline. At a minimum, the DEIS must acknowledge that a blanket certificate is a far greater encumbrance to a property than a traditional certificate, and therefore has the potential to reduce property values far more significantly.

2. Impacts resulting from abandonment

The DEIS neglects to address another potentially serious source of impacts: abandonment of the project. Here, abandonment is a foreseeable impact that must be evaluated under NEPA (see CEQ regulation XXX (requiring consideration of foreseeable impacts) because the precedent agreements only last for 20 years. The DEIS does not evaluate the impacts that could result from abandonment of the pipelines on their property, and potential for corrosion or contamination - particularly because once abandoned, the pipeline will no longer be maintained by MVP.

3. Impacts are exacerbated by grant of a blanket certificate

The DEIS also fails to examine the impact of granting a blanket certificate -- as the Applicant has requested -- on property values. Although a "blanket certificate" was originally intended to pre-authorize a pipeline to undertake, on a self- implementing

basis,⁹⁰ certain routine upgrades and repairs post-certificate without having to go through a lengthy authorization process.

Today, however, the Commission's blanket certificate program has been expanded to authorize substantial expansion projects – from 14,000 hp compressor stations⁹¹ to 16-mile lateral pipelines⁹² to “repairs and upgrades” located a half-mile from the original mainline project⁹³– with minimal prior notice and reduced environmental scrutiny. Moreover, not only do blanket certificates allow a pipeline to expand its system with limited procedural safeguards, but they may also rely on the finding of public necessity and convenience underlying the grant of the initial certificate to invoke eminent domain for structures permitted under the blanket certificate – whether they serve a public need or not.⁹⁴

What this means is that any property-owners either currently subject to the pipeline easement or within the general vicinity now have a proverbial target on their back as potential sites for new infrastructure that are pre-authorized under the blanket

⁹⁰ *Interstate Pipeline Certificates for Routine Transactions*, 47 FR 24254 (1982); also 18 C.F.R. §157.

⁹¹ *Centerpoint Energy*, 121 F.E.R.C. P61,180 (2007)(authorizing 14,000 hp compressor station under blanket certificate).

⁹² *Enable Gas Transmission*, 153 FERC ¶61,055 (2015)(affirming use of blanket certificate for 16-mile lateral transmission pipeline across multiple private properties with limited notice and environmental review).

⁹³ *Columbia Gas Transmission*, 768 F.3d 300 (3rd Cir. 2014)(affirming use of blanket certificate for repairs located one-half mile outside of easement and use of eminent domain).

⁹⁴ *Enable Gas, supra* ()(authorizing pipeline to construct 16-mile lateral line to new processing center under terms of a 30-year old blanket certificate, absent finding of need and with limited environmental review); *Columbia Gas, supra* (allowing pipeline to invoke eminent domain under blanket certificate for upgrade outside pipeline easement).

certificate and allow for use of eminent domain to acquire property rights for construction. This in turn devalues their property even further. In spite of these potential impacts, the DEIS treats the Application for a blanket certificate the same as a more limited, traditional Section 7 certificate and does not explore the potential, devastating impacts that result from granting blanket certification along a 300-mile, largely greenfield pipeline. Nor does the DEIS disclose the public what a “blanket certificate” is so that the public can fully comprehend the project impacts. The DEIS must address the impacts to property arising uniquely out of a “blanket certificate” to be considered adequate under NEPA.

4. Impacts on Property Insurance

The DEIS’ conclusion that the pipeline will not lead to increased property insurance is unsupported by evidence. First, the DEIS’ investigation of impacts resulting from the pipeline was inadequate. Instead of flatly inquiring of insurance companies whether a 42-inch natural gas pipeline constructed in karst-ridden terrain prone to landslides and running in close proximity - in some instances, as close as 50 feet - to residences will impact property insurance, FERC staff merely asked “whether a utility crossing would change the terms of a residential insurance policy.” DEIS 4-288. Not surprisingly, all that staff learned was that insurance policies might be impacted depending upon the type of utility and the terms of the operator’s policy. Notwithstanding that this information is *known* and not hypothetical for the MVP project, staff did not follow up to pursue a more definitive response.

The DEIS again turns to an industry-sponsored study by IRR regarding potential increases in insurance rates which reported that three of the largest home insurers indicated that proximity to a pipeline was not taken into consideration when underwriting a homeowner’s policy, and premiums would not increase following pipeline installation.

However, without detail on the methodology applied or questions presented to the insurers (for example, insurers may have believed that IRR was inquiring about gas distribution lines which of course have no impact, and not a 42-inch high pressure pipeline) or identification of the individuals consulted, the IRR study is of little value.

5. Mitigation

The mitigation for impacts to property values and property insurance is completely inadequate. For example, with respect to property insurance, the DEIS requires MVP to monitor and report to the Commission on complaints by landowners regarding increases or cancellation of property insurance for a period of two years following placement of the pipeline in service. DEIS 4-313. Although this proposal is a good start, the DEIS then goes on to state that MVP would “consider” mitigation on a

case-by-case basis if policy increases or cancellations were reported. Allowing MVP discretion to determine whether to reimburse a landowner for increases completely guts the effectiveness of the mitigation - since MVP can simply deny landowners' request for compensation. The proposed mitigation for property insurance increases would be far more effective if the DEIS simply mandated MVP to compensate impacted property owners, end of story.

As for mitigation resulting from devaluation of property, the DEIS assumes that property owners will be compensated as part of an easement agreement. As with much of the mitigation discussed in these comments, addressing compensation via an easement agreement is ineffective because it allows MVP *carte blanche* to establish the amount and terms of compensation with no accountability - since it can bring eminent domain proceedings against landowners who do not agree.⁹⁵ Although the DEIS cannot set the amount by which MVP must compensate landowners, it can and should recommend mandatory terms that MVP must include in its easement agreement so that landowners do not have to bargain away compensation to achieve equitable easement terms.

Thus, to protect landowners from the pipeline's impacts, the DEIS should either make the following terms enforceable conditions of the certificate.

- (1) MVP's easements must include a limitation of liability/hold harmless clause in its easement agreements to protect landowners from liability for damages caused by the pipeline;
- (2) MVP must post a bond as security to ensure full remediation of properties and resolution of claims by landowners for damages;
- (3) MVP must fund a decommissioning fund to pay for the cost of pipeline removal and restoration of the properties, and is required to remove the pipeline from a landowner's property if the project is abandoned, unless the landowner agrees to permit the pipeline to remain in place.

⁹⁵ In most instances, landowners do not refuse to accept an easement agreement because they want more money (as is generally assumed), but rather because they want the easement agreement to include protections such as a limited liability clause, or prohibition on installing a second pipeline in the easement which would not be authorized by the Commission certificate. *See, e.g., Tennessee Gas v. 104 Acres*, 749 F. Supp. 427, 431 (D. RI 1990)(finding easement agreement that provides for second pipeline and use of pipeline for substance other than gas invalid as beyond the scope of the FERC Certificate).

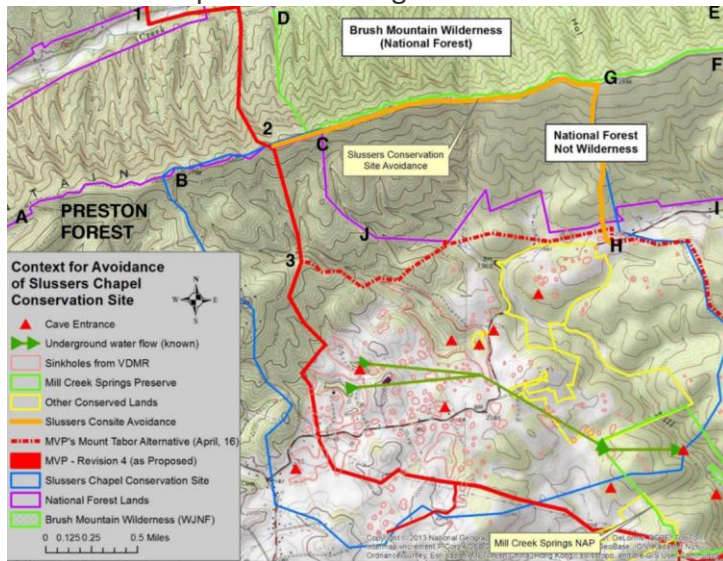
These terms will not fully mitigate the significant harm to landowners resulting from the pipeline (to recap, harm to landowners includes (property devaluation, increased property insurance premiums and other environmental and safety harms discussed in these comments). Nevertheless, if the pipeline is approved, inclusion of these terms would at least afford a small degree of added protection for landowners.

VI. IF THE PIPELINE WILL BE APPROVED, THE DEIS SHOULD RECOMMEND THE SLUSSER’S CHAPEL ALTERNATIVE

The County opposes the pipeline and believes that the Commission must deny the certificate and the Forest Service must deny the amendment to the Forest Management Plan. That said, in the event that the Commission decides to move forward with the pipeline, it must adopt the Sussers’ Chapel Alternative. Unfortunately, the DEIS is deficient in this regard because it does not evaluate the Sussers’ Chapel Alternative which was submitted just before the DEIS issued. At a minimum, the DEIS will need to be supplemented to evaluate the Slussers’ Chapel Alternative.

A. Description of the Slusser’s Chapel Alternative

On September 9, 2016, the VDCR submitted an alternative route known as the Slussers’ Chapel Alternative. The proposal is shown below, with the Slussers’ Chapel alternative depicted in orange and the Mount Tabor Route shown in dotted lines.



The Slussers' Chapel Conservation site completely bypasses the Mount Tabor Sinkhole Plain, and also reduces impacts to resources such as Slussers' Chapel, the Mount Tabor aquifer, Mill Creek site [other benefits?] ⁹⁶

B. Rationale for Adoption of the Slussers' Chapel Conservation Site

Alternatives are considered to be the heart of the DEIS and must be closely considered. Selection of alternatives is neither arbitrary nor subjective but instead are informed by the Commission's siting regulations and precedent. As relevant to evaluation of the Slussers' Chapel Alternative, Section 380.15(e)(2) provides that "the project sponsor, to the extent practicable shall avoid places listed on, or eligible for listing on, the National Register of Historic Places; natural landmarks listed on the National Register of Natural Landmarks; officially designated parks; wetlands; and scenic, recreational, and wildlife lands." Further, Section 380.15(e)(5) requires selection of a method to clear rights-of-way that takes account of soil stability and protection of natural vegetation and adjacent resources.

The Commission must adopt an alternative when it is determined to be environmentally preferable to the default route. In the past, the Commission has deemed an alternative environmentally preferable when it reduced impacts on forested acres by 6.5 acres and on wetlands by 6.6 acres and resulted in collocation of 40 percent of the route.⁹⁷ In another instance, the final EIS concluded that an alternative route was environmentally preferable to the proposed route because it would avoid a canal owned by a state water district.⁹⁸

C. Applying These Factors, The Slussers' Chapel Conservation Avoidance Route Is The Only Acceptable Alternative To Avoid Impacts to Karst and Slussers' Chapel.

Under both the Commission's siting regulations and precedent, the Slussers' Chapel Conservation Avoidance route is environmentally preferable alternative and should be adopted in the event that the pipeline goes forward. As compared to the Mount Tabor Route Variation, the Slusser's Chapel Conservation Avoidance Site will

⁹⁶ See Jones Comments October 11 and November 23, 2016).

⁹⁷ See *Gulf South Pipeline*, 155 FERC ¶61,287 (2016), P. 56.

⁹⁸ *Florida Gas Transmission*, 129 FERC ¶61,150 (2009) P. 81.

minimize impacts to a conservation site (as required by 380.15(e)(2),⁹⁹ avoids crossing a major stream twice as well as Mill Creek and its seven tributaries thus further lowering the danger of erosion and sedimentation of the underground aquifer with its effect on water supply and water quality. The Slussers' Chapel alternative crosses fewer driveways and access roads, traverses less karst (4 miles and not just 7/10 of a mile as MVP suggested) fewer parcels of land with occupied homes, and avoids a 1.5 mile long gouge on Brush Mountain, consistent with 380.15(e)(3)(requiring avoidance forested areas)¹⁰⁰ In light of all of these advantages, the Commission has no choice but to adopt the Slussers' Chapel Conservation Avoidance Site if it issues a certificate.

VI. THE DEIS LACKS SUFFICIENT INFORMATION TO SUPPORT EITHER THE LMRP AMENDMENTS OR A GRANT OF A BLM RIGHT-OF-WAY

The October 14, 2016 notice jointly by the Forest Service and BLM, cooperating agencies invited comments for submission to the Commission related to the Forest Service's consideration of the LMRP amendments or the BLM's consideration of a ROW grant. For economy's sake, the County incorporates comments on the Forest Service and BLM authorizations as part of its overall comments the Commission DEIS.

At the outset of this portion of the comments, the County asks the Forest Service and BLM to hold public hearings on the DEIS to allow for meaningful participation and comment by the public. The Commission's public hearings on the DEIS used a "one on one format," where individuals are ushered into a room, one at a time, to present their comments privately to a Commission representative. This format deprived participants of a chance to listen to each other's comments and as such, is incompatible with the transparency and openness of agency decision-making intended NEPA. In addition, the Forest Service and BLM public hearings should take place in the County where the section of forest crossed by the pipeline is located.

Second, the County emphasizes that any alternative to the pipeline crossing through the Jefferson National Forest that may involve a reroute through other portions of Montgomery County is unacceptable. MVP has already considered and rejected other routes through the County that would have an even more extensive impact than the current route. The County's residents have already endured two years of the certificate process, which has consumed many residents' time and resources. Therefore, if MVP is unable to obtain all of the required authorizations for the current route, the Commission

⁹⁹ See also VADCR Comments (September 9, 2016) at XXX (discussing benefits of Slussers' Conservation Avoidance route).

¹⁰⁰ Jones Comments (October 11, 2016).

must not allow MVP yet another opportunity to identify yet another route through the County.

1. Insufficient evidence for Forest Service decisions

Because a pipeline is utterly incompatible with the National Forest Management Act (NFMA) [CITE], in order for the pipeline to cross through the Jefferson National Forest, the Forest Service must amend DEIS to allow either the Forest Service or BLM to either conduct an adequate NEPA review or issue the requested authorizations. Here, the Forest Service must adopt four amendments in connection with the MVP:(1) a plan-level amendment to reallocate land to establish a 500-foot utility corridor for the pipeline, (2) a project specific amendment that would allow the pipeline to exceed certain protections for soils, (3) an amendment to allow removal of old growth trees and (4) an amendment to allow the pipeline to cross the Appalachian National Trail (ANST) on Peters Mountain. See DEIS 4-263-4-264 (discussing amendments).

Notwithstanding that each of these four amendments would have permanent direct and cumulative impacts on the Jefferson National Forest, the nearly 800-page DEIS devotes approximately seven pages to describing the impacts associated with the respective amendment. For example, the DEIS notes that “the effect of designating a 500-foot wide utility corridor” would be the potential for future development such as linear utility lines or communications sites in the corridors as well as a change in the SIO (Scenic Integrity Objectives) for the area. Besides stating the obvious, the DEIS offers no further assessment of the likelihood that additional development may occur in the corridor, or discussion of the impacts of future development on the forest, soils and other areas within the corridor. Moreover, even the Forest Service itself cannot evaluate the impacts of this amendment because neither MVP nor the Commission performed a “leaf-off” analysis.¹⁰¹

Nor does the Forest Service have sufficient information to analyze the amendment to existing soil requirements. In comments dated November XXX, 2016, the Forest Service advised that MVP would be required to segregate topsoil along the entire portion of the pipeline on forest service lands, and that in order to do so, MVP would need to expand the currently proposed ROW by 10-feet. Without details as to how MVP will segregate topsoil, the Forest Service stated that it could not evaluate the proposal. The Forest Service raised the same concern with regard to potential use of herbicides, seeking additional details so that it could evaluate the impacts.

¹⁰¹ Forest Service Comments at XXX.

In its current form, the DEIS lacks sufficient information to allow the Forest Service to consider the environmental impacts associated with the four proposed LMRP amendments and for that reason, they must be denied. If and when MVP supplies the additional information needed, the Forest Service must prepare a supplemental DEIS to incorporate the new information and provide another opportunity for comment.

2. The DEIS lacks sufficient information for BLM to grant an ROW

Not only does MVP require approval from the Forest Service, but it must also obtain a ROW from BLM because it crosses forest service lands. BLM will grant an ROW if the project is not inconsistent with the purpose of the federal lands. *See* 30 U.S.C. §185. BLM may also include conditions in the ROW providing for operation and maintenance of the pipeline, erosion control, protection of individuals in the vicinity of the pipeline. In addition, under 30 U.S.C. §185(b)(1), ROW may grant a ROW in excess of 50-feet only if the Secretary of Interior or agency head finds that the wider ROW is necessary for operation and maintenance, or to protect the environment and safety.

Because of its extensive statutory obligations, on December XXX, 2016, BLM filed an objection to the Commission's timetable of a June 8, 2017 final determination from BLM. First, BLM stated that many of the determinations that it must make are dependent upon actions by other cooperating agencies.¹⁰² Second, BLM explained that "the applicant has not provided sufficient information regarding the proposed crossing of the ANST to enable BLM to evaluate avoidance, minimization and mitigation strategies. In addition, BLM also sought information on MVP's contingency plan for open-trench crossing of the ANST if conventional boring fails.

Under BLM's regulations, failure to comply with a BLM deficiency notice or request for additional information is grounds for denying an application. *See* BLM ROW Regulations, 43 C.F.R. §2884.23(a)(3), (5). Because MVP has not provided the information

¹⁰² Because the MVP pipeline is more than 24-inches in diameter, the Secretary of Interior or BLM must notify the Committee on Natural Resources of the United States House of Representatives and the Committee on Energy and Natural Resources of the United States Senate. No right-of-way for such a pipeline shall be granted until a notice of intention to grant the right-of-way, together with the Secretary's or agency head's detailed findings as to the terms and conditions he proposes to impose, has been submitted to the committees. 30 U.S.C. §185(w). Although this provision is not directly relevant to the DEIS proceeding, it is another contingency that would prevent issuance of an ROW by the deadline set by the Commission.

that BLM needs to conduct an adequate environmental review of the proposed project, BLM should deny MVP's ROW application at this time.

VII. CONCLUSION

The Commission must deny the certificate application for the MVP pipeline. The MVP Pipeline will cause irreparable environmental and economic harm to resources and landowners within Montgomery County as well as in the surrounding regions.

The impacts of the MVP Pipeline are so significant that they preclude a finding of no significant impact in the DEIS. Moreover, the impacts are not offset by any public benefits, given the lack of need for the project and the exorbitant return on equity for shareholders. For these reasons, the Commission should deny a certificate for the project; however, if the project is approved, the DEIS must adopt the Slusser's Chapel Alternative and incorporate the mitigation measures described in these comments.

In addition, the DEIS is rife with information gaps that MVP is not required to address until the comment period closes. As a result, unless the Commission extends the deadline for comment or issues a supplemental DEIS, the public will be foreclosed from responding to MVP's late filings. Finally, the inadequate DEIS and outstanding information requests also preclude meaningful environmental review by both the Forest Service and BLM. Accordingly, the Forest Service must deny MVP's proposed LRMP amendments and BLM must deny MVP's ROW application.