ENVIRONMENTAL LAW — NATURAL RESOURCES — PROTECTING THE JEFFERSON NATIONAL FOREST AGAINST THE MOUNTAIN VALLEY PIPELINE
Sierra Club, Inc. v. United States Forest Serv., 897 F.3d 582 (4th Cir. 2018).

Virginia Whitener

301 Woodlawn Pike Apt C-1
Knoxville, Tennessee 37920
(276) 732-7641
vwhitene@vols.utk.edu

University of Tennessee College of Law
Expected Graduation Date: May 2020

I, Virginia Whitener, certify that I have reviewed and meet the terms for eligibility for the contest.

I. INTRODUCTION

The Mountain Valley Pipeline ("MVP") is an interstate natural gas pipeline that will run approximately 303 miles from Wetzel County, West Virginia to Pittsylvania County, Virginia.[1] Controversy surrounding pipelines continue to grow in the United States because they advance the continued burning of natural gas. Additionally, the MVP faces controversy due to the fact that it will cross 83 acres of the Jefferson National Forest, as well as many other environmental impacts the pipeline will have.[2] The MVP "would be the largest pipeline of its kind to cross the Jefferson National Forest."[3] As planned, the pipeline will be "up to 42 inches in diameter and will require approximately 50 feet of permanent easement."[4] During construction, however, the pipeline would require "up to 125 feet of temporary easement."[5] Construction of the pipeline will include "remov[ing] trees, shrubs, brush, roots, and large rocks" and will involve digging a 54 inch wide and 5.5 to 9 feet deep trench.[6] In order for the project to move forward, MVP was required to obtain approval from several federal agencies, including the Federal Energy Regulatory Commission ("FERC"), the Bureau of Land Management ("BLM"), and the United States Forest Service ("Forest Service").[7]

a. Mountain Valley Pipeline and FERC

On October 23, 2015, the MVP submitted its application for a Certificate of Public Convenience and Necessity ("Certificate") from FERC.[8] According to the Natural Gas Act, "a natural gas company is not permitted to undertake construction of a pipeline unless FERC first

[1] *Mountain Valley Pipeline Homepage*, https://www.mountainvalleypipeline.info (last visited Nov. 28, 2018).
[2] *Sierra Club, Inc. v. United States Forest Serv.,* 897 F.3d 582, 588–93 (4th Cir. 2018).
[3] *Id.* at 605.
[4] *Mountain Valley Pipeline Overview,* https://www.mountainvalleypipeline.info/overview (last visited Nov. 28, 2018).
[5] *Id.*
[6] Sierra Club, Inc. v. United States Forest Serv.*,* 897 F.3d 582, 587 (4th Cir. 2018). (internal quotation marks omitted) (citation omitted).
[7] *Id.*
[8] *Id.* at 588.

issues a Certificate authorizing such construction."[9] Just short of two years later, FERC granted the Certificate on October 13, 2017.[10] The petitioners' in this case "do not challenge FERC's issuance of the Certificate."[11] Additionally, because the MVP is an interstate natural gas pipeline, FERC also acts as the lead agency in issuing an Environmental Impact Statement ("EIS").[12] According to NEPA, the EIS must detail "the likely environmental effects, adverse environmental effects which cannot be avoided, and potential alternatives to the proposal."[13] Both the BLM and the Forest Service adopted FERC's final version of the EIS.[14]

b. Mountain Valley Pipeline and the BLM

In addition to FERC's Certificate and EIS, the MVP was also required to obtain permits from the BLM in order to cross federally owned lands.[15] The MVP's proposed route will cross the Jefferson National Forest, which is managed by the Forest Service.[16] However, the MVP will also cross "60 feet of the Weston and Gauley Bridge Turnpike Trail in Braxton County, West Virginia," which is managed by the Army Corps of Engineers.[17] Since the pipeline is crossing federal land managed by two agencies, "the Department of the Interior is responsible for issuing rights of way and attendant permits."[18] Furthermore, the Department of the Interior has delegated this authority to the BLM when the proposal to cross federal land is "for oil and gas pipeline rights of way."[19] For the BLM to grant the permits to the MVP, it had to obtain the concurrence of the two agencies that managed the land – the Forest Service and the Army Corps of Engineers.[20] The BLM also

[9] *Id.* (citing 15 U.S.C. § 717f(c)(1)(A) (2018)).
[10] *Id.*
[11] *Id.*
[12] *Id.* (citing 7 C.F.R. § 3407.11(a) (2018).
[13] *Id.* (internal quotation marks omitted) (citing 42 U.S.C. § 4332(C) (2018)).
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.* ("The Army Corps of Engineers is not a party to this case." *Id.* at note 4).
[18] *Id.* at 589 (citing 30 U.S.C. § 185(c)(2) (2018)).
[19] *Id.* at 588 (citing 36 C.F.R. § 251.54(b)(3) (2018)).
[20] *Id.* at 589.

reviewed "the pertinent regulations, FERC's EIS, and public comments."[21] "The BLM explicitly adopted [FERC's] EIS" and on December 20, 2017, issued a Rule of Decision ("ROD"). The ROD granted Mountain Valley "a 30 year, 50-foot operational right of way and associated temporary use permits across 3.6 miles of the Jefferson National Forest."[22]

c. Mountain Valley Pipeline and the Forest Service

The final obstacle for the Mountain Valley was complying with a "Land Resource Management Plan governing the Jefferson National Forest" (the "Jefferson Forest Plan").[23] According to the NFMA, all permits for using the Jefferson National Forest must be consistent with this plan.[24] As the pipeline was proposed, it was impossible to meet certain standards of the plan.[25] In the event that a proposed project is not consistent with the Jefferson Forest Plan, the Forest Service has four options.[26] It may modify the project to comply with the plan, simply reject the project, amend the plan so that the project will comply, or, finally, "amend the plan contemporaneously with the approval of the project" and have this amendment "apply only to the project" that is at question.[27] On December 1, 2017, the Forest Service decided to amend the Jefferson Forest Plan in order for the MVP to comply with the plan, "but those amendments would only apply to the MVP project."[28] The petitioners in this case sought review of both the BLM and Forest Service's decisions.[29] They challenged the BLM's granting of a right of way for construction and operation of the MVP through federal land.[30] Additionally, they challenged the Forest Service's decision to amend the Jefferson National Forest Land Resource Management Plan

[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] 36 C.F.R. § 219.15(c) (2018).
[27] *Id.*
[28] Sierra Club, Inc. v. United States Forest Serv., 897 F.3d 582, 589 (4th Cir. 2018).
[29] *Id.*
[30] *Id.* at 587.

"to accommodate the right of way and pipeline construction."[31] On appeal to the United States Court of Appeals for the Fourth Circuit, *held*, vacated, remanded.[32] A court may hold a federal agency action unlawful when approving natural gas pipelines if the act does not comply with the National Environmental Policy Act ("NEPA"), the National Forest Management Act ("NFMA"), and the Mineral Leasing Act ("MLA"). *Sierra Club, Inc. v. United States Forest Service,* 897 F.3d 582 (4th Cir. 2018).

II. The Development of Federal Environmental Law

Prior to the 1960s, environmental law was based on common law.[33] It was not until the late 1960s that the environmental movement began to grow throughout our society.[34] There are now many federal agencies that regulate and affect our lives every day.[35] In enforcing these regulations, relevant federal agencies must also comply with several federal acts, including NEPA, the NFMA, the MLA, and the Administrative Procedure Act ("APA").

a. The National Environmental Policy Act

In response to the growing awareness of environmental harm, Congress enacted the National Environmental Policy Act. This was the "first major environmental law in the United States."[36] NEPA was signed into law on January 1, 1970 by President Richard Nixon.[37] The goal of NEPA is to establish a federal policy "to use all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans."[38] Essentially, NEPA is a broad law that serves as the "basic national charter for protection of the environment"

---

[31] *Id.*
[32] *Id.*
[33] Robert V. Percival, et al., Environmental Regulation: Law, Science and Policy, 1 (8th ed. 2018).
[34] *Id.*
[35] *Id.*
[36] *National Environmental Policy Act Welcome Page*, https://ceq.doe.gov (last visited Nov. 28, 2018).
[37] *Id.*
[38] National Environmental Policy Act of 1969 § 101, 42 U.S.C. § 4331(a) (2018).

in our rapidly growing society.[39] NEPA took an interesting approach in achieving the goal of environmental protection. Instead of creating a complex regulatory system for industries to abide by, the Act called for a modification of federal agencies' decision-making processes.[40] Section 102 of NEPA requires that "all agencies of the Federal Government shall include in every recommendation or report on proposals for . . . major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on the environmental impact[.]"[41] Thus, before a federal agency may approve a project significantly affecting the environment, the agency must complete an EIS. This is to ensure that federal agencies are seriously analyzing the environmental harms that may occur before approving these projects. Following the passage of NEPA, a new area of litigation emerged. One of the first cases brought following the enactment of NEPA described itself as "only the beginning of what promises to become a flood of new litigation–litigation seeking judicial assistance in protecting our natural environment."[42] These cases helped define and shape NEPA into the current law it is today.

In *Calvert Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Commission*, the court examined and considered the vagueness of NEPA's policies.[43] In an attempt to meet the standards of NEPA, the Atomic Energy Commission ("AEC") adopted new rules determining how it would evaluate environmental impacts for the future issuance of permits or licenses.[44] The Commission believed these new rules satisfied the requirements of NEPA since they now included environmental data.[45] The petitioners in *Calvert Cliffs'* brought suit, arguing that the rules adopted by the AEC do not comply with the demands of NEPA.[46] Alternatively, the AEC took the position

[39] *National Environmental Policy Act Welcome Page*, https://ceq.doe.gov (last visited Nov. 28, 2018).
[40] ROBERT V. PERCIVAL, ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE AND POLICY, 912 (8th ed. 2018).
[41] National Environmental Policy Act of 1969 § 102(2)(C), 42 U.S.C. § 4332 (2018).
[42] Calvert Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Com., 449 F.2d 1109, 1111 (D.C. Cir. 1971).
[43] *Id.* at 1112.
[44] *Id.* at 1116.
[45] *Id.*
[46] *Id.* at 1111–12.

that NEPA is so vague that there is "much room for discretion and that the rules challenged by petitioners fall well within the broad scope of the Act."[47] The AEC argued that its rules were enough to satisfy NEPA because they required a "Detailed Statement" of environmental impacts to accompany an application for a permit through the review process.[48] The court adamantly rejected the Commission's argument.[49] The court stated that "the Commission's crabbed interpretation of NEPA makes a mockery of the Act."[50] Simply attaching a detailed statement is not fulfilling the requirements of NEPA.[51] As the court explained, "NEPA was meant to do more than regulate the flow of papers in the federal bureaucracy."[52] Instead, the language of NEPA must be read "to indicate a congressional intent that environmental factors, as complied in the detailed statement, be *considered* through agency review processes."[53] Furthermore, the environmental impacts must be considered "to the fullest extent possible."[54] This case set the precedent intended by NEPA; that federal agencies must actually *consider* the environmental effects in the EIS, rather than just performing and attaching research.[55] A subsequent case looked further into the requirements of an EIS.[56] In *Hughes River Watershed Conservancy v. Glickman,* the court explained the two ways in which the EIS furthers the protection of the environment.[57] The first reason is that "it ensures that an agency, when deciding whether to approve a project, will carefully consider, or a take a hard look at, the project's environmental effects."[58] Secondly, it guarantees that the public will be aware of the environmental impacts, giving them the opportunity to voice

[47] *Id.* at 1112.
[48] *Id.* at 1117.
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.* at 1117–18 (internal quotation marks omitted).
[54] *Id.* at 1118 (internal quotation marks omitted).
[55] *Id.* at 1129.
[56] Hughes River Watershed Conservancy v. Glickman, 81 F.3d 437 (4th Cir. 1996).
[57] *Id.* at 443.
[58] *Id.* (internal quotation marks omitted).

their opinions.[59] In other words, it is not enough that the agency prepares an EIS.[60] "NEPA requires agencies to take a hard look at the environmental consequences of their proposed projects even after an [environmental impact statement] has been prepared."[61] The agency is required to prepare an additional EIS when there is new information that changes the environmental effects.[62]

b. The National Forest Management Act

In 1976, Congress enacted the National Forest Management Act as "the primary statute governing the administration of national forests."[63] This act "expanded and otherwise amended the Forest and Rangeland Renewable Resources Planning Act of 1974, which called for the management of renewable resources on national forest lands."[64] NFMA "seeks to balance the protection of natural ecosystems on public lands with the industrial and recreational uses of those lands."[65] In other words, this act is meant to "address the conflicting interest that often vie for priority when forest resources are at stake."[66] The Secretary of Agriculture has delegated authority under NFMA to the Forest Service in issuing the regulations for all land and resource management plans.[67] NFMA established a "two-step procedure for managing National Forest lands."[68] Under this Act, the Forest Service must first "develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System."[69] This step creates Forest Plans which provide "guidelines and approved methods by which forest management decisions are to be made for a period of ten to fifteen years."[70] Second, the Forest Service must make sure

[59] *Id.*
[60] *Id.*
[61] *Id.* (citing Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 348 (1989)).
[62] *Id.*
[63] *National Forest Management Act of* 1976, http://www.thecre.com/fedlaw/legal14/nfma.htm (last visited Nov. 28, 2018).
[64] *Id.*
[65] Fed. Forest Res. Coal. v. Vilsack, 100 F.Supp. 3d 21, 27 (D.D.C. 2015) (citation omitted).
[66] *Id.*
[67] 36 C.F.R. § 200.3(b).
[68] Am. Wild Horse Pres. Campaign v. Perdue, 873 F.3d 914, 919 (D.C. Cir. 2017).
[69] 16 U.S.C. § 1604(a).
[70] Sierra Club v. Robertson, 28 F.3d 753, 758 (8th Cir. 1994).

that all "[r]esource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands [are] consistent with the land management plans."[71] Therefore, "no proposed site-specific project may go forward until it has been found consistent with the forest plan that has been developed pursuant to the Planning rule…and each project must also undergo the appropriate level of environmental review and public participation under NEPA and other applicable laws[.]"[72]

Since 1979, there have been several Planning Rules promulgated by the Forest Service.[73] Three years after the first Planning rule was promulgated, the Forest Service determined that it was too complicated and revised it in 1982.[74] This revision helped to "streamline the process of developing forest plans."[75] Due to advances in scientific knowledge, this plan eventually no longer provided for an efficient process.[76] A new Planning rule was promulgated in 2000, but was determined to be "procedurally burdensome."[77] In order to address this issue, the Forest Service issued another Planning rule in 2005 and then revised it again in 2008.[78] However, both of these Planning rules were "invalidated…for failure to comply with the procedural obligations of the NEPA[.]"[79] In *Citizens for Better Forestry v. United States Dep't of Agric.*, plaintiffs brought action against the U.S. Department of Agriculture alleging that the 2005 Planning rule violated NEPA, along with several other acts.[80] Defendants argued that a NEPA analysis was not necessary because "the 2005 Rule would 'not have environmental effects' because it simply 'provide[d] a starting point for project and activity NEPA analysis."[81] Essentially, they claimed that they were not required to

[71] 16 U.S.C. § 1604(i).
[72] Fed. Forest Res. Coal. v. Vilsack, 100 F.Supp. 3d 21, 28 (D.D.C. 2015) (citation omitted).
[73] *Id.* at 28–29 (D.D.C. 2015).
[74] *Id.*
[75] *Id.* at 29 (citing National Forest System Land and Resource Management Planning, 47 Fed. Reg. 43,026, 43,026 (Sept. 30, 1982)).
[76] *Id.*
[77] *Id.* (citing National Forest System Land and Resource Management Planning, 67 Fed. Reg. 72,770, 72,771 (Dec. 6, 2002)).
[78] *Id.*
[79] *Id.*
[80] Citizens for Better Forestry v. United States Dep't of Agric., 481 F.Supp. 2d 1059 (N.D. Cal. 2007).
[81] *Id.* at 1067 (quoting 70 Fed. Reg.1023 at 1031).

make an Environmental Assessment ("EA") because the Rule itself would not have environmental effects.[82] The court held that the defendants "at a minimum, should have prepared an EA," if not also an EIS, while creating the 2005 Rule.[83] By failing to do so, the 2005 Rule violated NEPA.[84] The agency then revised the 2005 Plan in 2008 and attempted to prepare a proper EIS.[85] The 2008 Planning Rule was again challenged for violating NEPA.[86] The court determined that the prepared EIS did "not actually analyze the environmental effects of implementing the Rule."[87] Instead, the EIS simply insisted that "the Rule [would] have no effect on the environment because it merely sets out the process for developing and revising[.]"[88] As a result, the court again held that the 2008 Rule "[did] not comply with NEPA's requirements" because the attempted EIS did not actually "evaluate the environmental impacts" of the Rule.[89] Following these rulings, "[t]he Forest Service engaged in a notice and comment period and the preparation of an EIS pursuant to NEPA in 2011, and it issued the final 2012 Planning Rule…on April 9, 2012."[90] This Planning Rule provides that forest plans may be amended "at any time."[91] It also stated that forest plans must be "consistent with the Forest Service NEPA procedures."[92] Courts held that "in order to satisfy the requirements of the 2012 Planning Rule, each forest plan must not only have been developed pursuant to certain procedural steps…it must also include certain substantive elements."[93] However, this led to "confusion about how responsible officials should apply the substantive requirements…when amending [earlier] plans."[94] To address this issue, the Plan was revised in 2016 to provide that the

[82] *Id.*
[83] *Id.* at 1089.
[84] *Id.*
[85] Citizen for Better Forestry v. USDA*,* 632 F. Supp. 968, 980 (N. D. Cal. 2009).
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *Id.* at 981.
[90] Fed. Forest Res. Coal. v. Vilsack, 100 F.Supp. 3d 21, 29 (D.D.C. 2015)
[91] 36 C.F.R. § 219.13(a) (2012).
[92] *Id.* at § 219.12(b)(3) (2012).
[93] *Fed. Forest Res. Coal*., 100 F.Supp. 3d at 30.
[94] National Forest System Land Management Planning, 81 Fed. Reg. 70,373-01, 70,374-75 (Oct. 12, 2016).

Forest Service must "[d]etermine which specific substantive requirement(s) within §§ 219.8 through 219.11 are *directly related* to the plan direction being added, modified, or removed by the amendment" before applying the requirements to the amendment.[95] Therefore, it must be determined whether the substantive requirements of the 2012 Planning Rule are *directly related* to an amendment in forest plans, and if so, those requirements must be applied to the amendment.[96]

c. The Mineral Leasing Act

The Mineral Leasing Act was enacted in 1920.[97] This act regulates "[r]ights-of-way through any Federal lands" for interstate pipelines.[98] The MLA states that "[in]n order to minimize adverse environmental impacts . . . the utilization of rights-of-way in common shall be required to the extent practical."[99] The MLA "gives the BLM broad discretion to decide whether to lease lands for oil and gas development."[100] Under NEPA, before the BLM can make a decision, it must complete an environmental review.[101] If it is determined that the proposed lease will "significantly [affect] the quality of the human environment[,]" then the BLM is required to complete an EIS.[102] In the EIS, the BLM "must 'rigorously explore and objectively evaluate' all reasonable alternatives[.]"[103] Additionally, the BLM must inform the public of the EIS and consider any comments that the public brings forth.[104] In *Richardson,* the Tenth Circuit held that the BLM erred when it did not "thoroughly analyze the environmental impacts of [an] Alternative[.]"[105] Therefore, the BLM must fully analyze all alternatives of a proposed plan under the MLA.[106]

[95] 36 C.F.R. § 219.13(b)(5) (emphasis added).
[96] National Forest System Land Management Planning, 81 Fed. Reg. 90,723-01, 90,731 (Dec. 15, 2016).
[97] *Mineral Leasing Act of 1920 as* Amended, https://www.blm.gov/or/regulations/files/mla_1920_amendments1.pdf (last visited Nov. 28, 2018)
[98] 30 U.S.C. § 185(a).
[99] *Id.* § 185(p).
[100] W. Energy All. v. Jewell, No. CIV 16-0912 WJ/KBM, 2017 U.S. Dist. LEXIS 5575 (D.N.M. Jan. 13, 2017) (citing U.S.C. § 226 (a).
[101] *Id.* at 3.
[102] 42 U.S.C. § 4332(C).
[103] N.M. ex rel. Richardson v. BLM, 565 F.3d 683, 703 (10th Cir. 2009) (quoting 40 C.F.R. § 1502.14)).
[104] *Id.* at 704.
[105] *Id.* at 708.
[106] *Id.* at 703.

d. The Administrative Procedure Act

The Administrative Procedure Act was enacted in 1946.[107] This act "governs the process by which federal agencies develop and issue regulations" and "other agency actions such as issuance of policy statements, licenses, and permits."[108] Because NEPA, NFMA, and the MLA do not create private rights of action, courts must "review the Forest Service's approval of [a] [p]roject as a final agency action under the [APA]."[109] A court will not "set aside an agency decision unless it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'"[110] A federal agency's decision is arbitrary and capricious if it "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[111]

III. *SIERRA CLUB, INC. V. UNITED STATES FOREST SERV.*

In *Sierra Club, Inc. v. United States Forest Serv.*, petitioners sought "review of the BLM and Forest Service RODs[.]"[112] The Court of Appeals for the Fourth Circuit had "jurisdiction to review them pursuant to the Administrative Procedure Act . . . and the [Natural Gas Act.]"[113] The court may "'hold unlawful and set aside [a federal] agency action' for certain specified reasons, including whenever the challenged act is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.'"[114] A federal agency's rule is "arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to

[107] *Summary of the Administrative Procedure* Act, https://www.epa.gov/laws-regulations/summary-administrative-procedure-act (last updated Dec. 30, 2016).
[108] *Id.*
[109] Utah Envtl. Cong. v. Russell, 518 F.3d 817, 823 (10th Cir. 2008).
[110] *Id.* (citing 5 U.S.C. § 706(2)(A)).
[111] *Id.* (quoting *Motover Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).
[112] Sierra Club, Inc. v. United States Forest Serv., 897 F.3d 582, 589 (4th Cir. 2018).
[113] *Id.* (citing 5 U.S.C. §§ 701–06 and 15 U.S.C. § 717r(d)(1)).
[114] *Id.* at 589–90 (quoting Friends of Back Bay v. U.S. Army Corps of Eng'rs, 681 F.3d 581, 586–87 (4th Cir. 2012)).

consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[115] Here, the Court found that the Forest Service violated NEPA, and NFMA, in its decision to amend the Jefferson Forest Plan for the MVP.[116] The Court also concluded that the BLM violated the MLA in its decision to grant a right of way to the MVP through federal land.[117] As a result, both federal agency decisions were vacated and remanded by the Fourth Circuit.[118]

a. The Forest Service Violated NEPA and the NFMA

Petitioners argued that "the Forest Service violated NEPA by adopting and relying upon the EIS's analysis of erosion and sedimentation effects in the Jefferson National Forest" because it failed to take a hard look at the environmental impacts of the pipeline.[119] MVP had three drafts of a report prepared called "Hydrologic Analysis of Sedimentation" (the "Hydrologic Report").[120] After the first draft was completed on June 7, 2016, the Forest Service filed comments which expressed concern that the draft "treats the sedimentation disturbance as a single-year occurrence."[121] On March 3, 2017, MVP addressed this concern in the second draft of the Hydrologic Report "and explained that sediment yields would reach a new sediment equilibrium within approximately four to five years[.]"[122] The second draft cited to a study by the Environmental Protection Agency from 2007.[123] The Forest Service then asked MVP to "provide additional supporting documentation for how [they] came up with their model assumptions[.]"[124]

[115] *Id.* at 590 (citing Defs. of Wildlife v. N.C. Dep't of Transp., 762 F.3d 374, 396 (4th Cir. 2014) (quoting Motor Vehicle Mnfs. Ass'n v. State Farm Mut. Auto. Ins., 463 U.S. 29, 43 (1983))).
[116] *Id.* at 587.
[117] *Id.*
[118] *Id.*
[119] *Id.* at 590–91.
[120] *Id.* at 591.
[121] *Id.*
[122] *Id.* (quotations omitted).
[123] *Id.*
[124] *Id.* at 592–93.

MVP then submitted the final Hydrologic Report on June 21, 2017, and provided several more sources in an attempt to satisfy the Forest Service's concerns.[125]The following day, June 22, 2017, FERC released its EIS, but it relied on the *second* draft of the Hydrologic Report, rather than the third and final draft.[126] Several months later, "the Forest Service issued its ROD" and adopted FERC's EIS.[127] In adopting the FERC's EIS, the Forest Service must first complete "an independent review of the [EIS]" and "[conclude] that its comments and suggestions have been satisfied."[128] The Forest Service gave no explanation as to how the EIS was proper even though it was not based on the final draft of the Hydrologic Report.[129] Additionally, the Forest Service did not explain how its comments on the second draft were addressed in the final report.[130] The Court found "no evidence that the Forest Service undertook the required independent review of the EIS's sedimentations analysis."[131] Prior to FERC's EIS, "the Forest Service expressed steadfast concerns" surrounding the second draft of the Hydrologic Report, but there is no explanation as to how those concerns were "alleviated."[132] Because the EIS adopted by the Forest Service did not address its concerns, and the Forest Service failed to make an independent review, the Court held that the agency acted "arbitrarily and capriciously."[133] For this reason, the Fourth Circuit vacated and remanded the Forest Service's decision.[134] Petitioners also argue that the Forest Service violated the NFMA.[135] The Forest Service amended the Jefferson Forest Plan, for only the MVP, regarding the soil and riparian standards.[136] The Jefferson Forest Plan had to be amended for the

[125] *Id.* at 593.
[126] *Id.*
[127] *Id.* at 594.
[128] *Id.* (quoting 40 C.F.R. § 1506.3(c)).
[129] *Id.*
[130] *Id.*
[131] *Id.*
[132] *Id.* at 596.
[133] *Id.*
[134] *Id.*
[135] *Id.* at 600.
[136] *Id.* at 601.

MVP, otherwise "the project could not meet its requirements[.]"[137] The Court looked to "whether the 2012 Planning Rule substantive requirements are 'directly related' to the plan direction added or modified by those amendments."[138] The Forest Service stated in its ROD that "some 2012 Planning Rule soil and riparian substantive requirements are *relevant* to the amendment," but not directly related because it would not cause "substantial adverse effects[.]"[139] The Court disagreed, finding that "the clear purpose of the amendment is to lessen requirements protecting soil and riparian resources so that the pipeline project could meet those requirements."[140] Therefore, the 2012 Planning Rule "sets forth substantive requirements *directly related* to [the] purpose" of the amendment.[141] This means that "the Forest Service is required to ensure that amendments to the soil and riparian standard in the Jefferson Forest Plan will comply with the NFMA[.]"[142] The Court vacated and remanded the Forest Service's decision in not applying the proper 2012 Planning Rule soil and riparian requirements.[143]

b. The BLM Violated the MLA

Finally, petitioners alleged that the BLM violated the MLA when it granted a "3.6 mile right of way across federal land."[144] As previously discussed, the MLA provides that "the utilization of rights-of-way in common *shall be required to the extent practical*."[145] Therefore, the MLA requires much more than the EIS's NEPA alternatives analysis.[146] The BLM did evaluate alternative routes in the EIS, including the Columbia Gas of Virginia route.[147] This route would "follow existing rights-of-way . . . cross[ing] approximately 0.8 mile[s] of the Jefferson National

[137] *Id.* at 603.
[138] *Id.* at 602 (citing 26 C.F.R. § 219.13(b)(5)).
[139] *Id.* (citation omitted).
[140] *Id.* at 603.
[141] *Id.* (citing 36 C.F.R. § 219.8(a)(2)(ii)).
[142] *Id.*
[143] *Id.*
[144] *Id.* at 604.
[145] *Id.* (emphasis added) (quoting 30 U.S.C. § 185(p)).
[146] *Id.*
[147] *Id.*

Forest."[148] However, following this route would add approximately 9 miles to the proposed route and result in over one hundred more acres of construction.[149] As a result, the BLM determined that the alternative route would not be a significant environmental advantage.[150] The BLM, however, does not address that "the MLA's direction that the utilization of rights of way in common 'shall be required to the extent practical.'"[151] The Court held that the BLM "entirely failed to consider an important aspect of the problem."[152] The BLM never determined that the existing right of way was impractical for the MVP route.[153] Had the agency performed the proper analysis under the MLA, it "would have favored routes utilizing existing rights of way unless those alternatives were impractical."[154] Therefore, the Court vacated and remanded the decision of the BLM.[155]

IV. CONCLUSION

The Fourth Circuit correctly applied the requirements of NEPA, the NFMA, and the MLA. Two federal agencies acted "arbitrarily and capriciously" in approving aspects of the MVP.[156] The Forest Service violated NEPA and the NFMA when it failed to perform an independent review of the EIS or explain how concerns surrounding the Hydrologic Report were alleviated. Additionally, the BLM failed to follow the MLA when it did not determine that an existing right of way was impractical. "American citizens . . . trust the Forest Service to protect and preserve this country's forests" and "the [BLM] to prevent undue degradation to public lands[.]"[157] The Fourth Circuit's holding was appropriate in remanding these decisions to the federal agencies.

[148] *Id.* (citation omitted).
[149] *Id.*
[150] *Id.*
[151] *Id.* (quoting 30 U.S.C. § 185(p)).
[152] *Id.* at 605 (quoting Defs. of Wildlife v. N.C. Dep't of Transp., 762 F.3d 374, 396 (4th Cir. 2014)).
[153] *Id.*
[154] *Id.*
[155] *Id.*
[156] *Id.* at 596.
[157] *Id.* at 605–06.