No. 18-2095

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SIERRA CLUB, and THE VIRGINIA WILDERNESS COMMITTEE,
Petitioners,

v.

NATIONAL PARK SERVICE, *et al.*,
Respondents,

and

ATLANTIC COAST PIPELINE, LLC
Respondent-Intervenor.

On Petition for Review

BRIEF OF *AMICI CURIAE* NATIONAL PARKS CONSERVATION ASSOCIATION AND THE COALITION TO PROTECT AMERICA'S NATIONAL PARKS IN SUPPORT OF PETITIONERS

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

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No. 18-2095 Caption: Sierra Club et al v. National Park Service et al

Pursuant to FRAP 26.1 and Local Rule 26.1,

National Parks Conservation Association ("NPCA")
(name of party/amicus)

who is amicus curiae, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

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6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Eric R. Glitzenstein Date: 12/14/18

Counsel for: NPCA

CERTIFICATE OF SERVICE

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I certify that on 12/14/18 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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No. 18-2095 Caption: Sierra Club et al v. National Park Service et al

Pursuant to FRAP 26.1 and Local Rule 26.1,

The Coalition to Protect America's National Parks ("The Coalition")
(name of party/amicus)

who is amicus curiae, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
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Signature: /s/ Eric R. Glitzenstein Date: 12/14/18

Counsel for: The Coalition

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

IDENTITIES AND INTERESTS OF AMICI CURIAE[1]

Amici Curiae National Parks Conservation Association ("NPCA") and the Coalition to Protect America's National Parks, Inc. ("Coalition") (collectively "*Amici*") submit this brief to address critical issues arising from the National Park Service's ("NPS") issuance of a Right-of-Way Permit and Special Use Permit (collectively, "ROW") to Atlantic Coast Pipeline, LLC ("ACP") authorizing the construction of an underground natural gas pipeline across the Blue Ridge Parkway ("Parkway").

NPCA is a non-profit organization founded in 1919 to protect and enhance America's National Parks for the benefit of present and future generations. NPCA represents over 1.3 million members and supporters who care deeply about America's shared natural and cultural heritage preserved by the National Park System. NPCA advocates for the protection of the National Park System at a grass roots level, in the federal courts and in Congress. Because of the significant adverse impact of the Pipeline on the Parkway and the Appalachian Trail, and

[1] *Amici* obtained consent from all parties to file this brief. This brief is submitted pursuant to Rule 29 of the Federal Rules of Appellate Procedure. No party or counsel for a party authored this brief in whole or in part. No party or counsel for a party contributed money to fund the preparation or submission of this brief. No other person except *amici curiae*, its members, or its counsel contributed money intended to fund the preparation or submission of this brief.

because of the harmful precedent NPS's decision sets for the National Park System, NPCA strongly opposes the ROW at issue.

With more than 1600 members, the Coalition consists mainly of retired NPS officials, including: former NPS directors; associate and regional directors; superintendents; rangers, and specialists with expertise in subject matter areas such as the NPS Organic Act, National Environmental Policy Act ("NEPA") compliance; historic, natural, and cultural resource preservation; and natural resource management and science. These NPS experts, all of whom serve on a volunteer basis, formed the Coalition in 2003 to advance the preservation and protection of America's national park areas and the central mission of NPS—the "conservation mandate" of the NPS Organic Act. Coal., *About the Coalition*, https://protectnps.org/membership-2/who-we-are/. The Coalition collectively represents nearly 35,000 years of professional stewardship experience in protecting America's most precious and important natural and historic places. *Id.*

The Chair of the Coalition is Philip A. Francis, who is a former superintendent of the Parkway and oversaw completion of the Parkway's General Management Plan ("GMP").[2] Because NPS relied upon a CE to issue the ROW, NPS did not invite any public comment. *See Petitioners' Opening Brief* at 21,

[2] The Organic Act requires NPS to develop GMPs for each National Park unit to guide the management and use of National Park lands. 54 U.S.C. § 100502.

Sierra Club v. Nat'l Park Serv. ("Sierra Club II"), No. 18-2095 (4th Cir. Dec. 7, 2018), ECF No. 28. After NPS issued its decision, Mr. Francis wrote to NPS on behalf of the Coalition and urged NPS not to grant the ROW because of the serious adverse effects that the Pipeline will have on the Parkway and to engage in additional public review under NEPA. *See* Coal., *Coalition Voices Concern About Atlantic Coast Pipeline*, https://protectnps.org/coalition-voices-concern-about-atlantic-coast-pipeline/ ("Francis Ltr.").

Because of their experience in safeguarding the National Park System, and specifically the Parkway, *Amici* file this brief to explain how NPS neglected its duties under the NPS Organic Act and NEPA to ensure that its actions will leave the National Park System unimpaired for future generations and to assess fully the environmental impacts of actions that will have significant, adverse effects on the National Park System.

BACKGROUND

I. STATUTORY BACKGROUND

A. The National Environmental Policy Act

NEPA "is our basic national charter for protection of the environment." 40 C.F.R. § 1500.1. NEPA requires preparation of an Environmental Impact Statement ("EIS") for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). NEPA's implementing

regulations, issued by the Council on Environmental Quality ("CEQ") and U.S. Department of the Interior ("DOI"), permit NPS to prepare an Environmental Assessment ("EA") to evaluate whether an EIS is required. 40 C.F.R. § 46.300; 40 C.F.R. §§ 1501.3, 1508.9. Agencies must solicit public comment on EISs, *id.* § 1503.1, and NPS also "must, to the extent practicable, provide for public notification and public involvement when an [EA] is being prepared." 43 C.F.R. § 46.305(a).

The only circumstances in which an agency may avoid preparing either an EIS or an EA is when the agency action is lawfully "categorically excluded" from NEPA review. A "categorical exclusion" ("CE") is a "category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect" by an agency through its NEPA implementing regulations. 40 C.F.R. § 1508.4. Yet even if a proposed action would otherwise fall within a CE, an agency must prepare an EIS or EA when certain circumstances enumerated in the agency's regulations exist. *Id.* § 1508.4.

B. The NPS Organic Act

Unlike other federal lands, the National Park System's sole purpose is conservation. *Mich. United Conservation Clubs v. Lujan*, 949 F.2d 202, 207 (6th Cir. 1991) ("[U]nlike national forests, Congress did not regard the National Park

System to be compatible with consumptive uses."). To that end, Congress has mandated that the management of the units of the National Park System, including the authorization of activities therein, must adhere to those conservation values and purposes for which the units were established (absent specific legislation to the contrary). 54 U.S.C. § 100101(b). Thus, NPS must determine that any activities it permits in National Park units—including the Parkway, 16 U.S.C. § 460a-2—are not in "derogation" of this "conservation mandate." *Id.*

C. The Blue Ridge Parkway Enabling Legislation

Congress added the Parkway to the National Park System in 1936. 16 U.S.C. § 460a-2. Under the establishment act for the Parkway, NPS may issue ROWs only "for such purposes and under such . . . conditions as [it] may determine to be not inconsistent with the use of such lands for parkway purposes." 16 U.S.C. § 460a-3. Hence, before issuing a ROW, NPS must make a valid determination that the pipeline is consistent with the Parkway's protected scenic, natural, and cultural values, and the public's enjoyment thereof. *See* 54 U.S.C. § 100101(a) (defining the National Park System's purposes).

The Parkway's GMP sets forth the Parkway's protected purposes: to "connect . . . national parks by way of a 'national rural parkway'—a destination and recreational road that passes through a variety of scenic ridge, mountainside, and pastoral farm landscapes"; "conserve the scenery and preserve the natural and

cultural resources of the parkway's designed and natural areas"; "provide for public enjoyment and understanding of the natural resources and cultural heritage of the central and southern Appalachian Mountains"; and "provide opportunities for high-quality scenic and recreational experiences along the parkway and in the corridor through which it passes." Administrative Record ("AR") 2143.

II. RELEVANT FACTUAL BACKGROUND

ACP proposes to construct and operate a 642-mile natural gas transmission pipeline ("Pipeline") that will span West Virginia, Virginia, and North Carolina. AR1925. In 2015, ACP filed an Application for a Certificate of Public Convenience and Necessity with the Federal Energy Regulatory Commission ("FERC"). At that time, FERC began its environmental review.

The proposed route for the Pipeline crosses the Parkway. AR1925. In September 2015, ACP applied for a ROW to authorize the construction of the proposed Pipeline across the Parkway by horizontal directional drilling. AR1925. The Pipeline will also cross the adjacent George Washington National Forest, administered by the U.S. Forest Service ("USFS"). While USFS was a cooperating agency, FERC EIS at ES-1,[3] NPS declined to formally cooperate in the preparation of FERC's EIS. ECF No. 28 at 22.

[3] The administrative record incorporates FERC Dockets CP15-554, CP15-555, and CP15-556, by reference. *See* Certified List, Entry 1 (ECF No. 25).

As part of USFS's NEPA process in its role as a cooperating agency, the company prepared a Visual Impact Assessment ("VIA") to "describe conditions and potential visual impacts for the segments" of the Pipeline that would cross federally protected lands, including the Parkway. AR733. The VIA assessed the visual impacts of the proposed pipeline on the Parkway from two vantage points: Ravens Roost and Three Ridges overlooks. AR841. The VIA concluded that from Ravens Roost, the proposed pipeline would likely "not be inconsistent with NPS management objectives for visual resources." AR841. From Three Ridges, however, the company conceded that the proposed pipeline "would likely be inconsistent with NPS management objectives for visual resources," but suggested that planting additional shrubs along the ROW "would *reduce* the inconsistency with NPS management objectives." AR841 (emphasis added). The VIA did not say that mitigation measures would be enough to *eliminate* the inconsistency.

In March 2017, NPS sent the company comments highly critical of the VIA. AR450. NPS disputed the VIA's conclusions about the effects of the proposed pipeline on the viewshed and questioned proposed mitigation measures. *Id.*

FERC issued its final EIS in July 2017. AR1926. On November 11, 2017, NPS invoked a CE for the ROW permit that applies to the "installation of underground utilities in previously disturbed areas having stable soils, or in an existing utility [ROW]." AR1927. However, the Pipeline will cut across

undisturbed areas of the Parkway, and requires a *new* ROW. AR169. NPS issued the initial ROW in December 2017 with no opportunity for public comment. AR1940; AR1965. The ROW was subsequently challenged in this Court. See *Sierra Club v. U.S. Dep't of Interior ("Sierra Club I")*, 899 F.3d 260 (4th Cir. 2018).

On August 6, 2018, this Court held that "NPS has not fulfilled its statutory mandate of ensuring consistency with values and purposes of the Blue Ridge Parkway unit and the overall National Park System." *Id.* at 264. Just over one month after this Court's decision and remand, NPS reissued the ROW, again without the opportunity for public comment. AR2049; AR2060. NPS did not conduct any additional environmental analyses, but instead, relied on the same CE as its 2017 decision. AR2074. The ROW was accompanied by two memoranda purporting to support its decision—a "CE Compliance Memorandum" adopting, without changes, existing documentation prepared for the 2017 ROW NEPA review, AR2073, and a "Consistency Determination," asserting that, based on the existing record, the ROW is consistent with Parkway purposes, AR2078.

ARGUMENT

I. NPS'S USE OF A CE TO AVOID NEPA REVIEW IS ARBITRARY AND UNLAWFUL.

A. The Specific CE Invoked By NPS Does Not Apply.

The Court should reject NPS's invocation of a CE to avoid preparation of an EIS or EA. By definition, a CE is "a *category* of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of the[] [NEPA] regulations." 40 C.F.R. § 1508.4 (emphasis added); *see also* 43 C.F.R. § 46.205 (DOI regulations defining a CE as a "category or kind of action that has no significant individual or cumulative effect on the quality of the human environment"). NPS's attempts to shoehorn its permitting of the Pipeline into this framework is a flagrant abuse of the CE concept and must fail.

DOI's NEPA regulations (which apply to NPS) provide that if a "proposed action does not meet the criteria for any of the listed Departmental categorical exclusions . . . then the proposed action *must* be analyzed" in an EA or EIS. 43 C.F.R. § 46.205(a) (emphasis added). Here, NPS invoked only one CE, and the Pipeline does not "meet the criteria" for that exclusion. The CE applies to the "[i]nstallation of underground utilities *in previously disturbed areas* having stable soils, or *in an existing utility right-of-way*." AR1927 (emphasis added). Because

the Pipeline requires a new ROW, NPS can invoke this CE only if it establishes that ACP will install the Pipeline in a "previously disturbed area." As explained below, NPS cannot meet this criterion.

Neither NPS's "CE Compliance Memorandum," nor any other document in the record, even attempts to establish that the length of ACP's proposed route across Parkway lands would fall within "previously disturbed areas." In fact, "[m]ost of the parkway remains undisturbed," AR2431, including the segment of the Parkway that the Pipeline will cut across, which consists of "deep mountain forests."[4] AR2202.

NPS ignored the plain language of the CE, stating instead that the ACP fits within the CE because it will involve "minimal soil disturbance." AR2075. Putting aside the fact that it defies logic to insist that a major Pipeline that will remove several thousand cubic yards of soil constitutes a "minimal" disturbance, *see* AR270, the plain language of the CE limits its application to only those projects that will occur in *"previously* disturbed areas." AR1927 (emphasis added). Supreme Court and Circuit precedent dictates that where, as here, a regulation is unambiguous, the plain language controls. *E.g., Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 193 (4th Cir. 2009); *see also Christensen v.*

[4] The Pipeline will cut underneath undisturbed forest land. *See* AR169.

Harris Cty., 529 U.S. 576, 588 (2000). Thus, the Court should reject NPS's reliance on this CE. *See City of Fredericksburg v. FERC*, 876 F.2d 1109, 1112 (4th Cir. 1989) ("It is well-settled that an administrative agency, under most circumstances, must abide by its own regulations[.]"); *see also Wilderness Watch v. Mainella*, 375 F.3d 1085, 1095 (11th Cir. 2004) (rejecting agency's invocation of a CE where the agency action fell outside of the CE's plain terms).

NPS's past practices reinforce this conclusion. A review of NPS's NEPA database confirms that NPS invokes this particular CE for work on *existing* utility lines.[5] Limiting the use of the CE to such activities fits its plain terms, and complies with the NEPA scheme, which limits CEs "to situations where there is an insignificant or minor impact on the environment." *Sierra Club v. Bosworth*, 510 F.3d 1016, 1027 (9th Cir. 2007); 43 C.F.R. § 46.205 (DOI regulation defining a CE as a "category or kind of action that has no significant individual or cumulative effect on the quality of the human environment"). As a *category*, the construction

[5] *See, e.g.*, https://parkplanning.nps.gov/documentsList.cfm?projectID=25563 (rebury exposed gas line); https://parkplanning.nps.gov/documentsList.cfm?projectID=57123 (pipeline repairs); https://parkplanning.nps.gov/document.cfm?parkID=322&projectID=48765&documentID=55206 (pipeline inspection); https://parkplanning.nps.gov/documentsList.cfm?projectID=42367 (pipeline inspection and repair). Indeed, in Mr. Francis's eight years as the Parkway's Superintendent, this CE was never invoked for a new utility line.

of *new* utility lines does not have insignificant or minor impacts on the environment. Unsurprisingly, therefore, NPS presented no evidence that this particular CE has *ever* been applied to the *construction* of a new utility line across a newly designated ROW.

To the contrary, NPS has previously reviewed requests for ROW permits for the construction of new utility lines across the Parkway—requests highly analogous to the ACP's ROW application.[6] NPS did not invoke any CE for such projects, but rather, prepared an EA. Thus, NPS's prior practice "indicates that the agency's own interpretation of the scope of this [categorical] exclusion has been more modest than the one it advocates here." *California ex rel Lockyer v. USDA*, 575 F.3d 999, 1017 (9th Cir. 2009) (internal quotation omitted).

B. Extraordinary Circumstances Preclude Reliance on the CE.

Even if the Pipeline fell within a CE, which it does not, the Court should reject NPS's reliance on the CE because "extraordinary circumstances" are present. 40 C.F.R. § 1508.4. NPS's NEPA regulations set forth several such "extraordinary circumstances," and if the proposal "may meet" any of them, NPS cannot invoke a CE. 43 C.F.R. § 46.215. Here, the Pipeline implicates several of the enumerated

[6] *See* NPS, *Environmental Assessment for Progress Energy Carolinas ROW Permit*, https://parkplanning.nps.gov/document.cfm?parkID=355&projectID=25400&documentID=40318.

circumstances. Accordingly, NPS's use of a CE for the Pipeline must be rejected. *See California v. Norton*, 311 F.3d 1162, 1177 (9th Cir. 2002) ("At the very least there is substantial evidence in the record that exceptions to the categorical exclusion may apply, and the fact that the exceptions may apply is all that is required to prohibit use of the categorical exclusion."); 43 C.F.R. § 46.215.

1. The Pipeline May Have Significant Adverse Impacts On The Parkway.

The Pipeline may "[h]ave significant impacts on such natural resources and unique geographic characteristics as *historic or cultural resources*; *park*, recreation or refuge lands . . . and other ecologically significant or critical areas." 43 C.F.R. § 46.215(b) (emphasis added).

As the first national rural parkway conceived and designed for scenic enjoyment, and constructed, in part, to "preserve[] and display[] cultural landscapes and historic architecture characteristic of the central and southern Appalachian highlands," the Parkway and surrounding lands are a significant historic and cultural resource. AR2143. As noted, experts—including the former superintendent of the Parkway—submitted comments to NPS explaining how the Pipeline threatens to undermine decades of agency efforts to protect and conserve the Parkway's scenic values and adjacent historic viewsheds. *See* Francis Ltr.

NPS's own statements on the inadequacies of the VIA confirm that the "proposed pipeline alignment . . . would dominate the valued landscape," and

would constitute "an adverse impact to the [Parkway]" that the proposed measures would not effectively mitigate. AR451. For this reason alone, NPS should have prepared an EIS, or at least an EA. *See Friends of Back Bay v. U.S. Army Corps of Eng'rs*, 681 F.3d 581, 590 (4th Cir. 2012) ("[P]olicy goals underlying NEPA are best served if agencies err in favor of preparation of an EIS when . . . there is a substantial possibility that the [proposed] activity may have a significant impact on the environment." (quotation and citation omitted)).[7]

The Court should reject NPS's new assertions purportedly justifying its determination that the Pipeline will not have significant impacts on any historic, cultural, or park resources because NPS's reliance on "mitigation" cannot be sustained. Not only is NPS's reliance on *site-specific* "mitigation" difficult to harmonize with invocation of a "*categorical*" exclusion, but NPS has never coherently explained how mitigation will render otherwise significant impacts to the Parkway viewshed insignificant. Indeed, in addition to relying on mitigation measures that NPS itself previously criticized as inadequate, AR450—with no

[7] Although NPS purports to have "analyzed the potential impacts to the scenic character" in the its review process under Section 106 process of the National Historic Preservation Act ("NHPA"), "compliance with the NHPA "does not relieve a federal agency of the duty of complying with the impact statement requirement [under NEPA] 'to the fullest extent possible.'" *Lemon v. McHugh*, 668 F. Supp. 2d 133, 144 (D.D.C. 2009) (quoting *Preservation Coal., Inc. v. Pierce*, 667 F.2d 851, 859 (9th Cir. 1982)). Thus, NPS's Section 106 process cannot substitute for its obligation to examine fully the environmental impacts of its decision under NEPA.

intervening explanation about why the agency's prior analysis was erroneous—NPS's new documentation does not find that the mitigation measures will reduce the impacts below the level of significance.

Rather, NPS merely says that invocation of a CE was appropriate because mitigation measures described in the VIA and included in FERC's EIS would "lessen[]" the impacts so that any impacts on the viewshed would be "low *to moderate*." *Id.* (emphasis added). But the record fails to provide any objective parameters by which to assess what even constitutes a purportedly "low to moderate" impact on the previously undisturbed landscape, and accordingly, this boilerplate finding cannot sustain NPS's conclusion that such impacts are not significant under NEPA. *See, e.g.*, *Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 106 (D.D.C. 2006) (rejecting NPS's conclusion that impacts would be insignificant where "[t]here is no basis in the administrative record for accepting NPS's conclusion that even a 'minor' impact is not significant under NEPA, because there are no determinate criteria offered for distinguishing a 'minor' impact from a 'moderate' or 'major' impact other than NPS's conclusory say-so").

Further, NPS's attempt to dismiss the potentially significant impacts is especially arbitrary given this Court's prior holding in *Sierra Club I*, which faulted NPS for failing to discuss "the efficacy of any mitigating steps." 899 F.3d at 293. On remand, NPS did not provide any further discussion of the efficacy of the

proposed mitigation, nor did it address its previous comments on the VIA, in which NPS criticized the same mitigation as inadequate. Instead, NPS repeated its summary assertion that planting shrubs and narrowing the ROW would "*reduce* the visual contrast between the proposed [ROW] and the surrounding landscape" to an unspecified level of significance, which will "ensure that the [ROW] is less apparent and *better* [(to some unspecified extent)] blended into the overall scenic character of the landscape." AR2089–90 (emphasis added). Such a "'perfunctory description' or 'mere listing' of mitigation measures without supporting analysis is insufficient to support" a finding of insignificance. *Ohio Valley Envtl. Coal. v. Hurst*, 604 F. Supp. 2d 860, 889 (S.D.W.V. 2009) (quoting *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 734 (9th Cir. 2001)).

Moreover, NPS's statements completely ignore its previous position that the mitigation measures proposed in the VIA would be ineffective in minimizing the impacts of the Pipeline. Such a reversal without *any* explanation—much less a rational one—constitutes textbook arbitrary and capricious decisionmaking and cannot serve as the basis for invoking a CE. *See Jimenex-Cedillo v. Sessions*, 885 F.3d 292, 298 (4th Cir. 2018) (noting that unexplained inconsistencies in agency policies render the action arbitrary and capricious).

2. The Pipeline May Have Highly Controversial Environmental Effects.

The record also establishes that the Pipeline presents extraordinary circumstances because it may have "highly controversial environmental effects." 43 C.F.R. § 46.215(c). A proposal is highly controversial when there is a "substantial dispute as to the size, nature, or effect of the major Federal action." *Rucker v. Willis*, 484 F.2d 158, 162 (4th Cir. 1973). NPS's own conflicting findings on the VIA establish the existence of such a dispute. NPS itself disputed several conclusions about the extent of the Pipeline's impacts and listed many questions about impacts of the Pipeline that the VIA left unanswered. AR451-58.

In addition, many others, including the Parkway's former Superintendent, have echoed NPS's own concerns. *See, e.g.*, Francis Ltr. (explaining the extraordinary value of the Parkway to both visitors and the local community; the extent to which NPS's authorization of the Pipeline crossing without an EIS would deviate from prior practice; and the significant scenic, cumulative, and other impacts that will ensue from the project). NPS never addressed these concerns. Thus, at minimum, NPS has "failed to meet its burden to provide a 'well-reasoned explanation' demonstrating that these responses . . . do not suffice to create a public controversy based on potential environmental consequences.'" *Bosworth*, 510 F.3d at 1032 (quoting *Nat'l Parks*, 241 F.32d at 736).

3. The Pipeline May Involve Unique Environmental Risks.

A CE is improper here because the Pipeline may entail "highly uncertain and potentially significant environmental effects, and involves unique or unknown environmental risks." 43 C.F.R. § 46.215(d).

Uncertainty about the extent of impacts can serve as "a basis for a finding that there will be a significant impact." *See Fund for Animals v. Norton*, 281 F. Supp. 2d 209, 234 (D.D.C. 2003); *see also Anderson v. Evans*, 371 F.3d 475, 489-93 (9th Cir. 2004) (finding uncertainty existed where the extent of impacts on local whale populations was unaddressed). The record is replete with instances in which NPS ignored possible environmental consequences or brushed away concerns with conclusory statements that the environmental impacts would be small. *See, e.g.*, AR2084 (insisting without evidence or determinative criteria that impacts to the viewshed will be "low" or "moderate"); AR2092 (insisting that the "minimal but not non-existent" risk of pipeline incidents, including potential leaks, that will result in nebulous "impacts" does not render the Pipeline inconsistent with Parkway purposes). As a result, the extent of the impacts of the Pipeline on various environmental resources within the Parkway remains unknown, and the environmental risks unexamined.

Where, as here, the adverse effects of the Pipeline on this unique and protected park are, at minimum, unknown and insufficiently described, and

additional data about these impacts may affect NPS's analysis, an EIS is required. *See National Parks*, 241 F.3d at 731-32 ("Preparation of an EIS is mandated where uncertainty may be resolved by further collection of data, or where the collection of such data may prevent speculation on potential . . . effects."); *cf. Friends of Back Bay*, 681 F.3d at 590 ("[P]olicy goals underlying NEPA are best served if agencies err in favor of preparation of an EIS when ... there is a substantial possibility that the [proposed] activity may have a significant impact on the environment." (citation and quotation omitted)). NPS's own evaluation of the VIA demands, at the very least, preparation of an EA.

4. The Pipeline May Establish A Damaging Precedent.

The ACP may "[e]stablish a precedent for future action, and represents a decision in principle about future actions with potentially significant environmental effects." 43 C.F.R. § 46.215(e). As explained by the Parkway's former Superintendent, NPS's approval of the Pipeline, and its process for doing so, deviates enormously from prior policy and practice—which has endeavored, along with neighboring communities, to safeguard the values and viewshed of the area to the greatest extent possible—and thus establishes a dangerous new precedent for other highly damaging activities. *See* Francis Ltr. at 2-3. Likewise, NPS failed to consider how the establishment of one pipeline and the degradation of the viewshed will inevitably impact NPS's evaluation of future proposals. *See*

Anderson, 371 F.3d at 493 (holding that the agency had to prepare an EIS where the agency had not considered the possibility that its decision, although limited in both scope and duration, might affect future agency deliberations).

In sum, NPS also cannot rely on the CE because the Pipeline "may meet" multiple "extraordinary circumstances" at 43 C.F.R. § 46.215. NPS was obligated "at the very least [to] explain why the action does not fall within one of the exceptions," *Norton*, 311 F.3d at 1117, but as discussed above, failed to provide any such rational explanation.

C. By Invoking a CE for the ACP, NPS Violated NEPA's Hard Look Requirement.

Given the preceding discussion, by issuing a CE for this highly controversial project, NPS also failed to satisfy NEPA's overarching "hard look" requirement. NEPA imposes an obligation on agencies to take a "hard look" at the environmental impacts of its actions, which must "encompass[] a thorough investigation into the environmental impacts of an agency's action and a candid acknowledgment of the risks that those impacts entail." *Nat'l Audubon Soc'y v. Dep't of the Navy*, 422 F.3d 174, 185 (4th Cir. 2005). "Mere conclusions, unsupported by evidence or analysis, that the proposed action will not have a significant effect on the environment will not suffice to comply with NEPA." *Friends of Congaree Swamp v. Fed. Highway Admin.*, 786 F. Supp. 2d 1054, 1062-63 (D.S.C. 2011). Applying those standards here, by forgoing preparation of an

EIS—or even an EA—for a major pipeline project on park land, NPS failed to take the requisite "hard look."

In particular, by forgoing an EIS or even an EA, NPS failed to "obtain[] opinions from experts outside the agency, give[] careful scientific scrutiny, and respond[] to all legitimate concerns that are raised." *Hughes River Watershed Conservancy v. Johnson*, 165 F.3d 283, 288 (4th Cir. 1999) (citing *Marsh v. Ore. Nat. Res. Council*, 490 U.S. 360, 377 (1989)) (defining "hard look" for the purposes of NEPA review). To the contrary, as stated above, the record shows that for many park resources, NPS performed no evaluation to determine the extent of any foreseeable environmental impacts, and instead, ignored possible significant environmental impacts, or explained in conclusory form that they were not of concern. For example, NPS insisted that planting shrubs would "reduce the visual contrast between the proposed [ROW] and the surrounding landscape," AR2089, yet provided no evidence or objective measures by which to assess the extent of the remaining impacts on the Parkway's viewsheds or other values.

Likewise, although NPS *admitted* that the risks of a natural gas spill are "not nonexistent under either construction method," AR2092, the agency never evaluated the reasonably foreseeable, non-speculative environmental impacts that would result from such a spill. Rather, the scope of its discussion about the risks of a spill was limited to whether such risks render the Pipeline inconsistent with

Parkway purposes, AR2090-92, which does not satisfy NEPA's mandate to take a "hard look" at the project's environmental effects. *See Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 443 (4th Cir. 1999). Courts routinely reject agency invocations of CEs based on similarly conclusory statements. *See, e.g.*, *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 21 (D.D.C. 2009) (invalidating the agency's invocation of a CE in part because "ignoring possible environmental impacts, or explaining in conclusory form that they are not of concern, is insufficient under NEPA"); *Bosworth*, 510 F.3d at 1028-29 (rejecting agency's invocation of CE because the record contained "only conclusory statements that there would be no significant impact").

NPS's belated reliance on a study that the agency initially deemed seriously flawed—without any explanation of its reversal of position—is the quintessential failure to take a "hard look." *See Nat'l Audubon Soc'y*, 422 F.3d at 188 (finding agency failed to take requisite "hard look" where agency acknowledged that studies provided no adequate assessment of potential environmental harm). By the same token, because FERC's EIS *admits* that the VIA "has not been finalized" and is being revised "in response to comments" from NPS, FERC EIS at 5-27, NPS's attempts to cure the serious deficiencies in its own NEPA process by relying on FERC's EIS must also fail, *cf. Nat'l Audubon Soc'y*, 422 F.3d at 186 (noting that agencies cannot "paper over one inadequate mode of analysis by referencing

another with shortcomings of its own"). NEPA "emphasizes the importance of coherent and comprehensive up-front environmental analysis to ensure informed decisionmaking to the end that 'the agency will not act on incomplete information, only to regret its decision after it is too late to correct.'" *Blue Mountains Biodiversity Proj. v. Blackwood*, 161 F.3d 1208, 1216 (9th Cir. 1998) (quoting *Marsh*, 490 U.S. at 371). Thus, where FERC's EIS itself is admittedly inconclusive, NPS, which declined to be a cooperating agency in the EIS's preparation, *see* ECF No. 28 at 22, cannot now rely on its analysis and still fulfill the agency's duty to take a "hard look" at the environmental consequences of its actions. *See Nat'l Audubon Soc'y,* 422 F.3d at 190-91 (finding that the agency failed to take a "hard look" where the record showed that the studies that the agency relied on were not conclusive but were merely preliminary analyses).

Circuit precedent also dictates that "NEPA's 'national policy . . . to promote efforts which will prevent or eliminate damage to the environment,' is surely implicated when the environment that may be damaged is one that Congress has specially designated for federal protection." *Nat'l Audubon Soc'y,* 422 F.3d at 186-87. NPS's "'hard look' in this case must therefore take particular care to evaluate how its actions will affect the unique . . . features of this congressionally protected area." *Id.* at 187. Its failure to do so was arbitrary and capricious. *See Hughes*

River, 81 F.3d at 445 (finding agency's failure to take a "hard look" at impacts when deciding whether to prepare an EIS was arbitrary and capricious).

II. THE ROW FOR THE PIPELINE VIOLATES THE NPS ORGANIC ACT.

The NPS Organic Act states that the "fundamental purpose" of the national park system is to "conserve the scenery and the natural and historic objects and the wild life therein." 54 U.S.C. § 100101(b). Although the Organic Act grants NPS some discretion to allow impacts to park values and resources, NPS's own interpretation of its authority dictates that it may do so only "when necessary and appropriate to fulfill the purposes of the park," and even then, only "so long as the impact does not constitute impairment of the affected resources and values." NPS Management Policies § 1.4.3; *see also Greater Yellowstone Coal. v. Kempthorne*, 577 F. Supp. 2d 183, 190 fn.1 (D.D.C. 2008) (noting that NPS recognizes that § 1.4 is the agency's "official interpretation" of the Organic Act and is therefore enforceable against NPS). As a result, NPS must exercise its discretion so that it is "calculated to protect park resources" and genuinely seeks to minimize adverse impacts on park resources and values. *See Greater Yellowstone Coal.*, 577 F. Supp. 2d at 193 (citing *Daingerfield Island Protective Soc'y v. Babbitt*, 40 F.3d 442, 446 (D.C. Cir. 1995); NPS Policies, § 1.4.3). When those standards are applied here, NPS's Consistency Determination issued on remand remains seriously flawed and

cannot support a finding that the Pipeline is not inconsistent with park purposes, as articulated in the Organic Act and the Parkway's GMP.[8]

As for visual impacts, NPS's reliance on the VIA to support its Consistency Determination fails for the same reasons as described in the NEPA discussion. NPS cannot rely on an incomplete assessment to support a finding that its decision does not conflict with park purposes. NPS also brushed aside its concerns with the VIA and the efficacy of the proposed mitigation measures with no meaningful explanation for its change in course. Such an unexplained departure from a previous position is quintessentially arbitrary. *Greater Yellowstone Coal.*, 577 F. Supp. 2d at 188–89. Indeed, NPS's obligation to provide a "reasoned analysis for the change" is "all the more pronounced where the agency's reversal is at odds with a clear statutory mandate governing the agency's actions." *Id.*

[8] The Parkway GMP represents the agency's "official interpretation" of the Parkway's purposes, as established by the Organic Act, the Parkway's enabling legislation, and NPS policies. *See* AR2143; *see also* AR2079 (assessing the consistency of the Pipeline with Parkway purposes as "developed . . . and explained" in the GMP); *Sierra Club I*, 899 F.3d at 292-93 (accepting the GMP's articulation of Parkway purposes as authoritative and binding on NPS). Under Circuit precedent, "the interpretation of a statute by the agency charged with its enforcement ordinarily commands considerable deference." *Monahan v. Cty. of Chesterfield, Va.*, 95 F.3d 1263, 1272 fn.10 (4th Cir. 1996) (citations omitted). Moreover, the GMP, issued under the authority of the Organic Act, "constitute[s] a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Id.* (citations omitted).

Moreover, once again, NPS failed to provide any evidence or objective criteria to support its bare assertions that planting shrubs or reducing the width of the ROW will "reduce the visual contrast" between the Pipeline and the landscape, or "minimize[]" the appearance of the "cut in the landscape." AR2089-90. As a result, NPS's decision is once again devoid of objective measures to determine the "*efficacy* of [] mitigating steps." *Sierra Club I*, 899 F.3d at 293 (emphasis added). Thus, it is impossible for NPS to conclude that the Pipeline is consistent with the Park's express purposes to "conserve the scenery" and "provide opportunities for high-quality scenic and recreational experiences." AR2143. Relatedly, NPS's use of the "wholly uninformative" descriptors "low" and "moderate" to describe impacts—offered with no determinate criteria—"cannot suffice to support an agency's decision because it provides no objective standard for determining what kind of differential makes one impact more or less significant than another." *Mainella*, 459 F. Supp. 2d at 101.

NPS's insistence that the Pipeline is consistent with park purposes despite the conceded possibility of a significant pipeline incident also lacks merit. NPS asserts that the "risks do not rise to the level of being inconsistent with the Park's purposes because the risks are minimal." AR2092. Yet NPS fails to account for the high consequences if such an incident were to occur. Indeed, the impacts may be so devastating that permitting an activity that could result in such damage to this

protected area would violate the agency's conservation mandate, *see* 54 U.S.C. § 100101(b) (requiring NPS to "leave [the National Parks] unimpaired for future generations"), and be inconsistent with the Parkway's purposes to "preserve the natural and cultural resources of the parkway's designed and natural areas," and "provide for public enjoyment and understanding of the natural resources" in the Parkway. AR2143.

Likewise, NPS limited its analysis to so-called "significant incidents,"[9] but did not evaluate or explain how incidents that may not rise to the level of "significant" as defined by the Pipeline and Hazardous Materials Safety Administration ("PHMSA"), but still impair park resources, are permissible under NPS's conservation mandate. In fact, NPS does not describe the potential impacts to park resources that could result from even a significant incident. NPS cannot support its determination that a proposed activity is consistent with NPS's conservation mandate with "conclusory declarations that certain adverse impacts are acceptable, without explaining why those impacts are . . . appropriate to fulfill the purposes of the park." *See Greater Yellowstone Coal.*, 577 F. Supp. 2d at 193.

[9] "Significant incidents" are defined by the PHMSA as events involving a fatality or requiring in-patient hospitalization, $50,000 or more in total costs (in 1984 dollars), highly volatile liquid releases of five barrels or more or other liquid releases of 50 barrels or more, and liquid releases resulting in an unintentional fire or explosion. AR2090–91.

Moreover, NPS's suggestion that because natural gas pipelines "pass near schools and hospitals, and cross under roadways and rivers all across the country," it necessarily follows that placing a gas pipeline under a National Park is not inconsistent with park values, AR2104, is a red herring. Other facilities are not subject to the same statutory conservation mandate as National Park System units. *See* 54 U.S.C. § 100101(b).

NPS's approval of the Pipeline is also inconsistent with the GMP and with NPS's historic practice in protecting the scenic values of the Parkway. As reported in the GMP, "[s]cenery was a major political determinant in the location and design of the Blue Ridge Parkway." AR2314. NPS therefore aims to "conserv[e] the scenic quality of view areas within and beyond the parkway boundary." AR2316. To that end, NPS has devoted significant resources to conserving and protecting this "core value," including by working with the USFS under a 1941 agreement to "coordinate and correlate such recreational development as each may plan, construct, or permit to be constructed, on lands within their respective jurisdictions which, by mutual agreement, should be given special treatment for recreational purposes," and by "work[ing] with the 12 metropolitan planning commissions to manage development so that the Parkway is protected." Francis Ltr. at 3. NPS's truncated review of the Pipeline, which it approved without conducting its own visual impact analysis to assess the effects of the Pipeline on

the very resource the Parkway was established to protect, thus breaks with decades of precedent during which NPS worked with local communities and federal partners to manage development in a way that conserved and protected scenic views.

Former NPS officials can supply "compelling" evidence of just how great a departure NPS's decision and process are from the agency's past practice. *See Greater Yellowstone Coal.*, 577 F. Supp. 2d at 193-94 (citing opposition by former NPS Directors as evidence that activity was inconsistent with park purposes). Here, the Parkway's former Superintendent has explained the great lengths to which NPS has previously gone to ensure that actions taken both in and around the Parkway did not result in the kind of derogation of park values that will result from the Pipeline. Francis Ltr. at 2-3. For example, when in 2009, Progress Energy applied for a ROW permit to construct a transmission line across the Parkway, NPS required the applicant to complete an EA, and a comprehensive visual impacts analysis.[10] *Id.* at 2. Moreover, NPS only determined that the crossing—which even paralleled an existing transmission line—was consistent with park purposes after

[10] The Visual Effects analysis for the project discussed the compensatory mitigation measures that were "not directly related to the proposed line," but that would "ensure the accomplishment of [Progress's] goal to construct the [transmission line] in a manner that will result in no adverse visual effects to the scenic quality" of the Parkway. *See supra* note 6 (Probable Visual Effects Analysis at 30).

the applicant agreed to remove other power line crossings "so that the net impact benefitted the Parkway by reducing the impact to visual resources and the Parkway's natural resources." *Id.* In addition, "the Parkway has routinely worked with adjacent communities and developers to prevent incremental damage to the Parkway views in order to provide for their enjoyment by Parkway visitors," including by "working with a consulting firm [to] develop[] voluntary architectural guidelines that could be used by developers and Parkway neighbors to protect their Parkway while making capital improvements to their respective properties." *Id.* at 2-3.

As with NPS's conclusory discussion of environmental impacts, NPS's Consistency Determination likewise failed to explain *how* the pipeline is consistent with park purposes. This failure is particularly stunning considering this Court's finding in *Sierra Club I* that "the agency decision is not accompanied by any explanation, let alone a satisfactory one," and as such, "NPS has not fulfilled its statutory mandate of ensuring consistency with values and purposes of the Blue Ridge Parkway unit and the overall National Park System." 899 F.3d at 293–94. NPS's hastily issued consistency determination, compiled and signed a little more than a month after this Court's decision, merely reiterates the conclusory statements this Court has already found insufficient, and adds nothing substantive

in support of NPS's decision. Thus, NPS has once again failed to show that the Pipeline will be consistent with the Parkway's purposes.

CONCLUSION

For all these reasons, the Court should vacate and remand the ROW to NPS.

Dated: December 14, 2018

Respectfully submitted,

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