

No. 19-1866

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

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WILD VIRGINIA; APPALACHIAN VOICES; PRESERVE BENT MOUNTAIN,  
a chapter of Blue Ridge Environmental Defense League; SIERRA CLUB;  
DEFENDERS OF WILDLIFE; CHESAPEAKE CLIMATE ACTION  
NETWORK; and CENTER FOR BIOLOGICAL DIVERSITY

*Petitioners,*

v.

UNITED STATES DEPARTMENT OF THE INTERIOR;  
DAVID BERNHARDT, in his official capacity as Secretary of the U.S.  
Department of the Interior; UNITED STATES FISH AND WILDLIFE SERVICE,  
an agency of the U.S. Department of Interior; MARGARET EVERSON, in her  
official capacity as Principal Deputy Director of the U.S. Fish and Wildlife  
Service; and CINDY SCHULZ, in her official capacity as Field Supervisor,  
Virginia Ecological Services, Responsible Official

*Respondents.*

and

MOUNTAIN VALLEY PIPELINE, LLC,

*Respondent-Intervenor*

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**PETITIONERS' MOTION FOR STAY OF RESPONDENT  
U.S. FISH AND WILDLIFE SERVICE'S BIOLOGICAL OPINION  
AND INCIDENTAL TAKE STATEMENT**

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Pursuant to Federal Rule of Appellate Procedure 18(a) and Local Rule 27(e),  
Petitioners seek a stay of the U.S. Fish and Wildlife Service's ("FWS") Biological  
Opinion ("BiOp") and Incidental Take Statement ("ITS")<sup>1</sup> for the Mountain Valley  
Pipeline ("MVP"). This Court has jurisdiction under the Natural Gas Act. 15 U.S.C.

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<sup>1</sup> The BiOp/ITS is attached as Exhibit A.

§ 717r(d)(1). Respondents and Respondent-Intervenor Mountain Valley Pipeline, LLC (“Mountain Valley”) have been informed of this motion and intend to file responses in opposition.

## I. INTRODUCTION

Mountain Valley is in the process of constructing approximately 303.5 miles of new 42-inch diameter gas pipeline in West Virginia and Virginia. Construction continued even after this Court invalidated several of MVP’s required federal authorizations. This construction—including cutting a 125-foot-wide right-of-way through forests and farmland, and over highly erodible steep slopes in Appalachia—adversely affects several threatened and endangered species.

Petitioners’ members have a demonstrated interest in these species—including the iconic Roanoke logperch and imperiled bat species already suffering precipitous population declines due to white-nose syndrome—and are harmed by impacts that occur because of FWS’s unlawful authorizations. Exs. J–X.

FWS’s incidental take limits for the bat species are plainly unlawful. *See Sierra Club v. U.S. Dep’t of the Interior*, 899 F.3d 260, 278–81 (4th Cir. 2018). MVP has already cut most of the bats’ forest habitat along the pipeline route, but these species continue to be harmed by tree felling, construction noise, lighting, dust, and impacts to wetlands and waterbodies that affect their foraging and roosting activity. *See* Ex. B at 4-2, 4-9, 5-2, 8-1.

The BiOp is also arbitrary because it fails to “[s]pecific[y] the impact, i.e., the amount or extent,” of incidental take on the endangered Roanoke logperch. 50 C.F.R. § 402.14(i)(1)(i). The logperch’s specialized feeding strategy makes it particularly susceptible to sedimentation. Yet FWS ignores impacts from “upland construction activities that *introduce substantial sediment loading rates* into affected stream reaches.” Ex. B at 8-64 (emphasis added). Instead, FWS narrowly focuses on impacts from constructing just five water crossings, and accounts for “take” only within 1,000 feet of those crossings. Ex. A at 14–16, 23–24, 40.

On October 23, 2018, a federal scientist who has studied the Roanoke logperch for over thirty years (but was not asked to review the BiOp) sent comments to FWS outlining serious deficiencies in the BiOp. Ex. C at Enclosure. *See also* Ex. I (Jenkins Decl. ¶8). Those comments were not made publicly available until April 12, 2019, when FWS attached them to a letter to the Federal Energy Regulatory Commission (“FERC”). FERC had “requested that [FWS] provide a list of questions and information/data needs to assist FERC and [FWS] in determining how best to proceed under the [Endangered Species Act] regarding certain activities related to [MVP].” Ex. C at 1.<sup>2</sup>

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<sup>2</sup> FWS’s information requests to FERC included: “[P]rovide an explanation as to whether effects to [Roanoke logperch] from upland sedimentation were considered in the [BiOp].” *Id.* at 2.

In recent weeks, Petitioners' members have observed a marked increase in construction activity in watersheds that contain Roanoke logperch habitat, and a corresponding increase in sedimentation of rivers and streams. Ex. N (Badger Decl. ¶¶8–11 & Exs. 1–3 (photographs)); Ex. O (Christopulos Decl. ¶¶8–11); Ex. P (Bowers Decl. ¶¶11–13); Ex. Q (Terry Decl. ¶¶12–14). Several long-time residents describe seeing unprecedented levels of turbidity in logperch habitat. Ex. N (Badger Decl. ¶¶11, 14); Ex. O (Christopulos Decl. ¶8); Ex. V (Malbon Decl. ¶17). MVP's weekly status reports also show this recent uptick in construction activity and associated sedimentation events. Ex. D at 2–3. This severe habitat degradation has occurred even though Mountain Valley is currently prohibited from constructing crossings through rivers and streams.

FWS has acknowledged that “[s]mall logperch populations *could go extinct with minor habitat degradation,*” and that “[a]ll the populations are small.” Ex. D at 3 (emphasis added).

On August 12, 2019, Petitioners initiated this action and requested that FWS stay the BiOp and ITS pending review. Ex. D. On August 15, 2019, Mountain Valley announced a voluntary suspension of “[c]ertain” “new” construction activities, while “continu[ing] certain activities” that, in its view, pose no risk to listed species. Ex. E at 1, 3. That same day, FWS denied Petitioners' stay request because it “expect[s] this voluntary stay to remain in place until the Service has made a final decision...

whether it is necessary to reinitiate consultation under the ESA.” Ex. F at 1–2. In the following days, local residents observed extensive construction operations in watershed areas that contain Roanoke logperch habitat. Ex. Z. As explained in section II.B, *infra*, this Court should not decline to stay FWS’s invalid approvals due to a voluntary suspension of limited scope and duration.

## II. ARGUMENT

Whether to issue a stay pending review turns on “consideration of four factors: ‘(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.’” *Nken v. Holder*, 556 U.S. 418, 434 (2009) (citation omitted). Petitioners meet all four factors.

### A. Petitioner are Likely to Succeed on the Merits

The BiOp and ITS are final agency actions reviewable under the Administrative Procedure Act. *Sierra Club*, 899 F.3d at 270. The Court “shall hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” 5 U.S.C. § 706(2)(A).

## 1. FWS Failed to Set Enforceable Limits on the Take of Threatened and Endangered Bat Species

A recent decision by this Court leaves no room for doubt: FWS's incidental take limits for the Indiana bat and Northern long-eared bat are arbitrary. *Sierra Club*, 899 F.3d at 271–74, 278–81. Mountain Valley appears to concede as much. Ex. D at Ex. 6, p. 2.

The Endangered Species Act (“ESA”) prohibits “take” of threatened and endangered species. 16 U.S.C. § 1538(a)(1)(B); 50 C.F.R. § 17.31. To “take” means “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 C.F.R. § 1532(19). “Harm and harassment include the disruption of normal behavioral patterns and indirect injury caused by habitat modification.” *Sierra Club*, 899 F.3d at 269 (citations omitted).

Congress created “a narrow exception to the prohibition against take: when ‘such taking is incidental to ... the carrying out of an otherwise lawful activity.’” *Id.* (quoting 16 U.S.C. § 1539(a)(1)(B)). To take a species under this exception, agencies (or private entities taking species pursuant to agency authority) must receive a valid Incidental Take Statement. *Id.* The take limit “must set a ‘trigger’ that can be monitored and enforced, else it is arbitrary and capricious.” *Id.* at 270 (citation omitted).

Here, for both bat species, FWS allowed MVP to take “a small percent of individuals” within set geographic areas. Ex. A at 41, 42. This Court has already

determined that “a ‘small percent’ ... of a species is not an enforceable limit.”

*Sierra Club*, 899 F.3d at 271.

The incidental take authorized here also is not a proper habitat surrogate. First, “it is not a true habitat surrogate” because “[a]lthough the geographic bounds are fixed, the pipeline can only take a subset of individuals located within those bounds.” *Id.* at 279. Second, for the Indiana bat, “two of the chosen geographic bounds are arbitrary.” *Id.* FWS knew the pipeline would affect 1,886.5 acres of unknown use summer habitat and 805.4 acres of unknown use spring staging/fall swarming habitat; “[y]et, without any explanation, the agency set the take limit for these two habitats at half of these acreages.” *Id.* See Ex. A at 17, 41. Third, “FWS has not shown that a numeric limit is impractical.” *Sierra Club*, 899 F.3d at 280. See *id.* (noting that FWS previously surveyed Indiana bats and issued take statements with numeric limits).

## **2. FWS Arbitrarily Ignored the Impact of Clearing Suitable Unoccupied Summer Habitat on the Indiana Bat**

Because the take limit creates a “‘trigger’ that, when reached, results in an unacceptable level of incidental take,” *id.* at 269, FWS must accurately “[s]pecific[y] the impact, i.e., the amount or extent, of such incidental taking on the species.” 50 C.F.R. § 402.14(i)(1)(i). Here, FWS arbitrarily omitted consideration of impacts to the Indiana bat from destruction of suitable unoccupied summer habitat, even though “information available to the FWS indicated that” clearing this habitat

“‘may affect’ listed species.” *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1120 (9th Cir. 2012) (“*CBD*”) (quoting 50 C.F.R. § 402.14(a)).

The BiOp states that adverse effects are “not expected” from clearing 1,248.6 acres of suitable unoccupied summer habitat. Ex. A at 17. But only a month earlier, in its BiOp for the Atlantic Coast Pipeline (“ACP”), this same field office concluded that “clearing this habitat *will have several anticipated indirect impacts*, including the expenditure of additional travel energy by pregnant females, which could lead to decreased pup survival, and increased risk of predation, leading to injury or death.” *Defrs. of Wildlife v. U.S. Dep’t of the Interior*, No. 18-2090, 2019 WL 3366598, at \*17 (4th Cir. July 26, 2019) (“*Defenders*”) (emphasis added).

The one-paragraph discussion of suitable unoccupied summer habitat in the MVP BiOp mentions the ACP BiOp, Ex. A at 17, but “offers no cogent explanation for this about-face.” *Defenders*, 2019 WL 3366598, at \*17.<sup>3</sup> While the ACP would clear more of this habitat than the MVP (3,275 acres and 1,248.6 acres, respectively), FWS does not even attempt to explain why destroying over a thousand acres of this habitat would result in *no* adverse effects for MVP, while

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<sup>3</sup> Even if the MVP BiOp did not discuss the ACP BiOp, it would be appropriate for the Court to consider it. *See Asarco, Inc. v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980) (a court may look beyond the record to “ascertain[] whether the agency considered all the relevant factors or fully explicated its course of conduct”).



just a month earlier it concluded for ACP that “a ‘majority’ of the impacts to Ibats would be caused by the clearing of” this habitat. *Id.* (emphasis added).

The fact that no Indiana bats were captured in mist-net surveys does not explain this difference. Ex. A at 17. For ACP, surveys similarly showed no Indiana bat presence in unoccupied summer habitat. *Defenders*, 2019 WL 3366598, at \*17.

Moreover, the “BiOp’s conclusion is in conflict with the evidence before the agency.” *Id.* at \*18. Two of the primary factors leading to Indiana bat decline are “habitat loss and degradation” and “forest fragmentation.” Ex. A at 10. “In light of those known primary threats,” FWS’s conclusory assertion that clearing over a thousand acres of this forest habitat will not adversely affect the bat is arbitrary. *Defenders*, 2019 WL 3366598, at \*18.

The BiOp is thus “arbitrary and capricious because, in reaching incidental take conclusions for [the Indiana bat], it did not consider the potential effects of” clearing suitable unoccupied summer habitat. *CBD*, 698 F.3d at 1119. FWS was required to discuss the potential indirect impacts of clearing this habitat, or, alternatively, provide a well-reasoned explanation for why it would not likely have such impacts.

### **3. FWS Failed to Take Indiana Bat Recovery Into Account**

A jeopardy evaluation must determine whether a project “reasonably would be expected...to reduce appreciably the likelihood of both the survival *and*

recovery of a listed species.” 50 C.F.R. § 402.02 (emphasis added). FWS “has defined ‘recovery’ as ‘improvement in the status of a listed species to the point at which listing is no longer appropriate.’” *Defenders*, 2019 WL 3366598, at \*11 (citation omitted). “[I]n the context of ‘site-specific’ BiOps..., recovery impacts, ‘like survival impacts, should be assessed.’” *Id.* (citation omitted).

FWS acknowledges the “rangewide status of the [Indiana bat] is declining” and “the degree of threat to the continued existence of the species is high.” Ex. A at 10. Between 2015 and 2017, the population decreased 8.4% to a total of 425 bats in Virginia, and decreased 54.7% to a total of 1,076 bats in West Virginia. *Id.* at 19. *See also id.* (“VA and WV hibernacula surveys indicate Ibat populations have decreased at least 95% since the discovery of [white-nose syndrome]”).

Yet the BiOp fails to discuss the MVP’s impacts on Indiana bat recovery. The agency thus “entirely failed to consider an important aspect of the problem.” *Sierra Club*, 899 F.3d at 293.

#### **4. FWS Failed to Specify the Impact of Pipeline Construction on Roanoke Logperch**

Roanoke logperch inhabit “clear streams” and are known for their distinctive behavior of “utilizing their snout to overturn gravel to forage on aquatic organisms on and in the streambed.” Ex. G at 4-232. They “are particularly susceptible to siltation impacts due to [this] specialized feeding strategy.” Ex. B at 8-58.

“Siltation and sedimentation are hypothesized to be contributing factors to the

reduction of the Roanoke logperch distributional range and respective population sizes.” *Id.* at 8-8. Mountain Valley acknowledges that “[m]ain threats to Roanoke logperch populations include...sedimentation/siltation due to *upland land disturbances.*” Ex. H at 39 (emphasis added). *See id.* at 66 (“Roanoke logperch may potentially experience lasting effects from sedimentation after Project completion.”).<sup>4</sup>

MVP construction “will disturb approximately 6,363 acres of land,” Ex. A at 4, including “about 5,053 acres of soils that are classified as having the potential for severe water erosion.” Ex. G at 5-2. *See also* Ex. I (Jenkins Decl. ¶¶4-6). The Biological Assessment estimated that MVP construction would cause *705 miles* of stream reaches to experience a 10% increase or more in sediment load. Ex. B at 4-10. It concluded that “[s]edimentation impacts resulting from instream pipeline construction and access roads were estimated to be 13.0 miles of Roanoke logperch habitat; *along with 36.4 miles of habitat affected by increased sedimentation from upland Project construction (i.e., upland runoff).*” *Id.* at 9-4 (emphasis added).<sup>5</sup>

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<sup>4</sup> FWS recognizes that “[p]rimary causes of RLP habitat degradation include... siltation,” yet contradictorily asserts that the “types of effects of the proposed action are not currently considered primary factors influencing the status of the species.” Ex. A at 16, 38.

<sup>5</sup> Because these distances were calculated using a 10% increase in sediment as a threshold, they likely underestimate “the distance water could carry deleterious concentrations of sediments downstream....” Ex. B at 4-12. As the U.S. Forest Service explained in April 2017 comments on the draft Hydrologic Report for

Incredibly, the BiOp fails to discuss the effects of sedimentation caused by upland disturbance. Consequently, FWS did not consider these impacts in reaching incidental take conclusions for the Roanoke logperch. *See CBD*, 698 F.3d at 1119. Instead, the BiOp identifies an artificially narrow subset of stream crossings for analysis, and declares (without support) that “the proposed action will impact 1,000 m (200 m above and 800 m below each crossing) plus the [22.86 m] construction ROW.” Ex. A at 14.

FWS’s assessment of impacts to Roanoke logperch and their habitat consists of a series of illogical or unexplained assumptions and unsupported conclusions. First, FWS identifies fourteen crossings as suitable or known habitat. *Id.* It eliminates six of those crossings in short order “[b]ased on the lack of documented occurrences in the [Blackwater River] watershed and the time-of-year restriction.” *Id.* But “[p]resence/absence surveys for [Roanoke logperch] were not conducted for the proposed action,” *id.* at 13, and “many of the watersheds within the Roanoke-Chowan remain undersampled (e.g., Blackwater River system), and the few fish collections that do exist were conducted prior to 1980.” Ex. H at 40. FWS cannot decline to conduct surveys and claim it is assuming presence in suitable habitat, and then in the next breath say no impacts are anticipated due to a lack of

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MVP, “in downstream areas where [Threatened and Endangered] aquatic species are present, it is important to further evaluate cumulative impacts less than 10% increase in sediment load....” *Sierra Club v. U.S. Forest Serv.*, 897 F.3d 582, 592 (4th Cir. 2018), *reh’g granted in part*, 739 F. App’x 185 (4th Cir. 2018).

documented occurrences. And the time-of-year restriction on which it also relies does not guarantee there will be no adverse impacts; it applies to instream work, and has no bearing on the “substantial sediment loading rates” caused by upland construction. Ex. B at 8-64.

Second, FWS provides no basis for its conclusory assertion that the area of impact will be 200 meters above and 800 meters below each crossing. Ex. A at 14. It is irrational to presume that the impact area will be identical at each crossing. *See* Ex. G at 4-136 (extent of impact caused by instream construction “would depend on sediment loads, stream velocity, turbidity, bank composition, and sediment particle size”).

Third, FWS’s approach for estimating the number of logperch at each of the five crossings is arbitrary. FWS repeatedly states that it “expect[s]” or “anticipate[s]” various conditions and outcomes, but provides no intelligible rationale for these assumptions. *See, e.g.*, Ex. A at 14 (“we expect RLP will use Bradshaw Creek when water levels are high; therefore we anticipate RLP numbers are low in this creek”).<sup>6</sup> FWS also states that it “expects[s] a small portion” (10%) of the fish within 6 river kilometers of the Bradshaw Creek 1 and Harpen Creek 1 crossings, and “expect[s] a portion” (30%) of the fish within 24 river kilometers of

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<sup>6</sup> This also fails to account for the fact that, during warmer months, adult logperch are typically found in deep water while small individuals are present in shallow backwaters. Ex. B at 7-25. Similarly, in the spring, “[f]emales are typically present in deep runs whereas males occupy shallow riffles.” *Id.*

the Pigg River crossing, to occur at those crossings. *Id.* at 15-16. FWS “appears to have randomly picked th[ose] number[s] out of a hat.” *Defenders*, 2019 WL 3366598, at \*8.

Using its unsupported estimates of the number of logperch expected to occur within an arbitrary distance of an artificially narrow subset of crossings, FWS concludes that “[a] total of 957 RLP are expected to occur in the action area.” Ex. A at 16. This number, in turn, serves as the incidental take limit. *Id.* at 40.

The take limit thus excludes logperch harmed by increased sediment from upland disturbance.<sup>7</sup> This omission is particularly surprising given that Mountain Valley acknowledges that “[u]pland disturbances may also impact the species downstream of Project construction where increased erosion and sedimentation may occur.” Ex. H at 66. *See* Ex. B at 8-59 (noting that reduced feeding efficiency and increased energy expenditures due to sedimentation constitute harassment). FWS provides no rationale for failing to discuss these impacts.

The BiOp’s discussion of effects focuses narrowly on 1) habitat alteration from instream structure placement and removal, 2) streambank vegetation clearing/trimming, and 3) trenching during operation and maintenance

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<sup>7</sup> FWS also ignores impacts from increased sediment loads in tributaries that feed into downstream logperch habitat. *See* Ex. R (Johnson Decl. ¶¶8, 10, 15, 20 & Ex. 1); Ex. I (Jenkins Decl. ¶7).

subactivities.<sup>8</sup> *See* Ex. A at 23–24 (discussing impacts from those activities<sup>9</sup>); *id.* at 40 (anticipating that 955 individuals will be harmed/harassed as a result of these three activities, with the remaining two injured/killed by entrainment, for a total take limit of 957 logperch).

The BiOp “provides no indication at all that FWS applied its expertise to the question of whether” sedimentation impacts from upland disturbance—not just highly localized impacts from streambank and instream disturbance at a limited number of crossings—may adversely affect the Roanoke logperch. *CBD*, 698 F.3d at 1124. The “Effects of the Action” section does not discuss sedimentation impacts from upland disturbance. Ex. A at 23–24. And the take limit only includes individuals harassed or harmed by instream and streambank construction (as well as operation and maintenance activities not at issue here).

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<sup>8</sup> Table 3 makes clear that FWS’s consideration of trenching during “New Disturbance – Construction” does *not* include trenching in upland areas. *See* Ex. A at Table 3 (noting that “[t]his subactivity occurs behind cofferdams....”).

<sup>9</sup> In discussing the duration of impacts from these activities, FWS relies on avoidance and minimization measures that it “anticipated [would] reduce surface water runoff and sedimentation, on average 79% containment....” Ex. A at 24. But prior to issuance of the BiOp, the U.S. Forest Service had “expressed nothing but skepticism of the 79% figure.” *Sierra Club*, 897 F.3d at 595. *See also id.* (Forest Service proposed 48% “as a ceiling...for sediment containment”); Ex. M (Gay Decl. ¶8 & Ex. 2). FWS uncritically accepted the 79% figure, ignoring its obligation to use “the best scientific...data available,” 16 U.S.C. § 1536(a)(2), and to “grapple with contrary evidence.” *Sierra Club*, 899 F.3d at 293.

FWS arbitrarily ignored impacts caused by “increased sedimentation from upland Project construction.” Ex. B at 8-59. Because the agency severely underestimated the amount of logperch habitat that MVP construction would adversely affect, FWS failed to “[s]pecific[y] the impact, i.e., the amount or extent” of incidental take. 50 C.F.R. § 402.14(i)(1)(i). FWS acted unreasonably when it did not discuss the potential impacts of sedimentation from upland disturbance or, alternatively, provide a well-reasoned explanation for why such sedimentation would not likely have such impacts.

### **B. Petitioners Will Be Irreparably Injured Absent a Stay**

“In light of the stated purposes of the ESA...establishing irreparable injury should not be an onerous task for plaintiffs.” *Cottonwood Env'tl. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1091 (9th Cir. 2015). *See also Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987). MVP construction will cause imminent, significant, and permanent harm to threatened and endangered species. Petitioners’ members enjoy observing, searching for, and studying the Roanoke logperch. Ex. L (Flores Decl. ¶8); Ex. M (Gay Decl. ¶¶5-6). They have observed logperch on their property. Ex. K (Reilly Decl. ¶¶13-15); Ex. S (Werner Decl. ¶29). Another member played a key role in having the Roanoke logperch listed under the ESA. Ex. U (Burkhead Decl. ¶6). Other members routinely travel to areas affected by the MVP to view threatened and endangered bats. Ex. J (Lambert Decl. ¶¶16-17); *see also* Ex. Q



(Terry Decl. ¶¶16–18); Ex. T (Kilduff Decl. ¶14). Their interests are harmed by FWS’s erroneous authorizations.

Although Mountain Valley suspended certain “new” construction activities after this lawsuit was filed, this voluntary suspension of limited scope and duration does not render a stay unnecessary.

As a threshold matter, the ESA does not permit piecemeal, “incremental-step” construction or analysis of impacts. *See Conner v. Burford*, 848 F.2d 1441, 1455 n.34 (9th Cir. 1988). FWS must reinitiate consultation to remedy the deficiencies in the BiOp and ITS, and “[r]einitiation...requires [FWS] to issue a new Biological Opinion before a project may go forward.” *Mt. Graham Red Squirrel v. Madigan*, 954 F.2d 1441, 1451 (9th Cir. 1992). Mountain Valley nonetheless is continuing to construct the pipeline, thereby impermissibly changing the “status quo” and making an “irretrievable commitment of resources” that forecloses potential “reasonable and prudent alternative measures” (e.g., route modifications to avoid impacting species). *Conner*, 848 F.2d at 1455 n.34; 16 U.S.C. § 1536(d). *See* 50 C.F.R. § 402.09. The FERC Certificate similarly “prohibits construction” until FERC “completes the process of complying with the Endangered Species Act.” *Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61043, at

\*48 (Oct. 13, 2017). Neither the statute nor MVP’s Certificate allows for construction to proceed in a piecemeal fashion under an invalid BiOp.<sup>10</sup>

More fundamentally, Mountain Valley’s limited, voluntary suspension does not ensure protection of threatened and endangered species. Mountain Valley has temporarily suspended “[c]ertain” “new” activities in areas where it determines they pose a risk of take “based on the Service’s BiOp.” Ex. E at 3 n.4.<sup>11</sup> But the BiOp understates which activities may adversely affect protected species, the severity of those impacts, and where species may be present. *See* section II.A, *supra*. Given this reliance on the BiOp’s inadequate impacts analyses, there is a significant risk that imperiled species will be harmed by activities Mountain Valley undertakes while FWS and FERC “determin[e] how to proceed under the Endangered Species Act”—a process that has already dragged on for more than four months. Ex. F at 1.

Mountain Valley authorizes itself to “continue certain activities” that, in its view, do not pose a risk of take. Ex. E at 3. Specifically, Mountain Valley says it will continue work it deems “necessary to stabilize and restore” previously

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<sup>10</sup> In addition, if the invalid BiOp remains in place, the Forest Service, BLM, and Army Corps may issue new authorizations that unlawfully rely on it. *See* section II.C, *infra*.

<sup>11</sup> FWS incorrectly suggests that all construction activity will stop in these areas: “MVP has voluntarily agreed to *cease activities in those areas* where it is anticipated (based on Appendix B of the Biological Opinion) that listed species...may be affected.” Ex. F at 1 (emphasis added).

disturbed areas. *Id.* This conveniently includes continued construction and installation of the pipeline under the guise of “stabilization.” *Id.* Petitioners do not oppose stabilization measures necessary to avoid further environmental harm. But rather than implementing erosion control measures to stabilize bare soil on the right-of-way, Mountain Valley is engaging in extensive construction activity.

Local residents have observed a flurry of construction activity *after* the voluntary suspension became effective on August 15, 2019. These activities—including delivering new pipe to the right-of-way, hauling pipe up steep slopes on the right-of-way, welding pipe on the right-of-way, and lowering pipe into the trench and burying it—go well beyond what is required to “stabilize” the right-of-way. Ex. Z (Moore Decl. ¶¶4-11 & Exs. 1-7 (photographs)). *See also* Ex. N (Badger Decl. ¶¶12-13); Ex. Y (Flora Decl. ¶¶10-15); Ex. X (Bondurant Decl. ¶¶9, 12, 14). This continued construction and equipment traffic on the right-of-way precludes implementation of erosion and sediment control measures to stabilize the exposed soil. *See, e.g.*, Ex. G at 2-38, 4-86, 4-222.

Instead, these unnecessary activities cause *additional* disturbance, which in turn increases the potential for erosion and sedimentation. For example, a substantial amount of heavy machinery has been observed actively working on the right-of-way during the suspension. Ex. Z (Moore Decl. ¶¶5-10 & Exs. 1-6 (photographs)). “[E]quipment traffic can compact soil[,] reducing porosity and

*increasing runoff potential.*” Ex. G at 4-81. *See also id.* (“backfilling, contouring, and the movement of construction equipment along the right-of-way” affects soil resources); *id.* at 4-85 (“impacts on compaction prone soils would be minimized by limiting construction traffic along the right-of-way”). Upland runoff, in turn, transports sediment into surface waters. *See id.* at 4-221, 4-605; Ex. V (Malbon Decl. ¶20). Mountain Valley’s continued construction during its voluntary suspension thus contributes to the very impacts that pose the greatest threat to the endangered logperch. *See* section II.A.4, *supra*.

Similarly, Mountain Valley is continuing construction that will further harm the Indiana bat. Mountain Valley has voluntarily suspended felling of trees or shrubs greater than 3” diameter-at-breast-height within suitable habitat. Ex. E at Att. 2.<sup>12</sup> However, bats are also harmed by “general construction disturbance.” Ex. G at 4-230. The Biological Assessment concluded that “noise, dust and lighting associated with...construction activities...would affect bats during multiple stages of the annual reproductive cycle.” Ex. B at 8-30. *See* Ex. Z (Moore Decl. ¶¶5, 7, 9 & Exs. 1, 3-5) (photographs showing large dust plumes caused by construction equipment on the right-of-way); Ex. B at 5-2; Ex. D at Ex. 1, pp. 10-11; Ex. H at 58 (“noise produced during construction of the Project is estimated to harass 63 hibernating individuals”).

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<sup>12</sup> There are still areas where trees are slated to be cut. Ex. E at 1; Ex. Q (Terry Decl. ¶19).

Finally, the duration of the voluntary suspension is insufficient. The BiOp and ITS should be stayed until this Court renders a final decision. Instead, Mountain Valley states it “will continue implementing the voluntary suspension ... with the exception of any activity/potential stressor that USFWS has determined does not warrant reinitiated consultation.” Ex. E at 4. This approach aggravates the problem of unlawful “incremental-step” analysis and approval by lifting the limited suspension with respect to individual activities or species, one at a time. *See Conner*, 848 F.2d at 1455 n. 34. In other words, under the voluntary suspension, construction is slated to continue in a piecemeal manner prohibited by both the ESA and MVP’s FERC Certificate.

The Court should not decline to stay an invalid FWS authorization, on which other agency authorizations depend, due to a voluntary suspension of limited scope that depends on the very BiOp in dispute to define which activities pose a risk to endangered species. Mountain Valley has committed only to temporarily ceasing a subset of harmful construction activities—and, contrary to the ESA, only until FWS makes piecemeal decisions regarding reinitiation. Meanwhile, Mountain Valley is rushing to deliver pipe to the right-of-way as active construction continues even in areas covered by the suspension. A stay is thus necessary to prevent imminent and irreparable harm pending this Court’s review.

### C. Balancing the Parties' Interests Favors Listed Species

“Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities.” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978). As a result, “when evaluating a request for injunctive relief to remedy an ESA [ ] violation, the equities and public interest factors *always* tip in favor of the protected species.” *Cottonwood*, 789 F.3d at 1091 (emphasis added).

FWS will not incur any substantial injury if the BiOp and ITS are stayed. Mountain Valley may argue that delaying construction will result in economic harm, but temporary harm to its economic interests is far outweighed by irreparable harm to listed species.

Moreover, the Court should not give weight to economic harm that may result from Mountain Valley’s strategy of rushing to construct the pipeline despite lacking several required federal authorizations. *See Sierra Club*, 897 F.3d at 606 (vacating U.S. Forest Service and Bureau of Land Management authorizations); *Sierra Club v. U.S. Army Corps of Engineers*, 909 F.3d 635, 639 (4th Cir. 2018) (vacating Nationwide Permit 12 verification). FERC’s Certificate for MVP prohibits construction prior to receipt of all “authorizations required under federal law.” *Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043, at \*76. Mountain Valley has ignored this Court’s admonition that, absent such authorizations, a pipeline

developer, “should it continue to proceed with construction, would violate FERC’s certificate of public convenience and necessity.” *Sierra Club*, 899 F.3d at 285 n.11 (interpreting analogous condition in ACP Certificate).

#### **D. A Stay Pending Review is in the Public Interest**

For the same reasons, a stay pending review is in the public interest. *Cottonwood*, 789 F.3d at 1090 (“Congress established an unparalleled public interest in the ‘incalculable’ value of preserving endangered species”). Endangered species “are of ‘esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people.’” *Gibbs v. Babbitt*, 214 F.3d 483, 487 (4th Cir. 2000) (*quoting* 16 U.S.C. § 1531(a)(3)). The public interest is not harmed by a delay in construction.

### **III. CONCLUSION**

Petitioners request that the Court stay the BiOp and ITS pending completion of the Court’s review.

DATED: August 21, 2019

Respectfully submitted,

/s/ Elizabeth F. Benson

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## CERTIFICATE OF COMPLIANCE

1. This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because this motion contains 5,200 words, excluding the parts of the motion exempted by Fed. R. App. P. 27(d)(2) and Fed. R. App. P. 27(a)(2)(B).
2. This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

Dated: August 21, 2019

/s/ Elizabeth F. Benson

Elizabeth F. Benson

## CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2019, I electronically filed the foregoing Motion for Stay on behalf of Petitioners with the Clerk of Court using the CM/ECF System, which will automatically send e-mail notification of such filing to all counsel of record.

/s/ Elizabeth F. Benson  
Elizabeth F. Benson