

RECORD NO. 18-1224(L)

CONS. with Nos. 18-1280, 18-1308, 18-1309, 19-1310, 18-1311, 18-1312, 18-1313

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA

Atlantic Coast Pipeline, LLC,

Petitioner,

v.

Federal Energy Regulatory Commission,

Respondent.

On Petition for Review of Orders of the Federal Energy Regulatory Commission

**AMICI CURIAE BRIEF OF THE CITY OF STAUNTON AND
NELSON COUNTY, VIRGINIA, IN SUPPORT OF CONSERVATION
PETITIONERS AND LANDOWNER PETITIONERS**

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), *Amici* City of Staunton and Nelson County, Virginia, certify as follows:

1. Parties and Amici. All parties, intervenors and *amici* appearing before the district court and in this Court are listed in the Joint Opening Brief of Conservation Petitioners and Landowner Petitioners except for *Amici* who submit this brief, *amici curiae*, the Natural Resources Defense Council and others identified in its brief, and *amicus curiae*, the Institute for Policy Integrity at New York University School of Law.

2. Rulings Under Review. References to the rulings at issue appear in the Joint Opening Brief of Conservation Petitioners and Landowner Petitioners.

3. Related Cases. The related cases appear in the Joint Opening Brief of Conservation Petitioners and Landowner Petitioners.

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GLOSSARY OF ABBREVIATIONS

ACP – Atlantic Coast Pipeline, LLC

BZA - Board of Zoning Appeals

CPCN - Certificate of Public Convenience

DEIS - Draft Environmental Impact Statement

DEQ - Department of Environmental Quality

DETI – Dominion Energy Transmission, Inc.

FEIS - Final Environmental Impact Statement

FEMA - Federal Emergency Management Agency

FERC - Federal Energy Regulatory Commission

NEPA - National Environmental Policy Act

VADEQ - Virginia Department of Environmental Quality

BRIEF OF AMICI CURIAE
CITY OF STAUNTON AND NELSON COUNTY, VIRGINIA

Amici City of Staunton and Nelson County, Virginia, support review of the Federal Energy Regulatory Commission (“FERC”) order issuing a Certificate of Public Convenience and Necessity in Atlantic Coast Pipeline, LLC, 161 FERC ¶ 61,042 (Oct. 13, 2017) (the “2017 CPCN Order”/ “Order”) for consideration of the environmental impacts the Pipeline will have on *Amici* consistent with FERC’s responsibility under the National Environmental Policy Act (“NEPA”). Further *Amici* have new information about impacts to their irreplaceable resources, which was not available when FERC issued the Order, that FERC should consider pursuant to its NEPA obligations.

Counsel for all parties to this litigation consent to the filing of this brief as required by Rule 29(a)(2).

I. IDENTITY OF THE AMICI

(1) City of Staunton, Virginia

Amicus City of Staunton (“Staunton”/“City”) is a municipality located in western Virginia in the Shenandoah Valley which is bordered by the Blue Ridge Mountains. The City has the powers vested in a municipal corporation under Virginia law and all powers pertinent to the conduct of the affairs and functions of municipal government consistent with the Constitution and Code of Virginia. Va. Code §§ 15.2-1100, -1102. A 7 member City Council governs the City and is

responsible for the health and safety of its citizens, and protecting its environment and economy. Va. Code §15.2-1102.

(2) Nelson County, Virginia

Amicus Nelson County (“County”) is a political subdivision of the Commonwealth located in central Virginia to the east of the Blue Ridge Mountains. The County is governed by a 5 member Board of Supervisors, which is also responsible for the health and safety of its citizens, and protecting its environment and economy. Va. Code §§ 15.2-403, -1201.

II. STATEMENT OF INTERESTS

The Atlantic Coast Pipeline (the “Pipeline”) is a proposed 604 mile interstate pipeline designed to transport natural gas between West Virginia, Virginia, and North Carolina. Order at ¶1. Installation involves ground and subsurface construction. The construction right-of-way for most of the pipeline is 125 feet. Final Environmental Impact Statement (“FEIS”) at 2-15. The City and the County share an overriding interest--their irreplaceable natural resources are directly threatened by the massive Pipeline. The potential for groundwater contamination from the Pipeline is an immediate threat to the City, its citizens, and its water supply. The stripping of forest land, disruption of viewsheds, and potential for landslides and flooding pose large risks threats to Nelson County. FERC failed to

give required consideration to the potentially catastrophic consequences for the environment, and the region's residents and economic well-being.

(1) City of Staunton, Virginia

The City of Staunton, the county seat of Augusta County, is located in the historic Shenandoah Valley. The Staunton-Waynesboro metropolitan statistical area has a population of $\pm 122,000$. These residents depend upon a reliable water supply. The impacts of the Pipeline on the drinking water supply were not properly considered by the Atlantic Coast Pipeline, LLC,¹ or FERC.

Founded in 1747, Staunton has a population of $\pm 24,000$. It became the first city manager form of government in 1908. Staunton is known for its historically redeveloped downtown, American Shakespeare Center's Blackfriars Playhouse, and Frontier Culture Museum. Staunton's historic character is a nationally recognized hallmark. A picture of downtown Staunton is attached as Addendum A-1.

The geography and geology of City environs are unique. Located between the Blue Ridge and Allegheny Mountains, the City is near the headwaters of multiple rivers, including the Shenandoah River and Middle River, that flow eventually into the Potomac River and the Chesapeake Bay. The area geology is

¹ Atlantic Coast Pipeline, LLC, is a partnership between subsidiaries Dominion Energy, Inc., Duke Energy Corporation, and The Southern Company (collectively "ACP").

karst, and the subsurface is comprised of limestone and other soluble rocks that create a network of underground drainage systems. Underground streams, caves and caverns are common. The groundwater courses underground and emerges at springs and seeps or is pumped to the surface by wells. This extensive underground aquifer “recharges” or supplies wells, both public and private.²

The City has two main sources of water: (1) water impoundments (with dams), which provide about 2.1 million gallons of water per day (“gpd”), and (2) Gardner Spring, which can provide as much as 7 million gpd depending on the season. See Community Services and Infrastructure section, City of Staunton Comprehensive Plan 2010-2030, adopted February 23, 2012, 9 (“Comprehensive Plan”). These water sources are shown on the attached map of the City and its environs. Addendum A-2. Both depend on nature with Gardner Spring being the larger and more vulnerable resource. The map area shown within the yellow line is the recharge area. *Id.* As the map shows in blue, scores of creeks, branches, caves, runs, and hollows, in addition to rivers, feed Gardner Spring. *Id.*

² “The water quality without a spring recharge area ‘can be adversely affected by land uses that allow groundwater contamination to migrate into underlying aquifers.’” See FEIS, Vol. IV at Z-374 (February 21, 2017 Letter of City Mayor Carolyn W. Dull to Julia Wellman, Environmental Impact Review Coordinator, VADEQ (“February 2017 City Letter”)(citing *Emery & Gardner Groundwater, Inc., Hydrogeologic Investigation of Gardner Spring* (July 2002))).

According to the Staunton Department of Public Works Utilities Superintendent, a licensed professional engineer, the recharge area is critical because it enables Gardner Spring, one of the largest springs in the Shenandoah Valley, to provide public water for approximately 25,000 Staunton residents and 10,000 Augusta County residents. Some homeowners also use individual private wells fed indirectly by the recharge area.

Karst geology results in labyrinthine drips and flows into Gardner Spring. This area is geologically fragile. *See generally* February 2017 City Letter. ACP's consultant calls karst a "known geohazard, and any infrastructure development in karst terrain must be carefully planned and managed." GeoConcepts Engineering, Inc., *Fracture Analysis and Dye Trace Report 2* (June 15, 2018 Revision 1) (the "2018 Dye Study"/ the "Study"). Sinkholes, which are "cavities in the ground that form when water erodes an underlying rock layer,"³ allow groundwater to flow into the recharge area and Gardner Spring. Sinkholes also demonstrate the vulnerability of the area.

ACP plans to construct the proposed pipeline (shown in red on Addendum A-2) through the Gardner Spring recharge area. However, ACP refused the City Council's request to meet to discuss the Pipeline. February 2017 City Letter at 3.

³ See NATIONAL GEOGRAPHIC, *Reference: Sinkholes* (available at <https://www.nationalgeographic.com/environment/sinkhole/>)(last viewed April 9, 2019).

This refusal to meet is alarming considering the 2018 Dye Study⁴ revealed the potential for contamination. ACP's consultant GeoConcepts Engineering performed this test after the FERC 2017 CPCN Order. On June 15, 2018 and 8 months after the Order, GeoConcepts Engineering provided the 2018 Dye Study to the Virginia Department of Environmental Quality ("VADEQ"). The Study shows that Gardner Spring tested positive for the dye. Therefore, Gardner Spring is at risk of pipeline contamination.

Despite specific advance request from City Public Works staff, ACP did not report the disturbing results of the 2018 Dye Study to the City. Instead, Staunton learned of the Study results from VADEQ.

Similarly, ACP did not provide the City with a spill emergency response Contingency Plan ("Spill Emergency Plan"). Although, the 2018 Dye Study noted that a Spill Emergency Plan was being prepared, ACP has still not provided the plan to the City for review. Study at 24. This lapse is appalling because the ACP had earlier conceded to City Public Works Utilities staff that accidental spills could impact the groundwater and construction could alter the flow depending upon the depth of the digging.

⁴ A dye simulating a contaminant was injected by GeoConcepts Engineering into the aquifer to see where it might flow.

City officials must review the Spill Emergency Plan to protect the community. Remediating underground contamination is challenging. Unlike an oil or gas spill on a river, a boom cannot be placed in a groundwater aquifer to stop natural gas leakage or other contaminants from construction. Karst geology makes it extremely hard to follow or predict the course of a contaminated flow. Digging for the Pipeline in this terrain can compound the issue by changing the water flow. See February 2017 City Letter. A contamination spill may be irremediable, rendering the Gardner Spring water undrinkable.

Also ACP failed to consult with the City about a sustained water cut off due to contamination or loss of water supply. Importantly, ACP has not consulted with the City regarding who will pay for water to City residents and businesses should their water supply be contaminated. Since acquiring this priceless resource in the 1940s, the City has invested millions of dollars in the associated water plant. The City does not have the resources to replace Gardner Spring as its largest water supply, and City Public Works staff indicate that no replacement is readily available. ACP has proposed no alternative route, which avoids Gardner Spring and its recharge area.

The City Council has voiced longstanding concerns about the pipeline. See Staunton Resolution (Oct. 23, 2014) at FEIS, Vol. IV at Z-376–Z-377. Prophetically, the City’s 2014 resolution stated that the project would “pass in

close proximity to a public water source” and create risks to the environment “including threats to karst environments and water supplies locally in the Shenandoah Valley.” The City Council also provided letters to FERC, dated May 24, 2016 and February 21, 2017, expressing concern about Gardner Spring.

In its strongly-worded February 2017 Letter in response to the draft Environmental Impact Statement (“DEIS”), the City again pleaded for consideration of the Pipeline’s impact on Gardner Spring. The City stated in part:

We submit that both Dominion and the Federal Energy Regulatory Commission, as evidenced in the Draft Environmental Impact Statement (DEIS), have utterly failed to account yet for the potentially catastrophic consequences of the project as to the route of the line that would be unacceptably within the ambit of our water source known as Gardner Spring. *Id.* at Z-372. [Emphasis added.].

It is not obvious to us that anything in the “Construction Impacts and Mitigation” aspects of the DEIS addresses Gardner Spring or, without specific reference by name, even anything similar to this uniquely vital water resource for so many who depend on it daily. *Id.* at Z-373.

That recharge area is vital, because the bulk of the water that feeds Gardner Spring comes from an extensive underground aquifer system and network of karst channels that the DEIS has wholly failed to acknowledge, much less analyze...we believe that it is essential that any meaningful analysis of the environmental impact must be based on a careful, thorough consideration of the recharge area. *Id.* at Z-374. [Emphasis added.].

VADEQ echoed the City’s concern in its recommendations to FERC.⁵

⁵ *Attachment A: Recommendations for the Final Environmental Impact Statement, Plans and Procedures*, Department of Environmental Quality, 6, 17, 23-4, (April 6,

Given these deficiencies and consequential new information, FERC acted prematurely. Granting the Petition for Review is imperative.

(2) Nelson County, Virginia

Across the Blue Ridge, and also to be crossed by the Pipeline, lies Nelson County (“County”). Similar to Staunton, FERC ignored potential Pipeline impacts on the County, including landslides, flooding and other issues.

Rural Nelson County encompasses 474 square miles and has a population of $\pm 15,000$. Hills and mountains dominate the County, and in the valleys, gaps and hollows, streams and floodplains prevail. A picture of the County is attached as Addendum A-3. Some of the County lies within the George Washington National Forest and the Blue Ridge Mountains. Rivers collect rains and snow melts coming off the slopes which are often steep. The local Rockfish River flows into the James River, and then into the Chesapeake Bay.

Wintergreen Resort (“Wintergreen”), a mountain resort open year-round, is the core of the County’s economy. People come to enjoy unparalleled views and recreation at this nationally known area. Wintergreen and attendant businesses provide employment to the County and its residents. The proposed Pipeline has no concomitant benefit to the County.

2017) (<https://www.abralliance.org/wp-content/uploads/2017/04/Virginia-DEQ-comments-on-DEIS-4-6-17.pdf>) (“VADEQ Recommendations”).

The Pipeline will bisect the entire County, crossing approximately 27-29 miles, up, over, and down steep slopes. It will pass through 11 floodplain areas, which have been identified as “sensitive” by the Federal Emergency Management Agency (“FEMA”). A map showing the Pipeline’s proposed route through the County is attached as Addendum A-4. As shown on the map, the Pipeline (in red) passes through mountainous terrain, FEMA floodplains, and waterbodies. It cuts through Rockfish Gap in the north and then heads through mountains and forests to the James River in the south.⁶

The Pipeline’s construction right-of-way requires massive clear cutting and a permanently cleared path. This results in a cleared area roughly the width of a 6-lane highway. Construction will remove forested areas along and near steep slope areas, creating the potential for landslides and land slippage. In short, the pipeline will scar a county which is 80% forested. “Heart-stopping” views will be slashed. The ecology will be disrupted by this forest fragmentation.

The County’s topography has shown a susceptibility to environmental disasters, particularly slope failure and flooding. In 1969, the remnants of Hurricane Camille hit, causing flooding and debris flows. The storm devastated

⁶ The James is Virginia's largest river. Its watershed – the land basin in which water drains into the James – covers about 1/4 of the state. See James River Association, *About the James River* (available at <https://thejamesriver.org/about-the-james-river/>) (last viewed April 10, 2019).

buildings and the flash floods killed approximately 150 people in the County and surrounding areas (1% of the County's population). See Addendum A-4, A-5 (photos showing the devastation of the hurricane). Fed by waters coming off of the mountains and into the Rockfish watershed, the James River also flooded part of the City of Richmond as a result of the storm. This catastrophe still haunts residents and businesses.⁷ A 125 ft. wide band of clear-cutting cleaving the entire County, including steep slopes with attendant digging for the laying of pipe, is a swath with potential for Camille-like flooding.

Given problems with landslides and steep slopes, a proposed pipeline developer must sufficiently examine the County's topography and mitigate any potential risks. ACP did only a cursory review of these issues on the Pipeline route through Nelson County.

An engineering firm evaluated ACP's submissions to FERC through December 1, 2016, "pertaining to soils/soil structure, slope stability and the associated geohazards or erosion/water quality concerns that the Pipeline project could create in Nelson[]." See Blackburn Consulting Services, LLC, *Nelson County Report: Reference: Report Analysis and Field Verification of Soil and*

⁷ For a detailed discussion of Hurricane Camille's impact on Nelson County, see Paige Shoaf and Jerry H. Simpson Jr., *Torn Land* (2d ed. 1971). "Unprecedented Rain: Hurricane Camille's deadly flood in the Blue Ridge Mountains," *Washington Post*, August 19, 2013.

Geologic Concerns with the Atlantic Coast Pipeline (ACP) in Nelson County, VA, 1 (March 23, 2017). Blackburn's report summarized serious concerns in a cover letter: "the potential for debris flows in the very steep mountainous portions of Nelson County are underestimated by the reports submitted to FERC by ACP." *Id.* It further states:

. . .many of the statements made in Dominion's FERC filings represent gross generalities. Dominion has not adequately identified those soils and landforms that are prone to debris flows/landslides, nor have they adequately addressed how they plan to mitigate those site-specific hazards that can put people, property and water quality at extreme risk.

Id. at 2. The Report's recommendations include performing a soil study along the County's steep slopes and identifying potential debris flow areas. *Id.* It concludes:

Without site-specific investigation of the terrain and debris flow potential surrounding the pipeline right-of-way within Nelson County it will be impossible to adequately design stabilization and water management strategies to address erosion and sedimentation controls or protect these landforms from factors that may increase the risk of catastrophic slope failure... We recommend that these additional examinations be performed — and that appropriate, site-specific stabilization plans be developed and made available for stakeholder comment — BEFORE the pipeline is approved by FERC.

Id. at 40 [Emphasis added.].

Notably, the FEIS acknowledges the potential for landslides and groundwater issues due to the Pipeline.

[W]e conclude that constructing the pipelines in steep terrain or high landslide incidence areas could increase landslide potential. Similarly, long-term impacts related to slope instability adjacent to waterbodies

have the potential to adversely impact water quality and stream channel geometry... FEIS, Vol. I at 5-1[Emphasis added.].

While Atlantic and DETI have implemented programs and several mitigation measures to minimize the potential for slope instabilities and landslides, and has sited the pipeline to maximize ridgeline construction, numerous segment of pipeline would be constructed on steep slopes and in areas of high landslide potential. *Id.* at 4-594.

Constructing pipelines and access roads in steep terrain or high landslide incidence areas could increase the potential for landslides to occur. *Id.* at ES-5.

The greatest threat posed to groundwater resources would be during construction through mature karst terrain and from a hazardous material spill or leak into groundwater supplies. *Id.* at 4-99.

Despite the FEIS' express concerns, ACP did not discuss mitigation measures or alternative routes with the County. FERC failed to consider/mitigate the County's specific landslide and flooding potentials or the impact on drinking water from wells. The Order again ignores evident issues.

The County has also consistently voiced opposition to the Pipeline. In a September 9, 2014 resolution, the Board of Supervisors stated:

the construction of the pipeline through the watershed of the Rockfish River would disturb and damage surface water resources at or near every stream crossing;

and the Pipeline would cause harm to property owners, tourism and natural resources.

The Board, as a consulting party to the Section 106 Process, sent comments of concern, dated February 22, 2018, to FERC. The comments stated:

The scar left by the [Pipeline] across the face of our mountains, farms, rivers and streams and historic places would deform a unique and pristine natural environment...

The comments also documented the failure to mitigate the impact on forests.

Nelson County has more high-quality core forests than most counties in VA and boasts perhaps the most intact forested areas in the Piedmont. The Sugarloaf Forest Conservation Area, incorporating the adjacent Shields Gap Forest, is the largest of the unfragmented Piedmont forests identified by the Nature Conservancy, lies almost entirely within Nelson County and would be bisected by the Pipeline... Nelson County forests are scheduled to be totally bisected by a 125' clear cut for a total of 29 miles. Including clearing for new access roads, nearly 440 acres of Nelson County's forests will be destroyed. [Emphasis added.].

The Board called procedural deficiencies in the Section 106 Process to the attention of FERC. However, the County never received a response.

On June 14, 2018, the County sent comments to VADEQ about the Pipeline wetland and/or stream crossings. The comments stated that the Pipeline “proposes to cross more floodplains in Nelson County than any community along its 600-mile route.” See Letter from Nelson County to VADEQ, 2 (June 14, 2018) [“June 2018 Comments”]. As a result of missing/incorrect information: “Dominion, FERC, the Army Corps and the DEQ have failed to do a thorough documentation of *all* waterbody crossings in Nelson County.” *Id.*

On December 3, 2018, the Nelson County Board of Zoning Appeals (“BZA”) denied ACP’s variance request to avoid County floodplain regulations

which are based on federal law.⁸ ACP has sued the County and the BZA in federal court, requesting in part a preliminary and permanent injunction to the County enforcement of its floodplain regulations. That suit is pending.⁹

Given these deficiencies and new information, granting the Petition for Remand is crucial.

III. SOURCE OF AUTHORITY TO FILE

The Court will generally allow an *amicus* brief if it is helpful and presents information that is not found in the parties' briefs. *See Ellsworth Assocs. v. United States*, 917 F. Supp. 841, 846 (D.D.C. 1996) ("The decision whether to allow a non-party to participate as an *amicus curiae* is solely within the broad discretion of the Court. Generally, a court may grant leave to appear as an *amicus* if the information offered is timely and useful") (internal citations and quotation marks omitted); *Northern Mariana Islands v. United States*, 2009 U.S. Dist. LEXIS 125427, *3 (D.D.C. 2009) ("[t]he filing of an *amicus* brief should be permitted if it will assist the judge by presenting ideas, arguments, theories, insights, facts or data that are not to be found in the parties' briefs") (internal citations and quotation marks omitted). Further, "[e]ven when a party is well represented, an *amicus* may

⁸ The County's Floodplain Management Ordinance was adopted in connection with the National Flood Insurance Act and FEMA.

⁹ *Atlantic Coast Pipeline LLC v. Nelson Cnty. Bd. of Supervisors et al.* Case No. 3:18-cv-00115 (W.D.V.A. filed Dec. 6, 2018).

provide important assistance to the court.” *Neonatology Assocs., P.A. v.*

Commissioner of Internal Revenue, 293 F.3d 128, 132 (3rd Cir. 2002). *Amici* have highly relevant and pertinent information that will assist the Court in examining this case.

IV. RULE 29(a)(4)(E) STATEMENT

Amici’s counsel authored this brief in its entirety. No party or party’s counsel has contributed money intended to fund preparing or submitting this brief.

V. SUMMARY OF THE ARGUMENT

Staunton and Nelson County support review and remand of this matter. They share concerns that: 1) NEPA requires recognition of their environmental concerns as local governments; 2) their irreplaceable natural resources are directly threatened by the Pipeline; and 3) new information has been identified since the FERC Order. FERC failed to meet NEPA obligations with respect to these local governments, and its approval of the Pipeline was “striking, and inexplicable.” *Cowpasture River Pres. Ass’n v. Forest Serv.*, 911 F.3d 150, 166 (4th Cir. 2018) (rejecting approval of the Pipeline through the national forest, which runs through Nelson County). For these reasons these localities support Petitioners’ request for this Court to vacate the FERC 2017 CPCN Order to ACP.

VI. ARGUMENT

A. City of Staunton and Nelson County Identified Critical Concerns about the Pipeline's Potential Environmental Impacts On Their Jurisdictions.

City and County concerns about the Pipeline's impact on their environment and community are profound and were not addressed by FERC. Staunton is concerned about potential contamination from huge pipeline construction and leaks into the karst geology thus threatening a major water supply. Nelson County's environmental concerns include potential landslides, flooding and water contamination issues, as well as concomitant economic damage. ACP ignored these localities' concerns, as did FERC. New information since the Order compels further consideration by FERC as the NEPA-gatekeeping entity.

Staunton has repeatedly voiced health and safety concerns regarding the Pipeline. As discussed, the City told FERC about the importance of analyzing the fragile Gardner Spring area, which provides about half of the City's water supply, and serves approximately 35,000 Staunton and Augusta County residents. ACP should have mapped the karst system in the Gardner Spring area to obtain a picture of how water moves through that geology, and analyzed and addressed this potential for contamination of a major water source with the City. The FEIS should have included this information so that FERC could address the threat and mitigate. Water contamination represents a possible adverse environmental effect that must

be identified, evaluated, and mitigated under NEPA. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-52 (1989). FERC entered its Order before the 2018 Dye Study. ACP never brought the post-Order Dye test results to FERC's attention.

Similarly, Nelson County pointed out the Pipeline's possible damage. Due to the devastating effects of Hurricane Camille, the County and its citizens know the dangers of landslides and flooding. On September 9, 2014, the Board of Supervisors by resolution, opposed the Pipeline because of environmental and other concerns. The Board sent a letter to FERC in February 2018 concerning the Pipeline's impacts, and comments to VADEQ in June 2018 about water issues.

The Blackburn Report called out ACP's glaring and alarming deficiencies in assessing the potential impacts in the County. Further VADEQ urged FERC to adopt measures to protect the County. VADEQ Recommendations at 11, 12. Organizations such as Petitioners Friends of Nelson and Friends of Wintergreen, Inc., outlined the Pipeline's potential negative impacts in response to the DEIS. FEIS, Vol. IV at Z484-485; Z1050-Z1130. ACP did not respond to these concerns, and the Order makes only passing reference.

In sum, Staunton and Nelson County identified the Pipeline's impacts on vital environmental matters that went unaddressed by the FERC Order.

B. FERC Must Work with Local Governments Regarding the Pipeline.

Permitting the FERC Order to stand would disregard serious local government concerns about public health and safety and contravene NEPA policy.

By ignoring *Amici*'s environmental concerns, the 2017 CPCN Order violates the federal policy to work with local governments to protect nature. NEPA states:

[I]t is the continuing policy of the Federal Government, in cooperation with State and local governments... to foster and promote the general welfare, 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. [Emphasis added.].

42 U.S.C. § 4331. This policy mandates that federal agencies work with localities to ensure nature is protected. FERC, as the “administrator” of NEPA is required to work with local governments. Yet FERC did not prioritize issues raised by these two localities. It ignored these local governments which are charged with caring for the public health, safety and welfare of their communities. The Order does not comply with NEPA policy.

FERC's 2017 CPCN Order, the FEIS, and ACP did not take into account Staunton's and Nelson County's concerns relating to water supply, adverse environmental impacts, and safety issues associated with the Pipeline.

Disregarding these concerns can lead to disastrous and irremediable impacts on these localities and their citizens. Accordingly, FERC had to consider these

concerns and possible mitigation measures before granting the 2017 CPCN Order. FERC's lack of reference to and/or discussion of these issues show that it failed to do so. Thus, the Order renders NEPA useless.

Allowing this Order to stand would establish a dangerous precedent of expediency inconsistent with the law's environmental tenets. It would allow FERC to contravene NEPA and grant certificates of public convenience and necessity without the statutorily required consideration of local government concerns and impacts. Local governments should not have to assume serious risks or shoulder heavy environmental burdens simply because ACP wants to build a pipeline.

C. Pursuant to NEPA, FERC Is Obligated to Consider the Environmental Impacts on These Localities.

In determining whether to grant a certificate of public convenience and necessity ("CPCN"), FERC is statutorily obligated to consider the environmental impacts of any action concerning a proposed pipeline, whether or not they are expressed by local governments. FERC's consideration was deficient.

Pursuant to statute, an applicant must apply for a CPCN, which will only be approved if FERC determines that the applicant meets the relevant requirements.

15 U.S.C. § 717f. FERC is designated as the lead agency

for the purposes of coordinating all applicable Federal authorizations and for the purposes of complying with the National Environmental Policy Act of 1969 (NEPA).

15 U.S.C. § 717n. The Fourth Circuit summarized:

NEPA requires that agencies consider alternatives to the proposed action and ‘take a hard look at environmental consequences []’. To that end, whenever a federal agency proposes to take a ‘major Federal action [] significantly affecting the quality of the human environment,’ the agency must prepare a detailed [F]EIS describing the likely environmental effects of the proposal, any unavoidable adverse environmental effects, and potential alternatives. Consideration of alternatives ‘is the heart of the [FEIS].’ [Emphasis added.]

See Cowpasture River Pres. Ass'n v. Forest Serv., 911 F.3d at 169-170 (internal citations omitted). *See also American Rivers v. Fed. Energy Regulatory Comm.*, 895 F.3d. 32, 49 (2018) (NEPA requires agencies, like FERC, to take a “hard and honest look at the environmental consequences of their decisions”).

This assessment requires that adverse environmental effects be adequately identified and evaluated, and steps are taken to mitigate adverse environmental consequences. *Robertson*, 490 U.S. at 350-351; *see also Env'tl. Def. v. U.S. Army Corps of Engineers*, 515 F. Supp. 2d 69, 77-78 (D.D.C. 2007).¹⁰ In particular, “[t]he NEPA analysis must take into account all foreseen impacts...[and] [t]he

¹⁰ This Court has further stated: “NEPA requires the agency to (1) identify accurately the relevant environmental concerns, (2) take a hard look at the problem in preparing its Environmental Assessment, (3) make a convincing case for any finding of no significant impact, and (4) show why, if there is an impact of true significance, there are sufficient changes or safeguards in the project to reduce the impact to a minimum, which would obviate the need for an Environmental Impact Statement entirely.” *Am. Rivers & Ala. Rivers Alliance v. FERC*, 895 F.3d 32, 49, (D.C. Cir., 2018). *FERC did not perform these requirements with respect to Amici.*

agency must also consider the unique characteristics of the geographic area.”

Am. Rivers & Ala. Rivers Alliance, 895 F.3d at 50.

This Court has made clear that FERC must consider adverse direct and indirect environmental effects of pipelines. *Sierra Club v. FERC*, 867 F.3d 1357, 1373, (D.C. Cir. Aug. 22, 2017).¹¹ Additionally, FERC has a legal obligation to ensure that the FEIS accurately describes the environmental effects caused by the project.

Broad generalizations and vague references to mitigation measures...do not constitute the detail as to mitigation measures that would be undertaken, and their effectiveness, that the [agency] is required to provide.

Neighbors of Cuddy Mountain v. U.S. Forest Service, 137 F.3d 1372, 1381 (9th Cir. 1998); *see also Okanogan Highlands All. v. Williams*, 236 F.3d 468, 473 (9th Cir. 2000). Succinctly, FERC is the environmental gatekeeper. FERC must properly assess and consider the Pipeline’s environmental impacts on specific localities. With respect to *Amici*, FERC has abrogated its obligations.

¹¹ “FERC will balance ‘the public benefits against the adverse effects of the project’...including adverse environmental affects...Because FERC could deny a pipeline certificate on the ground that the pipeline would be too harmful to the environment, the agency is a ‘legally relevant cause’ of the direct and indirect environmental effects of pipelines it approves.” (internal citations omitted).

D. This Court Should Remand the 2017 CPCN Order Because It Did Not Properly Consider the Environmental Impacts on the Affected Localities in Contravention of NEPA.

In contravention of federal law, FERC did not properly assess the Pipeline's specific environmental impacts on *Amici* as affected localities. The FEIS and 2017 CPCN Order are deficient. Also new environmental information has come to light since the 2017 CPCN Order, which ACP should have provided and FERC considered prior to issuing it.

1. The FEIS and 2017 CPCN Order Failed to Consider and Mitigate *Amici's* Concerns.

Threat of contamination to a City's water supply and the potential of landslides in a County are material issues. Yet FERC ignored both the City's and the County's concerns.

FERC did not properly consider Staunton's concerns about contamination of its drinking water supply. The FEIS from July 2017 does not address concerns about Gardner Spring. Instead the FEIS makes only passing reference to this major water supply and fails to articulate mitigation measures acceptable to the City.¹² Thus the 2017 CPCN Order, based on the FEIS, failed to properly consider and mitigate the Pipeline's impacts on Staunton resources.

¹² "Gardner Spring only appears to be listed once in the FEIS in Volume I: "The AP-1 mainline would also cross the western boundary of Zone 2 of the Gardner Spring Well/Spring." FEIS at 4-79.

Subsequently, the 2018 Dye Study confirmed the City's fears that the Order did not address. Yet, astoundingly, ACP did not approach Staunton about the troubling results. ACP has not shown that it can mitigate a contamination threat. It has not provided the City a Spill Emergency Plan. It has not explained how the City can remove a contaminant from its water supply. Thus, a simple statement that ACP will mitigate is hard to trust and insufficient.

How can the City adequately plan for an emergency? Who will pay for the response? Will the City even be notified of contamination? During a contamination period, replacement water must be provided to those residents and businesses who depend upon it. Like its failure to tell FERC about the belated 2018 Dye Study results, ACP conveniently ignores the question of who will ensure the City's water supply. Effectively, ACP places the entirety of a potential disaster burden on the City. The City has neither the expertise nor resources to singlehandedly prevent a major pipeline leakage/contamination. ACP's omissions demonstrate that it has not acknowledged the risk to City water-users, or properly planned precautionary actions to eliminate those risks. This Court should make ACP take Staunton's concerns seriously and require FERC to examine the risks before the City water supply is contaminated.

FERC's consideration of Nelson County's concern about potential environmental disasters that threaten public health and safety of its residents and

economy was also dismissive. As discussed, the County complained that, as a consulting party to the Section 106 Process, it was aware of many procedural deficiencies. Many issues were raised, including potential landslides or debris flows due to the massive clearing for and construction of the Pipeline which will cut through the County, including Wintergreen and the Blue Ridge mountain area.

ACP did not consult with the County about the proposed route. It never approached the County to discuss flood mitigation measures, or alternative routes that would lessen potential impacts. ACP's lawsuit against the County in order to avoid ordinance protections of floodplains shows that the ACP intends to construct the Pipeline without regard to County authority, and more importantly, these environmental protections.

The FEIS recognizes an increased probability of potential landslides. FEIS, Vol. I at 5-1. It states that Nelson County contains "areas with a high incidence of and high susceptibility to landslides." *Id.* at 4-27. Additionally, it recognizes "final measures related to slope hazards have not yet been completed..." *Id.* at 4-30.

The Blackburn Report is not mentioned in the FEIS or 2017 Order. Despite the clear danger of landslides and the incomplete information in the FEIS, FERC granted the 2017 CPCN Order. The Order superficially discusses potential landslide risks, essentially ignoring the FEIS comments in this regard. It naively

states mitigation measures would be implemented for “susceptible slopes or hillsides.” Order at ¶¶ 203-204. Hence the FEIS fails to fulfill its essential purpose.

FERC could not make an informed decision on the Pipeline alignment through the County based on ACP’s submission which omitted or used incorrect information. With no information about final measures, FERC granted the CPCN, placing faith in brazen/haphazard ACP to sort out the landslide issues and mitigation measures prior to construction.

Nelson County has neither the staff nor financial resources to conduct its own mitigation study. The County cannot bear the public safety and financial burden to prevent risks associated with a reckless and cavalier attitude towards the Pipeline location.

Consequently, the 2017 CPCN Order represents FERC’s complete failure to properly consider and mitigate the impacts upon the City and County.

2. New Pertinent Information Needs to Be Considered by FERC.

The City of Staunton and Nelson County discovered new information relating to environmental impacts that FERC should consider pursuant to its NEPA obligations. These documents/information were not available at the time FERC issued the Order. This new information includes:

- The 2018 Dye Study contains crucial information relating to potential contamination of Gardner Spring, a major water supply in Staunton.

- Nelson County's June 2018 Comments, including its concern that ACP, FERC, the Army Corps of Engineers, and VADEQ failed

"to do a thorough documentation of *all* waterbody crossings in Nelson County. Nelson County residents have documented numerous waterbodies and wetlands and impacts that are not included in Table B-1 and therefore unanalyzed and others that are included but contain incorrect information." June 2018 Comments at 2. [Emphasis added.].
- ACP/ACP's suit against Nelson County to avoid compliance with County floodplain regulations which are based on federal law.

FERC should have reckoned these issues prior to granting its 2017 CPCN Order.

They represent clear and prescient environmental impacts that FERC must address.¹³

VII. CONCLUSION

FERC failed to give required consideration to these local governments' concerns about potentially catastrophic consequences to the environment, residents and their economic well-being. Broad brush analysis of critical topographical features, understating the risk, and proceeding despite serious issues mark the ACP's analyses of and response to both the Gardner Spring water recharge issue in the Staunton area and the steep slopes and floodplains concerns in Nelson County.

¹³ The failure to properly consider the Pipeline's environmental impacts in violation of NEPA appears to be a common issue. The Fourth Circuit recently ruled the Forest Service had violated NEPA by "failing to take a hard look at the environmental consequences of the [Pipeline] Project." *See Forest Serv.*, 911 F.3d at 173-174.

For these reasons, *Amici* support Petitioners' request for this Court to vacate the 2017 CPCN Order to ACP. *Amici* urge this Court to grant the Petition and remand, requiring FERC to consider their environmental concerns and to comply with its statutory duties. *Amici* jurisdictions further pray that the Court will stay Pipeline construction during the review.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. Pursuant to Fed. R. App. P. 32(g)(1), this document complies with the type-volume limit of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B)(i) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and D.C. Cir. R. 32(e)(1), this document contains 6,206 words.

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of April, 2019, I caused copies of the foregoing to be served by electronic means via the Court's CM/ECF system on all counsel registered to receive electronic notices, and by mail to Michael J. Hirrel, Esq., 1300 Army Navy Drive, #1024, Arlington, VA 22202-2020, counsel for Petitioner Fairway Woods Homeowners Condominium Association.

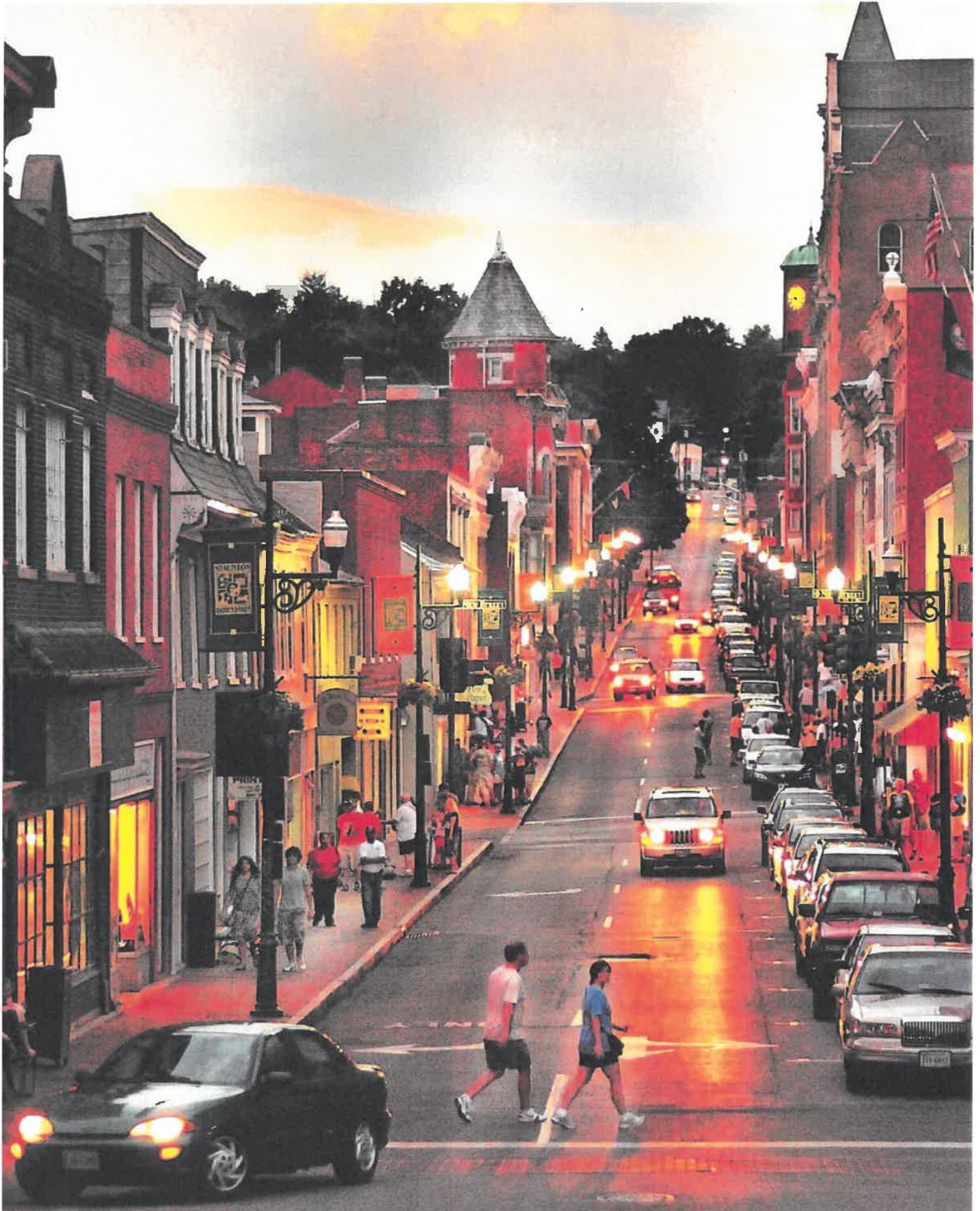
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ADDENDUM

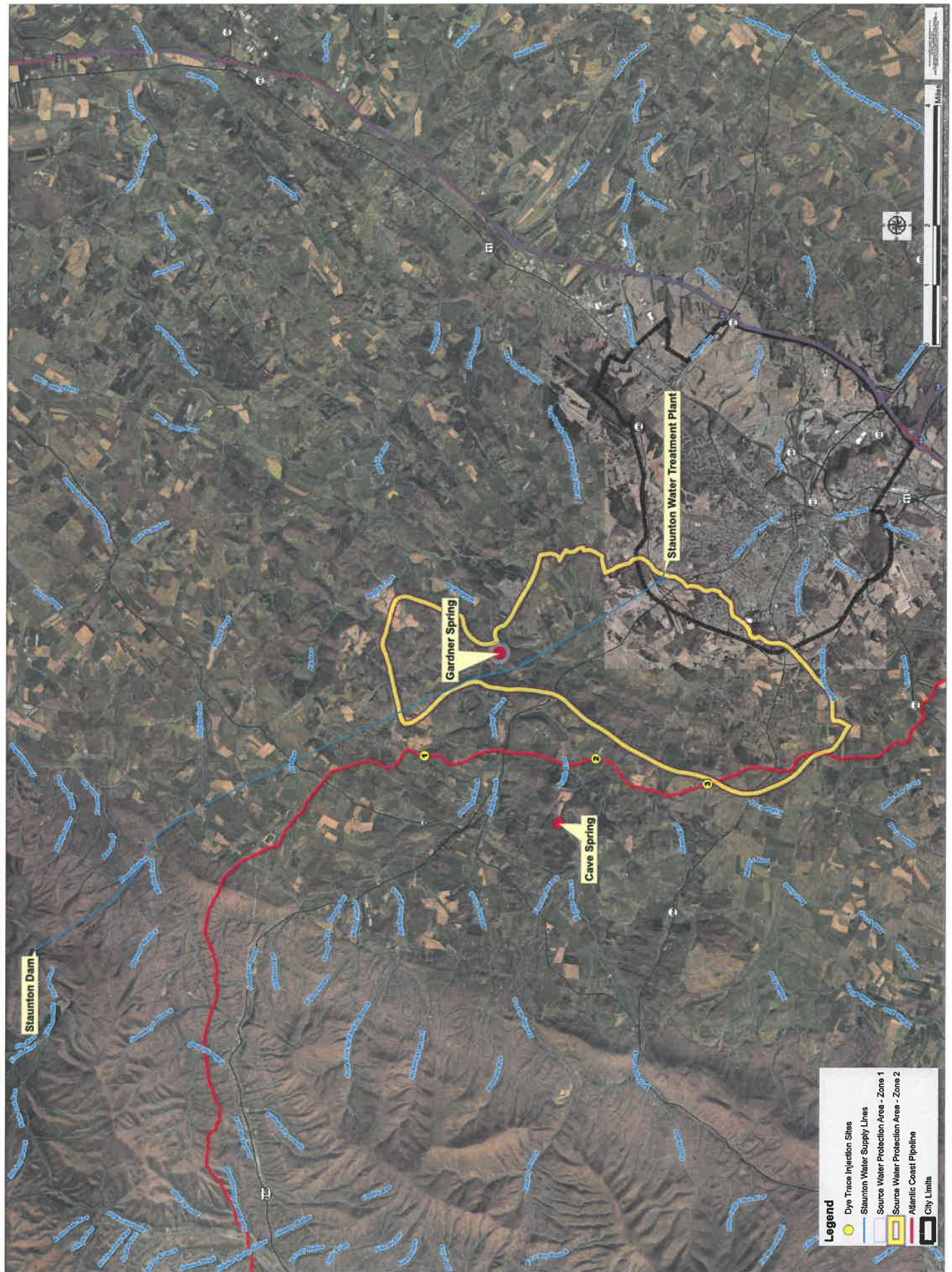
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Downtown
Staunton, Virginia



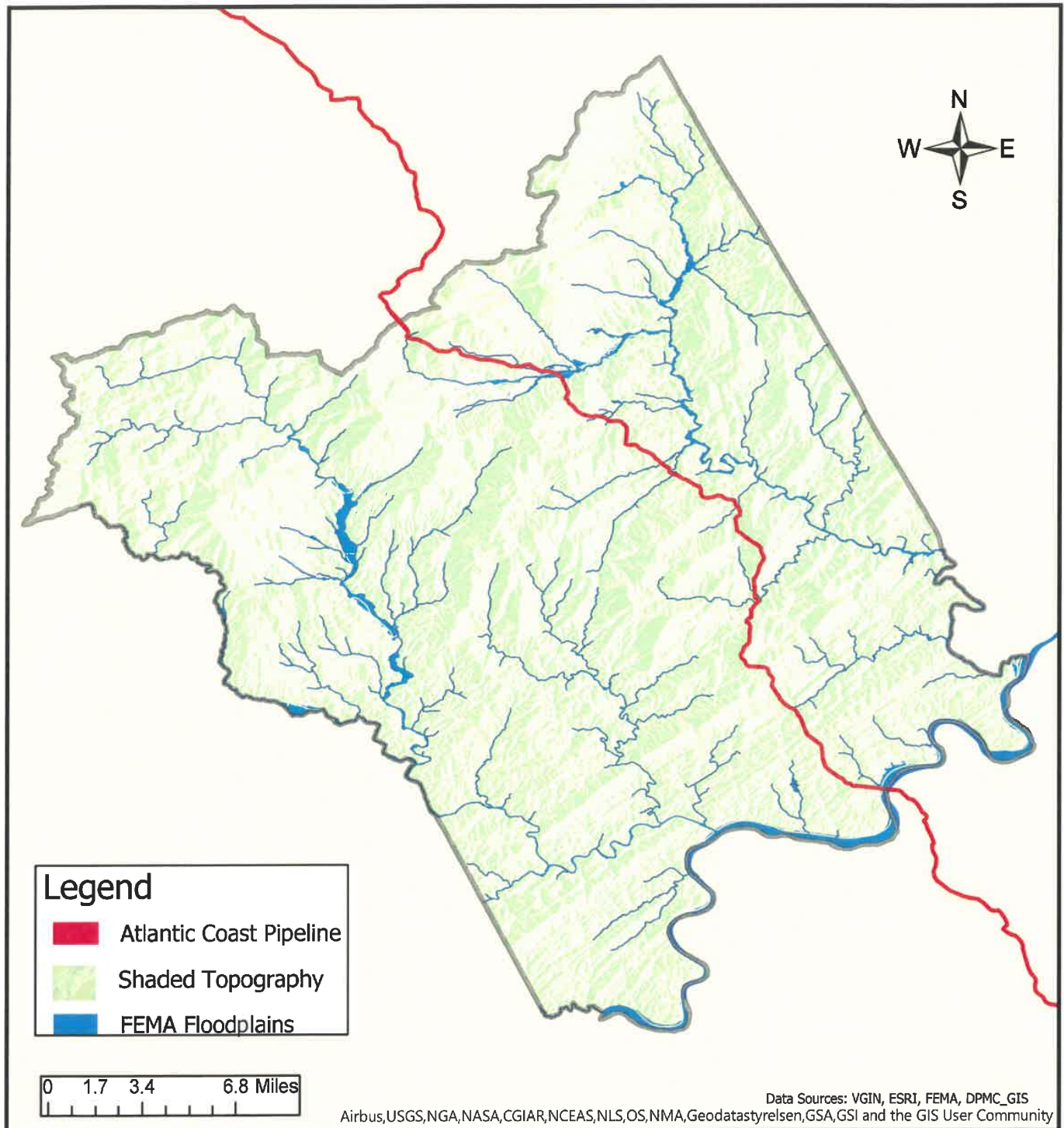
Vicinity of the Atlantic Coast Pipeline to City of Staunton's Water Supply Facilities



**Blue Ridge Mountains
in Nelson County, Virginia**



FEMA Floodplains and Slopes in Nelson County on Atlantic Coast Pipeline Route



Aerial shot of massive mudflows in the mountains of Nelson County, VA, created by Hurricane Camille's remnants. (Dick Whitehead Collection)





Hurricane Camille Devastation