



Great Horned Owl © Estate of Roger Tory Peterson. All rights reserved.

APPALACHIAN MOUNTAIN ADVOCATES

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November 27, 2018

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

Re: Supplement to Request for the Issuance of a Stop-Work Order Based on the Court of Appeals for the Fourth Circuit Stay of Clean Water Act Section 404 Permit for the Atlantic Coast Pipeline, CP5-554 *et al.*

Dear Secretary Bose:

On behalf of the undersigned organizations, we write to supplement our November 9, 2018 Request for the Issuance of a Stop-Work Order for the Atlantic Coast Pipeline, CP5-554, based on additional recent developments.

Our November 9, 2018 request was based on the fact that a condition precedent to the ability of Atlantic Coast Pipeline, LLC (“Atlantic”) to conduct construction activities under the October 13, 2017 certificate is no longer satisfied, requiring the Commission to stop further construction activities. Since that request, Atlantic has lost three additional federal authorizations—its Nationwide Permit 12 (“NWP 12”) authorizations issued by the Pittsburgh, Norfolk, and Wilmington Districts of the United States Army Corps of Engineers’ (“the Corps”) pursuant to Clean Water Act Section 404, 33 U.S.C. § 1344.¹ As a result of the suspensions of those three

¹ See Letter from Jon T. Coleman, U.S. Army Corps of Eng’rs, to Leslie Hartz, Atlantic Coast Pipeline, LLC, Re: Notice of Nationwide Permit 12 Verification Suspension

authorizations, Atlantic no longer has the requisite federal approval to construct any stream or wetland crossing along its entire route. Atlantic also lacks NWP 12's authorization for "temporary structures, fills, and work necessary for the remediation of inadvertent returns of drilling fluids to waters of the United States through subsoil fissures or fractures that might occur during horizontal directional drilling [HDD] activities,"² meaning that Atlantic lacks the ability to promptly and legally control the all-too-common inadvertent releases from HDD operations that might be performed in lieu of in-stream crossings. Because those mandatory federal authorizations are now lacking, FERC must not allow pipeline construction to continue, not only in waters of the United States but anywhere along the pipeline route. For that reason, the undersigned respectfully request that the Commission issue a Stop-Work Order to Atlantic as soon as possible. Time is of the essence because we have reason to believe that Atlantic resumed tree-felling activities along the pipeline route when the window for such activity reopened on November 15, 2018.

The Commission's October 13, 2017 Order Issuing Certificates (161 FERC ¶ 61,042) (hereafter "Certificate Order") requires all federal authorizations to be in

(Nov. 20, 2018) (attached as Exhibit A); Letter from William T. Walker, U.S. Army Corps of Eng'rs, to Leslie Hartz, Atlantic Coast Pipeline, LLC, Re: Notice of Nationwide Permit 12 Verification Suspension (Nov. 20, 2018) (attached as Exhibit B); Letter from Scott McLendon, U.S. Army Corps of Eng'rs, to Leslie Hartz, Atlantic Coast Pipeline, LLC, Re: Notice of Nationwide Permit 12 Verification Suspension (Nov. 20, 2018) (attached as Exhibit C).

² Nationwide Permit 12 at 1, *available at* https://www.nao.usace.army.mil/Portals/31/docs/regulatory/NationwidePermits/Nationwide_Permit_12.pdf.

place in order for construction to take place. Specifically, Environmental Condition 10 mandates that

Atlantic and DETI must receive written authorization from the Director of OEP **before commencing construction of any project facilities**. To obtain such authorization, Atlantic and DETI must file with the Secretary documentation that it has received all applicable authorizations required under federal law (or evidence of waiver thereof).³

FERC's Order specifically recognizes the Clean Water Act Section 404 permit as one of the "authorizations required under federal law."⁴ As the Fourth Circuit explained when vacating permits issued for the ACP by the National Park Service and Fish and Wildlife Service, "FERC's authorization for ACP to begin construction is conditioned on the existence of valid authorizations from both FWS and NPS. Absent such authorizations, ACP, should it continue to proceed with construction, would violate FERC's certificate of public convenience and necessity." *Sierra Club v. United States Dep't of the Interior*, 899 F.3d 260, 285 n.11 (4th Cir. 2018)

The Corps' suspension of Atlantic's Section 404 NWP 12 authorizations in the Pittsburgh, Norfolk, and Wilmington Districts means that Atlantic no longer possesses all "authorizations required under federal law." Under the plain language

³ Certificate Order, App. A ¶ 10.

⁴ *Id.*, ¶ 224 ("In addition to the measures we require here, the Army Corps, the Pennsylvania Department of Environmental Protection, West Virginia Department of Environmental Protection, Virginia Department of Environmental Quality, and North Carolina Department of Environmental Quality, have the opportunity to impose conditions to protect water quality pursuant to section 401 and 404 of the Clean Water Act. We expect strict compliance by the applicants with any such conditions.").

of Environmental Condition 10, and the Fourth Circuit's ruling in *Sierra Club*, 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. Moreover, the Commission should not issue any additional Notices to Proceed to Atlantic.

FERC's stop work order must apply to *all* construction along the ACP route, not just the pipeline's waterbody crossings. This result is required because the FERC Certificate is defective for want of ACP's NWP 12 verifications and also because permitting ACP's water crossings through the CWA Section 404 individual permit process (which is ACP's only alternative to a NWP) may result in selection of a different route that includes fewer aquatic impacts or the outright denial of permits for impacted bodies of water. For example, as part of its 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"⁵ as well as potential "[p]roject modifications to minimize adverse project impacts."⁶ Those modifications could include "reductions in scope and size" of the project.⁷ Further, the 404(b)(1) Guidelines require the Corps to "[i]dentify

⁵ 33 C.F.R. § 320.4(a)(2)(ii).

⁶ *Id.*, § 320.4(r)(1)(i).

⁷ *Id.*

appropriate and practicable changes to the project plan to minimize the environmental impact of the discharge”⁸ 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.”⁹ 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.”¹⁰ The Corps must also consider avoiding “sites having unique habitat or other value, including habitat of threatened or endangered species,”¹¹ of which there are many along the pipeline route.¹² 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 Atlantic to continue construction up to the presently identified stream crossing locations runs the risk that sections of the pipeline that have already

⁸ *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.”)

⁹ *Id.*, § 230.10(a).

¹⁰ *Id.*, § 230.10(a)(1)(ii), (a)(2).

¹¹ *Id.*, § 230.75(c). *See also id.*, § 230.76 (requiring the Corps to consider avoiding areas of particular value for human use).

¹² *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 ACP would disrupt the habitat of the endangered Roanoke Logperch, Clubshell Mussel, and the Madison Cave Isopod).

been 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 National Park Service and Fish and Wildlife Service's permits for the ACP, FERC

cannot predict when NPS or FWS may act or whether NPS will ultimately approve the same route. Should the NPS authorize an alternative crossing location, Atlantic may need to revise substantial portions of the ACP 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.¹³

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 Atlantic's compliance with the 404(b)(1) Guidelines' restrictions as part the agency's individual permitting process. *See Md. Conservation Council, Inc. v. Gilchrist*, 808 F.2d 1039, 1042 (4th Cir. 1986) (halting a county's construction of a road 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." (citation omitted)).

For the foregoing reasons, as a result of the Fourth Circuit's decision discussed in our November 9, 2018 request and the Corps' November 20, 2018 suspensions of Atlantic's NWP 12 authorizations in the Pittsburgh, Norfolk, and Wilmington

¹³ FERC, Notification of Stop Work Order, Docket No. CP15-554-000 (Accession No. 20180810-4011) at 1–2.

Districts, FERC must issue a stop work order halting all on-the-ground construction activities and revoke or suspend all notices to proceed for the Atlantic Coast 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, Sierra Club, West Virginia Highlands Conservancy, West Virginia Rivers Coalition, and Wild Virginia, we hereby request that FERC immediately issue such an order or otherwise respond to this request for a Stop Work Order by November 30, 2018.

Sincerely,



Benjamin A. Lockett
Derek O. Teaney
Appalachian Mountain Advocates
P.O Box 507
Lewisburg, WV 24901
(304) 645-0125
blockett@appalmad.org

On behalf of Appalachian Voices, Chesapeake Climate Action Network, Sierra Club, West Virginia Highlands Conservancy, West Virginia Rivers Coalition, and Wild Virginia

CERTIFICATE OF SERVICE

I hereby certify that I have on November 27, 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



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
PITTSBURGH DISTRICT, CORPS OF ENGINEERS
WILLIAM S. MOORHEAD FEDERAL BUILDING
1000 LIBERTY AVENUE
PITTSBURGH, PA 15222-4186

November 20, 2018

Regulatory Division
LRP-2014-731

NOTICE OF NATIONWIDE PERMIT 12 VERIFICATION SUSPENSION

Atlantic Coast Pipeline, LLC
Attn: Ms. Leslie Hartz
707 East Main Street, 19th Floor
Richmond, Virginia 23219

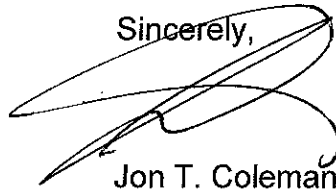
Dear Ms. Hartz:

I am writing you per your request, dated November 15, 2018, regarding the February 2, 2018 Department of the Army permit verification letter (LRP-2014-731) issued to you authorizing under Nationwide Permit (NWP) #12. The project impacts to waters of the U.S. included 187 single complete projects, or crossings of Waters of the U.S. within West Virginia. These impacts facilitate the installation of a 61.3 mile natural gas pipeline in West Virginia known as the Atlantic Coast Pipeline (ACP). On November 7, 2018, the United States Court of Appeals for the Fourth Circuit stayed the Corps' verification of ACP's compliance with the NWP 12 in West Virginia. Because of that order, it is uncertain whether NWP 12 will ultimately be available to authorize work for ACP in West Virginia. Therefore as requested, the Pittsburgh District finds it appropriate to temporarily suspend your authorization and await clarity on this issue.

Exercising our authority under 33 CFR §330.5, we hereby suspend the February 2, 2018, authorization to conduct work under NWP 12. Effective immediately you must stop all activities being done in reliance upon the authorization under the NWP. You may take measures necessary to stabilize any work in progress. This suspension will remain in effect until the authorization is reinstated, modified or revoked.

Within 10 days of receipt of this notice of suspension, you may request a meeting with the Pittsburgh District to present information on this matter. After completion of such meeting or within a reasonable period of time after this notice, if no meeting is requested, the Corps may take action to reinstate, modify or revoke the authorization. If you have any questions and/or concerns about this permit verification suspension, please contact me via telephone at (412) 395-7188 or via email at jon.t.coleman@usace.army.mil.

Sincerely,

A handwritten signature in black ink, appearing to read 'Jon T. Coleman', written over a horizontal line.

Jon T. Coleman
Acting Chief, Regulatory Division

Pittsburgh District

cc:

Mike Hatten (Corps – Huntington District)
Scott McLendon (Corps – Wilmington District)
Peter Kube (Corps – Norfolk District)
Brian Bridgewater (WV DEP)
Kevin Bowman, Federal Energy Regulatory Commission



DEPARTMENT OF THE ARMY
US ARMY CORPS OF ENGINEERS
NORFOLK DISTRICT
FORT NORFOLK
803 FRONT STREET
NORFOLK VA 23510-1011

November 20, 2018

Eastern Virginia Regulatory Section
NAO-2014-1749 / VMRC #2015-1353

NOTICE OF NATIONWIDE PERMIT 12 VERIFICATION SUSPENSION

Atlantic Coast Pipeline, LLC
Attn: Ms. Leslie Hartz
707 East Main Street, 19th Floor
Richmond, Virginia 23219

Dear Ms. Hartz:

I am writing you per your request, dated November 20, 2018, regarding the February 9, 2018 Department of the Army permit verification letter, project number NAO-2014-1749 (VMRC # 2015-1353) issued to you authorizing under Nationwide Permit (NWP) #12. The project impacts to waters of the US included 889 separate stream and wetland crossings within the Commonwealth of Virginia. These impacts facilitate the installation of a 307 mile natural gas pipeline known as the Atlantic Coast Pipeline (ACP). On November 7, 2018, the United States Court of Appeals for the Fourth Circuit stayed the Corps' verification of ACP's compliance with the NWP 12 in West Virginia (order enclosed). Because of that order, it is uncertain whether NWP 12 will ultimately be available to authorize work for ACP in West Virginia. Therefore as requested, the Norfolk District finds it appropriate to suspend your authorization and await clarity on this issue.

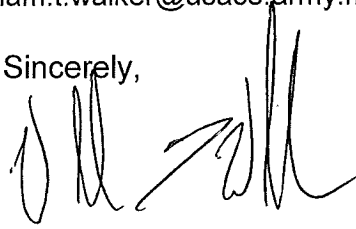
Exercising our authority under 33 CFR §330.5, we hereby suspend the February 9, 2018, authorization to conduct work under NWP 12. Effective immediately you must stop all activities being done in reliance upon the authorization under the NWP. You may take measures necessary to stabilize any work in progress. This suspension will remain in effect until the authorization is reinstated, modified or revoked.

A copy of this letter will be forwarded to Mr. Randy Owen, Virginia Marine Resources Commission, Mr. Steven Hardwick, Department of Environmental Quality, and Mr. Kevin Bowman, Federal Energy Regulatory Commission

Within 10 days of receipt of this notice of suspension, you may request a meeting with the Norfolk District to present information on this matter. After completion of such meeting or within a reasonable period of time after this notice, if no meeting is requested,

the Corps may take action to reinstate, modify or revoke the authorization. If you have any questions and/or concerns about this permit verification suspension, please contact me via telephone at (757) 201-7657 or via email at william.t.walker@usace.army.mil.

Sincerely,

A handwritten signature in black ink, appearing to read 'William T. Walker', with a stylized flourish at the end.

William T. Walker
Chief, Norfolk District
Regulatory Section

Enclosures



DEPARTMENT OF THE ARMY
WILMINGTON DISTRICT, CORPS OF ENGINEERS
69 DARLINGTON AVE
WILMINGTON, NC 28403

REPLY TO
ATTENTION OF:

November 20, 2018

Regulatory Division
SAW-2014-01558

NOTICE OF NATIONWIDE PERMIT 12 VERIFICATION SUSPENSION

Atlantic Coast Pipeline, LLC
Attn: Ms. Leslie Hartz
707 East Main Street, 19th Floor
Richmond, Virginia 23219

Dear Ms. Hartz:

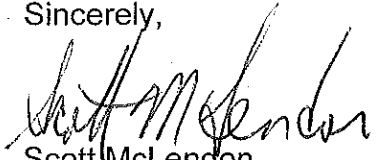
I am writing you per your request, dated November 20, 2018; regarding the February 9, 2018 Department of the Army permit verification letter (SAW-2014-01558) issued to you authorizing under Nationwide Permit (NWP) #12, impacts to waters of the U.S. at 552 single complete projects, or crossings of Waters of the U.S. within North Carolina. These impacts facilitate the installation of a 186 mile natural gas pipeline in North Carolina known as the Atlantic Coast Pipeline (ACP). On November 7, 2018, the United States Court of Appeals for the Fourth Circuit stayed the Corps' verification of ACP's compliance with the NWP 12 in West Virginia. Because of that order, it is uncertain whether NWP 12 will ultimately be available to authorize work for ACP in North Carolina.. Therefore as requested, the Wilmington District finds it appropriate to temporarily suspend your authorization and await clarity on this issue.

Exercising our authority under 33 CFR §330.5, we hereby suspend the February 9, 2018, authorization to conduct work under NWP 12. Effective immediately you must stop all activities being done in reliance upon the authorization under the NWP. You may take measures necessary to stabilize any work in progress. This suspension will remain in effect until the authorization is reinstated, modified or revoked.

Within 10 days of receipt of this notice of suspension, you may request a meeting with the Wilmington District to present information on this matter. After completion of such meeting or within a reasonable period of time after this notice, if no meeting is

requested, the Corps may take action to reinstate, modify or revoke the authorization. If you have any questions and/or concerns about this permit verification suspension, please contact me via telephone at (910) 251-4952 or via email at scott.c.mclendon@usace.army.mil.

Sincerely,



Scott McLendon
Chief, Regulatory Division
Wilmington District

Cc (via e-mail):

Mike Hatten (Corps – Huntington District)
Peter Kube (Corps – Norfolk District)
Brian Bridgewater (WV DEP)
Kevin Bowman, Federal Energy Regulatory Commission
Karen Higgins NC Division of Water Resources