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APPALACHIAN MOUNTAIN ADVOCATES

P.O. Box 507
Lewisburg, WV 24901
ph: 304-645-9006
fax: 304-645-9008
email: info@appalmad.org
www.appalmad.org

October 3, 2018

Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, DC 20426

Re: Court of Appeals for the Fourth Circuit Vacatur of Clean Water Act
Section 404 Permit for the Mountain Valley Pipeline, CP16-10 *et al.*;
Request for Stop Work Order

Dear Secretary Bose:

On behalf of the undersigned organizations, we write to inform you that a condition precedent to the ability of Mountain Valley Pipeline, LLC (“Mountain Valley”) to conduct construction activities under the October 13, 2017 certificate is no longer satisfied, requiring the Commission to take action to stop further construction activities. On October 2, 2018, the U.S. Court of Appeals for the Fourth Circuit issued an order vacating the Huntington District of the U.S. Army Corps of Engineers’ authorization of the Mountain Valley Pipeline (“MVP”) pursuant to Nationwide Permit 12 (“NWP 12”), issued under Clean Water Act Section 404, 33 U.S.C. § 1344.¹ The Court’s Order vacated NWP 12 coverage for the 591 waterbody crossings within the Huntington District on the basis that Mountain Valley cannot comply with all of that permit’s terms and conditions, and indicated that Mountain Valley must apply

¹ See *Sierra Club v. U.S. Army Corps of Eng’rs*, No. 18-1173(L) (4th Cir. October 2, 2018), attached as Exhibit A.

to the Corps for an individual Section 404 permit. The Court's Order also establishes that the Corps' coverage under NWP 12 of the remainder of the project outside the Huntington District is invalid. Because that mandatory federal authorization is now lacking, FERC must not allow pipeline construction to continue, not only in waters of the United States within the Corps' Huntington District but anywhere along the pipeline route. We thus hereby request FERC to issue a stop work order halting all construction activity on the MVP.

The Commission's October 13, 2017 Order Issuing Certificates (161 FERC ¶ 61,043) (hereafter "Certificate Order") requires all federal authorizations to be in place in order for construction to take place. Specifically, Environmental Condition 9 mandates that

Mountain Valley and Equitrans must receive written authorization from the Director of OEP **before commencing construction of any project facilities**. To obtain such authorization, Mountain Valley and Equitrans must file with the Secretary documentation that it has received all applicable authorizations required under federal law (or evidence of waiver thereof).²

FERC's Order specifically recognizes the Clean Water Act Section 404 permit as one of the "authorizations required under federal law."³ On October 20, 2017, Mountain

² Certificate Order, Appendix C p.5 (emphasis added).

³ *Id.*, ¶ 187 ("In addition to the measures we require here, the Army Corps, the Pennsylvania Department of Environmental Protection (PADEP), WVDEP, and Virginia Department of Environmental Quality (VADEQ) have the opportunity to impose conditions to protect water quality pursuant to sections 401 and 404 of the Clean Water Act. The applicants must obtain all necessary federal and state permits and authorizations, including the water quality certifications, prior to receiving Commission authorization to commence construction.").

Valley Pipeline, LLC accepted the terms of FERC's Order, including Environmental Condition 9.⁴

The Court of Appeals' Order vacating the Huntington District's Section 404 NWP 12 authorization means that Mountain Valley no longer possesses all "authorizations required under federal law." Under the plain language of Environmental Condition 9, no further construction may proceed pursuant to the Certificate Order. FERC must therefore issue a stop work order under Environmental Condition 2(b) and the Commission's regulations at 18 C.F.R. §375.308(x)(7) suspending any previously issued notices to proceed which allow construction activity and halting further construction activity anywhere along the pipeline route.

The cessation of construction along the entire length of the pipeline route is required not only because Environmental Condition 9 prohibits construction in the absence of *all* required federal authorizations, but also because the Court's vacatur of the Corps' NWP 12 authorization in the Huntington District establishes that the authorization of the remainder of the project under NWP 12 is invalid. That is because if *any* single crossing is ineligible for coverage under a Section 404 nationwide permit, then *all* of a project's crossings are ineligible.

The Court recognized that principle in its Order. The Court vacated the Corps' NWP 12 authorization on the basis that Mountain Valley could not comply with Special Condition C, which mandates that "[i]ndividual stream crossings must be

⁴ See Letter from Jeremiah J. Ashcroft to Kimberly Bose (October 20, 2017), attached as Exhibit B.

completed in a continuous, progressive manner within 72 hours,” at four different river crossings.⁵ The Court’s Order vacating NWP 12 coverage was not, however, limited to those four river crossings. Rather, the court vacated Mountain Valley’s NWP 12 coverage for *every* waterbody crossing authorized by the Huntington District.⁶ In so doing, the Court cited 33 C.F.R. § 330.6(d) for the proposition that “if any part of a project requires an individual permit, then ‘the NWP does not apply and all portions of the project must be evaluated as part of the individual permit.’”⁷ The inability of Mountain Valley to comply with Special Condition C at those four rivers thus means that *none* of the MVP’s crossings may be authorized by NWP 12 and must all be evaluated as part of the Corps’ individual permit process.

Because only the Huntington District’s verifications were challenged in the Petitions for Review at issue in No. 18-1173(L), the Court’s Order in those petitions

⁵ Order at 2. Special Condition C was incorporated into NWP 12 as a result of West Virginia’s Clean Water Act section 401 Certification of that permit, pursuant to 33 U.S.C. § 1341(d) and 33 C.F.R. § 330.4(c)(2). Corps of Engineers Regulatory Program Reissuance and Issuance of Nationwide Permits with West Virginia Department of Environmental Protection 401 Water Quality Certification (May 17, 2017) at 20, *available at* <https://www.lrh.usace.army.mil/Portals/38/Users/007/87/1287/20170512%20NWP%202017%20LRH%20PN%20WV-WQC-2.pdf?ver=2017-06-01-145846-977>.

⁶ Order at 2 (“Accordingly, we VACATE, in its entirety, the Corps’ verification of the Pipeline’s compliance with NWP 12.”).

⁷ *Id.* See also 56 Fed. Reg. 14598, 14599 (Apr. 10, 1991) (“In cases where the NWP activity cannot function independently or meet its purpose without the total project, the NWPs do not apply and all portions of the project requiring a Department of the Army permit must be evaluated as an individual permit.”); 82 Fed. Reg. 1860, 1888-89 (Jan. 6, 2017) (explaining, in specific reference to NWP 12, that “[i]f one or more crossings of waters of the United States for a proposed utility line do not qualify for authorization by NWP then the utility line would require an individual permit because of 33 CFR 330.6(d)”).

may only apply directly to the crossings within that district. However, the legal conclusion that the Court necessarily reached in vacating coverage for all of the MVP's crossings within the Huntington District applies equally to the NWP 12 verifications in other districts. Nothing in 33 C.F.R. § 330.6(d) nor in any of the Corps' official interpretations thereof distinguishes projects whose NWP verification comes from multiple Corps districts. Rather, because the crossings within the Huntington District were improperly authorized, all of the MVP's crossings in the Pittsburgh and Norfolk Districts are ineligible for coverage under NWP 12. To prevent potentially harmful in-stream work from occurring pursuant to wrongfully issued NWP 12 verifications, and in violation of Environmental Condition 9, FERC must therefore issue a stop work order suspending any previously issued notices to proceed which allow construction activity and halting further construction activity anywhere along the pipeline route until Mountain Valley obtains an individual Clean Water Act Section 404 permit for *all* of the MVP's waterbody crossings.

FERC's stop work order must apply to *all* construction along the MVP route, not just the pipeline's waterbody crossings. As part of the individual permitting process, the Corps must apply its own regulations as well as the U.S. Environmental Protection Agency's Clean Water Act Section 404(b)(1) guidelines.⁸ Application of those regulations may result in selection of a different route that includes less aquatic impact or outright denial of permit coverage. For example, as part of its

⁸ 33 U.S.C. § 1344(b)(1); 33 C.F.R. 320.4. Because Mountain Valley and the Corps wrongfully attempted to proceed under the streamlined NWP 12 process, these regulations have not been specifically applied to the MVP.

determination of whether a project is in the public interest, the Corps must consider “the practicability of using reasonable alternative locations and methods to accomplish the objective of the proposed structure or work”⁹ as well as potential “[p]roject modifications to minimize adverse project impacts,” which modifications include “reductions in scope and size” of the project.¹⁰ Further, the 404(b)(1) Guidelines require the Corps to “[i]dentify appropriate and practicable changes to the project plan to minimize the environmental impact of the discharge”¹¹ and prohibit the issuance of a permit if “there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem.”¹² The alternatives that must be considered include “[d]ischarges of dredged or fill material at other locations in waters of the United States,” including locations “not presently owned by the applicant.”¹³ The Corps must also consider avoiding “sites having unique habitat or other value, including habitat of threatened or endangered species,”¹⁴ of which

⁹ 33 C.F.R. § 320.4(a)(2)(ii).

¹⁰ *Id.*, § 320.4(r)(1)(i).

¹¹ *Id.*, § 230.5(j); *see also id.*, § 230.10(d) (“[N]o discharge of dredged or fill material shall be permitted unless appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem.”).

¹² *Id.*, § 230.10(a).

¹³ *Id.*, § 230.10(a)(1)(ii), (a)(2).

¹⁴ *Id.*, § 230.75(c). *See also id.*, § 230.76 (requiring the Corps to consider avoiding areas of particular value for human use).

there are many along the pipeline route.¹⁵ In sum, the Corps' individual permitting process contains numerous requirements that may result in the agency mandating a different route with less impact to aquatic resources, or denying permit coverage outright due to the pipeline's significant degradation of waters of the United States.

Allowing Mountain Valley to continue construction up to the presently identified stream crossing locations runs the risk that sections of the pipeline that will have been already constructed will need to be moved, adding unnecessary expense and environmental impact. As FERC recognized when issuing a comprehensive stop work order following the Fourth Circuit's vacatur of the U.S. Forest Service and Bureau of Land Management's permits for the MVP, FERC

cannot predict when [the Corps] may act or whether [the agency] will ultimately approve the same route. Should the [Corps] authorize alternative routes, MVP may need to revise substantial portions of the Project route . . . , possibly requiring further authorizations and environmental review. Accordingly, allowing continued construction poses the risk of expending substantial resources and substantially disturbing the environment by constructing facilities that ultimately might have to be relocated or abandoned.¹⁶

FERC should issue a full stop work order not only to avoid unnecessary adverse impacts from construction of facilities that may ultimately have to be removed, but also to avoid improperly influencing the Corps' consideration of alternatives and Mountain Valley's compliance with the 404(b)(1) Guidelines' restrictions as part the

¹⁵ See, e.g., *Sierra Club v. United States Dep't of the Interior*, 899 F.3d 260, 274–76 (4th Cir. 2018) (acknowledging that the MVP would disrupt the habitat of the endangered Roanoke Logperch and Clubshell Mussell).

¹⁶ FERC, Notification of Stop Work Order (Accession No. 20180803-3076) at 1.

agency's individual permitting process. *See Maryland Conservation Council, Inc. v. Gilchrist*, 808 F.2d 1039, 1042 (4th Cir. 1986) (halting a county's construction of a road up to the boundaries of a park, the crossing of which required completion of an environmental impact statement by Secretary of the Interior, because "[t]he decision of the Secretary of the Interior to approve the project ... would inevitably be influenced if the County were allowed to construct major segments of the highway before issuance of a final EIS. The completed segments would 'stand like gun barrels pointing into the heartland of the park ...' *Named Individual Members of the San Antonio Conservation Society v. Texas Highway Department*, 400 U.S. 968, 971, 91 S.Ct. 368, 369, 27 L.Ed.2d 338 (1970) (Black, J., dissenting from denial of certiorari)").

For the foregoing reasons, as a result of the Fourth Circuit's decision, FERC must issue a stop work order halting all on-the-ground construction activities and revoke or suspend all notices to proceed for the Mountain Valley Pipeline, both within waters of the United States and elsewhere, until the Corps has completed its individual Section 404 permit review process. On behalf of Appalachian Voices, Chesapeake Climate Action Network, Indian Creek Watershed Association, Sierra Club, West Virginia Rivers Coalition, and Wild Virginia, we hereby request that FERC immediately issue such an order.

Sincerely,



Benjamin A. Lockett
Derek O. Teaney
Appalachian Mountain Advocates

P.O Box 507
Lewisburg, WV 24901
(304) 645-0125
bluckett@appalmad.org

On behalf of Appalachian Voices, Chesapeake Climate Action Network, Indian Creek Watershed Association, Sierra Club, West Virginia Rivers Coalition, and Wild Virginia

CERTIFICATE OF SERVICE

I hereby certify that I have on October 3, 2018, caused the foregoing document to be served upon each person designated on the official service list compiled by the Secretary in this proceeding.

Sincerely,

A handwritten signature in black ink, appearing to read "Benjamin A. Lockett", written over a horizontal line.

Benjamin A. Lockett
Appalachian Mountain Advocates