IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

MOUNTAIN VALLEY PIPELINE, L.L.C., Plaintiff, v. EASEMENTS TO CONSTRUCT, OPERATE AND MAINTAIN A NATURAL GAS PIPELINE OVER TRACTS OF LAND IN GILES COUNTY, CRAIG COUNTY, MONTGOMERY COUNTY, ROANOKE COUNTY, FRANKLIN COUNTY, AND PITTSYLVANIA COUNTY, VIRGINIA, et al., Defendants.	)	Civil Action No. 7:17-cv-492-EKD

MEMORANDUM IN SUPPORT OF MOTION FOR STAY PENDING APPEAL

Defendants George Lee Jones; Michael S. Hurt and Mary Frances K. Hurt; Gordon Wayne Jones and Donna W. Jones; Roanoke Valley 4-Wheelers Association; Vernon V. Beacham, Sr. and Vernon V. Beacham, II; Stephen W. Bernard and Anne W. Bernard; Keith M. Wilson and Mary K. Wilson; Steven C. Hodges and Judy R. Hodges; Delwyn A. Dyer, Trustee of the Dyer Family Trust, and Delwyn A. Dyer, Trustee of the Dyer Living Trust; Clarence B. Givens and Karolyn W. Givens; Wendell Wray Flora and Mary McNeil Flora; and New River Conservancy, Inc., (hereinafter "Landowners") respectfully submit this memorandum in support of their motion for stay pending appeal. ECF #362. On February 13, 2018, Landowners filed a notice of appeal (ECF #361) of the Court's January 31, 2018 Memorandum Opinion (ECF #339) and associated Order (ECF #340) that grants the motion by Mountain Valley Pipeline, LLC ("MVP"), for a preliminary mandatory injunction allowing it immediate possession of easements

on Landowners' properties, conditional on the resolution of the appropriate amount of a Rule 65(c) security.

Because MVP will timber their forests and trench their fields under the equitable relief it obtained from this Court, irreparably disturbing the status quo, Landowners respectfully request that the Court stay its January 31, 2018 Memorandum Opinion and associated Order pending the resolution of their appeal under Federal Rule of Civil Procedure 62(c). Because of the imminent threat to Landowners' private properties and their natural and historical resources, Landowners further request that the Court expedite review of this motion for stay pending appeal, and direct MVP to file a response within three (3) business days. If the Court is unable to rule on this motion within seven (7) calendar days, Landowners may need to file a motion for a stay pending appeal under Federal Rule of Appellate Procedure 8 in the United States Court of Appeals for the Fourth Circuit.

STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 62(c), a district court may suspend, modify, restore, or grant an injunction while an appeal is pending from an interlocutory order that grants an injunction. The factors governing the issuance of a stay of an injunction pending appeal are:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Hilton v. Braunskill, 481 U.S. 770, 776 (1987).

ARGUMENT

I. Landowners Are Likely to Succeed on the Merits of Their Appeal.

Landowners respectfully submit that they are likely to succeed on the merits of their appeal for at least two reasons, both of which are related to the Court's assessment of the

irreparable harm factor of the injunction test in *Winter v. N.R.D.C.*, 555 U.S. 7, 20 (2008).[1] First, the Court erred in concluding that MVP was threatened with imminent noneconomic irreparable harm in the form of missing its FERC deadline of October 13, 2020, absent an injunction. Such harm is not imminent, and the Court compounded that error by failing to narrowly tailor its injunction to the facts of the case. Second, the Court erred in failing to recognize that the consideration of economic loss as irreparable harm when unrecoverable is a "quite narrow" exception to the general rule that economic loss cannot constitute irreparable injury. *Hughes Network Sys., Inc. v. InterDigital Comms. Corp.*, 17 F.3d 691, 694 (4th Cir. 1994).

A. The Court Committed Reversible Error by Issuing an Injunction Based on Harm That Is Not Imminent and by Failing to Tailor Its Injunction to the Circumstances of the Case.

The Court's decision runs afoul of the Supreme Court's rule that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). The Court issued an impermissibly broad injunction that should have awarded possession no earlier than November 15, 2018, based on the evidence of imminency established at the hearing.

The Court held that MVP established non-economic irreparable harm because, if not allowed possession until the conclusion of the just compensation proceedings, MVP would not be able to meet its FERC imposed deadline. ECF #339 at 31. The Court conceptualized its choice as between immediate possession now and possession at the conclusion of just compensation trials. As a result, the Court discounted MVP's admission that it could meet its FERC deadline if it began tree-cutting in November 2018, and would most likely do so if it could not begin tree-

[1] Landowners intend to raise other issues in their appeal, including whether allowing immediate possession to a natural gas company under Rule 65 violates the separation of powers doctrine, but focus here on the Court's irreparable harm analysis.

cutting in February 2018. In so doing, the Court impermissibly issued an injunction when the claimed irreparable harm was not imminent. *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 812 (4th Cir. 1991). Because MVP admits that it can comply with its FERC deadline if it begins tree-cutting in November 2018 (ECF #339 at 31; Day 1 Tr. at 209; 214–15; 218), its claimed harm is not imminent. Under Supreme Court precedent, the question this Court needed to answer was whether an injunction is "*now* needed to guard against any present or imminent risk of likely irreparable harm." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 162 (2010) (emphasis added). Respectfully, the Court's answer to that question is not supported by the evidence.

As the Supreme Court has observed, "[t]he essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case." *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944). In light of MVP's admission that it does not need immediate possession in February 2018 in order to comply with its FERC certificate, the Court should have denied MVP's motion for immediate possession on the ground that it failed to carry its burden to establish likely and imminent irreparable harm. *Cf. Monsanto Co.*, 561 U.S. at 158 ("It is not enough for a court considering a request for injunctive relief to ask whether there is a good reason why an injunction should *not* issue; rather, a court must determine that an injunction *should* issue under the traditional four-factor test[.]" (emphasis original)). At most, the Court should have tailored the relief to the facts of the case. That is, to the extent it allowed early possession at all, the district court should not have allowed that possession until November 15, 2018 at the earliest. Because immediate possession by November 15, 2018 would suffice to prevent any non-economic irreparable harm to MVP, the Court's issuance of a drastic remedy allowing immediate possession in February 2018 constitutes reversible error, making it

likely that Landowners will succeed on the merits of their appeal. *Monsanto*, 561 U.S. at 165–66 (where a less drastic remedy would suffice, a court abuses its discretion in issuing a broad injunction); *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 151 (1988) (reversing issuance of broad injunction where limited injunction would suffice).

The Fourth Circuit "will vacate an injunction if it is 'broader in scope that than necessary to provide complete relief to the plaintiff' or if an injunction does 'not carefully address only the circumstances of the case.'" *PBM Prod., LLC v. Mead Johnson & Co.*, 639 F.3d 111, 128 (4th Cir. 2011) (quoting *Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425, 436 (4th Cir. 2003)); *see also Cromer v. Kraft Foods N. Am., Inc.*, 390 F.3d 812, 818 (4th Cir. 2004) (holding that injunctions that are not narrowly tailored will not survive appellate review); *Hayes v. N. State Law Enf't Officers Ass'n*, 10 F.3d 207, 217 (4th Cir. 1993) ("Although injunctive relief should be designed to grant the full relief needed to the prevailing party, it should not go beyond the established violation."); *Consolidation Coal Co. v. Disabled Miners*, 442 F.2d 1261, 1267 (4th Cir. 1971) (holding that an injunction "should be tailored to restrain no more than what it reasonably required to accomplish its ends"). Because the injunction issued by this Court—allowing MVP immediate possession in February 2018 of Landowners' properties when possession by November 15, 2018, would suffice—is not narrowly tailored, Landowners are likely to succeed on the merits under well-established Supreme Court and Fourth Circuit precedent.

B. This Case Does Not Present the Extraordinary Circumstances Required for Economic Loss to Constitute Irreparable Harm.

Landowners are also likely to succeed on the merits of their appeal because the Court committed an error of law in determining that MVP's claimed economic losses constitute irreparable injury because they are unrecoverable from the Landowners. Although the Fourth

Circuit will review the Court's issuance of an injunction for abuse of discretion, "[t]he district court must exercise its discretion 'within the applicable rules of law or equity.'" *Pashby v. Delia*, 709 F.3d 307, 319 (4th Cir. 2013) (quoting *Direx Israel*, 952 F.2d at 814). Indeed, the Fourth Circuit has held that, in the preliminary injunction context, "a district court's action that is based on an error of law is a *per se* abuse of discretion." *United Transp. Union v. S.C. Pub. Ry. Comm'n*, 130 F.3d 627, 631 (4th Cir. 1997); *see also United States v. Srivastava*, 540 F.3d 277, 287 (4th Cir. 2008) (holding that "a district court necessarily abuses its discretion when it makes an error of law"). Accordingly, the Fourth Circuit will review this Court's application of equitable rules governing what constitutes irreparable harm *de novo*. *Dewhurst v. Century Alum. Co.*, 649 F.3d 287, 290 (4th Cir. 2011).

In this case, the Court committed legal error, likely to be reversed on appeal, by failing to recognize that the consideration of economic loss as irreparable harm when unrecoverable is a "quite narrow" exception to the general rule that economic loss cannot constitute irreparable injury. *Hughes Network Sys.*, 17 F.3d at 694. That narrow exception is not applicable here. It has long been the law of the Fourth Circuit that "mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of [equitable relief], are not enough" to support equitable relief. *Long v. Robinson*, 432 F.2d 977, 980 (4th Cir. 1970); *see also Di Biase v. SPX Corp.*, 872 F.3d 224, 230 (4th Cir. 2017); *Hughes Network Sys.*, 17 F.3d at 694. *Hughes Network Systems* acknowledges a "quite narrow" exception to that rule where money damages would otherwise be available at judgment but either the moving party or the non-moving party may not survive to judgment absent an injunction. 17 F.3d at 694; *see also SAS Inst., Inc. v. World Programming Ltd.*, 874 F.3d 370, 387 (4th Cir. 2017) (characterizing the *Hughes* exception as "narrow"). As a threshold matter, the exception is not applicable here

because money damages are not available to MVP at all in this case. Consequently, it is not necessary to invoke the rule to prevent the loss of something otherwise recoverable. Moreover, the first extraordinary circumstance recognized by *Hughes* is not present here because MVP will survive to construct its pipeline even without immediate possession in February 2018. Day 1 Tr. at 209. The second exceptional circumstance in the *Hughes* exception is not applicable here because this is not a case where a plaintiff has a claim for money damages against an impecunious defendant. Because the narrow exception from *Hughes* is not applicable here, it was error for the Court to conclude that MVP's claimed economic losses constitute irreparable harm in this case.

"[T]he mere fact that economic losses may be unrecoverable does not alone compel a finding of irreparable harm." *Nat'l Min. Ass'n v. Jackson*, 768 F.Supp.2d 34, 53 (D.D.C. 2011). It is true that MVP cannot recover any losses it may suffer from Landowners; but it also true that, because of sovereign immunity, litigants may not recover economic losses that result from administrative actions. The U.S. District Court for the District of Columbia frequently faces the latter situation. In *Air Transp. Ass'n of Am., Inc. v. Export-Import Bank of the U.S.*, that court recognized the illogical result of the rule adopted by this Court in its opinion: "[I]t would . . . effectively eliminate the irreparable harm requirement. Any movant that could show any damages against an agency with sovereign immunity—even as little as $1—would satisfy the standard." 840 F.Supp.2d 327, 334–36 (D.D.C. 2012). "The wiser formula," in cases where the defendant cannot be liable for monetary losses, "requires that the economic harm be significant, even where it is irretrievable[.]" *Id.* at 336. The rule adopted by this Court has the effect of rendering the irreparable harm element automatic in cases like this—contrary to the Supreme Court's frequent warnings to lower courts that injunctive relief is never automatic. *Winter*, 555

U.S. at 24; *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982). That is the reason that the Fourth Circuit and its district courts hold that economic losses must threaten the existence of the movant's business to constitute irreparable harm. *Fed. Leasing, Inc. v. Underwriters at Lloyd's*, 650 F.2d 495, 500 (4th Cir. 1981);[2] *Ohio Valley Envtl. Coalition, Inc. v. Pruitt*, No. 3:15-cv-271, 2017 WL 1712527, at *9 (S.D. W. Va. May 2, 2017); *Amtote Int'l, Inc. v. PNGI Charles Town Gamining Liab. Co.*, 998 F.Supp. 674, 678 (N.D. W. Va. 1998). Because the exacting standard of review applicable to preliminary injunctions is "even more searching" with regard to mandatory injunctions, *Pashby*, 709 F.3d at 319, and because the Court erred as a matter of law in holding that MVP's claimed economic losses constituted irreparable harm, Landowners are likely to succeed on the merits of their appeal.

II. Landowners Will Be Irreparably Injured Absent a Stay.

This Court's injunction subjects Landowners to multiple forms of irreparable harm. Most importantly, because MVP's FERC Certificate remains subject to administrative and judicial review, immediate possession by MVP in February 2018 could constitute the wrongful exercise of eminent domain, which itself constitutes irreparable harm. *See Carpenter Tech. Corp. v. City of Bridgeport*, 180 F.3d 93, 97 (2d Cir. 1999) (finding threat of irreparable injury presented by potentially wrongful exercise of eminent domain); *Tioranda, LLC v. New York*, 386 F.Supp.2d 342, 350 (S.D.N.Y. 2005) (holding that deprivation of an interest in real property, and damage that would result from wrongful condemnation, constitute irreparable harm); *Monarch Chem. Works, Inc. v. Exxon*, 452 F.Supp. 493, 502 (D. Neb. 1978) (holding condemnation of land can result in irreparable injury). Unlike in *East Tennessee Natural Gas Co. v. Sage*, 361 F.3d 808,

[2] *See also A Helping Hand, LLC v. Baltimore Cty., MD.*, 355 F. App'x 773, 776 (4th Cir. 2009) (characterizing the holding from *Federal Leasing* as "finding irreparable injury only when economic losses threatened the very existence of the business") (unpublished opinion).

828 (4th Cir. 2004), where there is no indication that the underlying FERC Certificate was the subject of administrative or judicial review or that the pipeline developer needed additional regulatory approvals to proceed, here there is ample evidence that construction of the pipeline is not certain to occur. Day 1 Tr. at 190:16 to 191:1 (noting potential for delay from outstanding regulatory approvals); 275:8–12 (acknowledging that pending litigation could void the FERC Certificate and result in the pipeline not being built). In *Sage*, the court was safe in assuming that the pipeline would be built. Here, there is no safety is such an assumption. Accordingly, the irreparable harm posed to Landowners is not simply a question of timing as it was in *Sage*, 361 F.3d at 829.

Landowners Judy R. Hodges, Gordon W. Jones, Keith M. Wilson, and New River Conservancy currently have requests for rehearing pending before FERC, resolution of which has been indefinitely postponed. ECF # 198-14; Day 2 Tr. at 202. Landowners Stephen W. Bernard, Anne W. Bernard, and George Lee Jones have submitted declarations in support of actions seeking judicial review of the FERC Certificate. ECF #287 at 5 n.3. Absent a stay, those Landowners face immediate entry on their property before their complaints about the FERC Certificate are resolved, which could moot their claims and subject them to irreparable injury. *Cf. Ohio Valley Envtl. Coalition v. U.S. Army Corps of Eng'rs*, No. 3:08-cv-0979, 2010 WL 11565166, at *4 (S.D. W. Va. May 4, 2010).

Absent a stay, MVP could enter Landowners' property and destroy precious resources, only to ultimately lose its FERC Certificate.[3] The environmental harm that would occur on

[3] Indeed, this is the precise scenario confronting property owners along the Sabal Trail pipeline, whose property was taken through immediate possession. *See, e.g.*, *Sabal Trail Transmission, LLC v. 3.522 Acres*, Civ. No. 3:16-cv-266, 2016 WL 3188940, at *1 (M.D. Fla. June 8, 2016). The FERC Certificate for the pipeline was vacated by the D.C. Circuit after construction of the pipeline commenced. *Sierra Club v. F.E.R.C.*, 867 F.3d 1357, 1379 (D.C. Cir. 2017).

Landowners' properties absent a stay constitutes irreparable injury. *See Amoco Prods. v. Village of Gambell*, 480 U.S. 531, 545 (1987) ("Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable."); *see also Nat'l Audubon Soc'y v. Dep't of Navy*, 422 F.3d 174, 201 (4th Cir. 2005) (same); *S.C. Dep't of Wildlife & Marine Res. v. Marsh*, 866 F.2d 97, 100 (4th Cir. 1989) (same).[4] Large-scale timber removal changes the landscape and alters forests, waterways, viewsheds, and ecosystems. Indeed, even FERC has acknowledged, in its Final Environmental Impact Statement and in MVP's FERC Certificate that, "in the case of the clearing of forest, the final EIS concludes that impacts will be *long-term* and *significant*." P's Ex. 1 at 52.[5] Tree-cutting that would occur under the Court's injunction would profoundly damage many Landowners' properties. *See, e.g.*, Day 2 Tr. at 205–07.

Moreover, expert hydrogeologist Dr. Pamela Dodds testified extensively about the potential harms to ground and surface water from pipeline construction activities. *See generally* Day 2 Tr. at 89–102. The type of harm that Dr. Dodds testified about constitutes irreparable harm. *See, e.g.*, *Sierra Club v. U.S. Forest Serv.*, 843 F.2d 1190, 1194–95 (9th Cir. 1988). Harm to Landowners' cultural and historical resources, as established at the hearing, also constitutes

[4] *See also All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (finding timbering and loss of use of enjoyment of forested areas to constitute irreparable harm); *Cronin v. U.S. Dep't of Agric.*, 919 F.2d 439, 445 (7th Cir. 1990) (recognizing timbering as an irreparable harm); *Envtl. Def. Fund v. Tenn. Valley Auth.*, 468 F.2d 1164, 1183–84 (6th Cir. 1972) (holding that cutting and burning of timber is the type of "permanent defacing [of] the natural environment" to constitute irreparable harm supporting an injunction); *Sierra Club v. Bosworth*, Civ. No. C-04-02588-CRB, 2005 WL 3096149 at *11 (N.D. Cal. Nov. 14, 2005) ("Timber cutting that has an environmental impact always has a strong potential of causing irreparable harm justifying preliminary relief.").

[5] Because FERC recognized the significant and long-term adverse affects of tree-clearing, Landowners' assertions of harm from forest clearing cannot be characterized as a collateral attack on the FERC Certificate.

irreparable harm. *Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dept. of Interior*, 755 F.Supp.2d 1104, 1120–21 (S.D. Cal. 2010) (holding that balance of equities tipped in favor of protecting historic and cultural resources pending completion of National Historic Preservation Act procedures); Day 1 Tr. at 243:21 to 244:2 (Mr. Cooper agreed that his construction activities for the pipeline would irreparably alter areas with historic resources).

At the motions hearing, numerous landowners testified as to the harm that they would incur under the Court's injunction, and the Court acknowledged that harm as "real." ECF #339 at 36. The New River Conservancy ("NRC") holds a conservation easement that it must protect in perpetuity because of its important natural and environmental resources, including core forests and streams such as Little Stony Creek of the New River. Day 2 Tr. at 200:5–11. The property features globally rare species, migratory bird breeding habitat, and aquatic habitat, all of which would be permanently degraded by construction conducted under the Court's injunction. *Id.* at 208:10–11, 208:15, 208:19–20, 203:11–12. NRC's property interests cannot be fully remedied by money damages because it does not hold its easement for any pecuniary purpose. *Id.* at 203:15–23. Most importantly, the timing of harm from immediate possession of NRC's conservation easement constitutes irreparable harm to NRC because each day that the conservation easement exists, protecting its forests and making its environmental resources available to the flora and fauna of the New River Watershed, provides incalculable value to NRC that cannot be monetarily compensated. Day 2 Tr. at 209:5-22.

Steven Hodges testified that the proposed MVP route will run across the steep rim of one sinkhole on his property and directly down the slope of a second sinkhole. Day 2 Tr. at 167:1–4; 167:10–13. He testified that due to the pipeline location and the steep slope, 96% of the soil in the sinkhole area will erode into the open sinkhole, causing both surface and groundwater

damage. *Id.* at 168:18-23. Erosion into the sinkhole contaminates drinking water for Mr. Hodges and his neighbors. *Id.* at 170:1–4. Mr. Hodges' testimony establishes practically unquantifiable harm to his own property and to the aquifer that the area residents rely upon. Don Jones, who holds Power of Attorney for Defendant George Lee Jones, testified that his property is characterized by springs and sinkholes, all of which are at risk due to MVP's proposed route. *Id.* at 176:4; 178:23; 179:6. Mr. Jones planned to build a family cabin on a ridge overlooking the historic Jones family property. *Id.* at 180:1–3. However, the proposed MVP route eliminates the cabin site as a feasible building location. *Id.* at 180:8. Water quality is also a chief concern for Keith Wilson. His Franklin County property is subject to a proposed MVP access road that would run directly over the well that supplies his home with drinking water. *Id.* at 184:4–5. The road would pass no more than 40 feet from the Wilson home. *Id.* at 184:8. The road would lead to the pipeline route, which would require the removal of old-growth forest on the Wilson property. *Id.* at 185:22-23. The construction would be uphill from the only well supplying the Wilson home with water. *Id.* at 186:17. Anne Bernard's unique property has been a working art studio for more than 20 years. *Id.* at 189:2. The proposed pipeline route goes directly adjacent to the Bernard water well, residence, and art studio. *Id.* at 190:7-9. The pipeline would cross the Bernards' creek and field, while an MVP access road would occupy the Bernards' driveway, the sole access to the residence and art lesson space. *Id.* at 190:9–11, 191:17. The MVP route would irreversibly disrupt the Bernard home, business, and art studio setting.

Landowner Karolyn Givens testified that the pipeline would cross through a wooded area of her property, and immediate possession would not allow her time to have those woods timbered as she intends to do. Day 2 Tr. at 157–159. Landowner Vernon Beacham, II, owns a property that has been managed to conserve core, old-growth forest for wildlife and selective

timbering. ECF # 198-7 at ¶¶ 3–8. Mr. Beacham has intentionally avoided timbering the forest that the pipeline would cross because of environmental concerns. *Id.* at ¶6. Without a stay, MVP will cut trees in that forest, causing irreparable harm to the environmental resources of that forest and to Mr. Beacham's property rights. *Id.* at 3–8. Landowner Roanoke Valley 4-Wheeler Association owns forested property on which tree-clearing would occur absent a stay, and that tree-cutting would diminish its members recreational enjoyment of the property. Stay Motion Ex. 1 at ¶¶ 1–5.

Because the harm that would befall Landowners absent a stay of this Court's injunction is irreparable, it stands in stark contrast to the purely economic and speculative harm to MVP if a stay were issued. Irreparable environmental injury outweighs economic harm in the balance of equities. *See Ohio Valley Envtl. Coalition v. U.S. Army Corps of Engineers*, 528 F.Supp.2d 625, 632 (S.D. W. Va. 2007) ("Money can be earned, lost, and earned again; a valley once filled is gone."); *see also League of Wilderness Defs. v. Connaughton*, 752 F.3d 755, 765 (9th Cir. 2014) (finding that temporary delay of one year resulting in economic harm to ski resort developer was not so substantial as to outweigh irreparable environmental harm faced by plaintiffs); *Sierra Club v. U.S.A.C.O.E.*, 645 F.3d 978, 996–97 (8th Cir. 2011) (finding that harm to an endangered mussel outweighed the possibility that a power company would incur $11 million per month in economic loss if an injunction issued); *Alaska Ctr. for the Env't v. West*, 31 F. Supp. 2d 714, 723 (D. Alaska 1998) (longer permit processing time was "not of consequence sufficient to outweigh irreversible harm to the environment"); *Citizen's Alert Regarding the Env't v. U.S. Dep't of Justice*, No. 95-1702 (GK), 1995 WL 748246 at *11 (D.D.C. Dec. 8, 1995) (potential loss of revenue, jobs, and monetary investment that would be caused by project delay did not outweigh "permanent destruction of environmental values that, once lost, may never again be replicated").

III. A Stay Will Not Substantially Injure MVP

MVP admitted at the hearing that it will "most likely" construct its proposed pipeline even without immediate possession in February 2018. Day 1 Tr. at 209. Because economic losses are not substantial unless they threaten an entity's existence, *see, e.g.*, *Fed. Leasing*, 650 F.2d at 500; *Air Transp. Ass'n of Amer.*, 840 F.Supp.2d at 336, whatever harm MVP may incur from a stay is not substantial.

IV. The Public Interest Lies in a Stay.

The public interest lies in a stay of the Court's injunction pending appeal because the injunction implicates Landowners' constitutional rights and threatens harm to environmental, historical and cultural resources. As the Fourth Circuit recently observed, "upholding the Constitution undeniably promotes the public interest." *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 604 (4th Cir. 2017), *vacated on other grounds*, 138 S.Ct. 353 (2017); *see also Giovanni Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002) ("[U]pholding constitutional rights surely serves the public interest."). Immediate possession implicates Landowners' rights under both the Takings Clause and the Due Process Clause of the Fifth Amendment to the United States Constitution. Preventing a wrongful invasion of private property based on a flawed injunctive relief analysis under a judicially created quick-take doctrine, therefore, would serve the public interest. Moreover, allowing immediate possession while Landowners' challenges to the FERC Certificate are in administrative purgatory deprives Landowners of due process and leaves them with no way to obtain timely and meaningful judicial review of the very certificate on which the Court's injunction is based. To treat MVP's conditional certificate as final for one purpose—allowing it immediate possession—but not final

for others—including for purposes of judicial review—violates the public's interest in the fair and equitable administration of the law.

Moreover, preventing harm to the environment that would result under the Court's injunction is in the public interest. *See Nat'l Wildlife Fed'n v. Burford*, 676 F.Supp. 271, 279 (D.D.C. 1985); *Ohio Valley Envtl. Coal.*, 528 F.Supp.2d at 633. Preserving open spaces in their natural state in perpetuity—such as NRC's conservation easement—serves the public interest. *See, e.g.*, *Feduniak v. Calif. Coastal Comm'n*, 148 Cal. App. 1346, 1378 (2007). And, as evidenced by Congress's enactment of the National Historic Preservation Act, the preservation of historical and cultural resources is in the public interest. All of those interests would be served by a stay pending appeal.

In contrast, a stay would not imperil the claimed public interest in construction of MVP's proposed pipeline. To the extent that there is a public interest in the completion of the pipeline, FERC has determined that that interest will be met so long as the pipeline is completed by October 13, 2020. That deadline would not be jeopardized by a stay pending appeal.

CONCLUSION

For the foregoing reasons, Landowners respectfully request that the Court issue an order staying its January 31, 2018 pending the appeal of that order.

Respectfully submitted,

/s/ Derek O. Teaney
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CERTIFICATE OF SERVICE

I hereby certify that, on February 13, 2018, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to counsel of record. I will serve the foregoing by United States mail, postage prepaid, on February 14, 2018, on the following defendants at the following addresses:

0.11 Acres of Land, Owned by Delmar Wayne Howard
2740 Reese Mountain Road
Elliston, VA 24087

0.28 Acres of Land, Owned by Elijah D. Howard
0.37 Acres of Land, Owned by Elijah Howard and Kristin Howard
2219 Willis Hollow Road
Shawsville, VA 24162

/s/ Isak Howell
Isak Howell (VA Bar No. 75011)