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November 9, 2018

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

Re: 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 inform you 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. On November 7, 2018, the United States Court of Appeals for the Fourth Circuit issued a stay of the Huntington District of the United States Army Corps of Engineers' ("the Corps") authorization of the Atlantic Coast Pipeline ("ACP") pursuant to Nationwide Permit 12 ("NWP 12"), issued under Clean Water Act Section 404, 33 U.S.C. § 1344.[1] The Court's Order stayed the Corps' NWP 12 verification for the 156 waterbody crossings within the Huntington District on the basis that Atlantic cannot comply with all of that permit's terms and conditions. Because that mandatory federal

[1] *See* Order, *Sierra Club v. U.S. Army Corps of Eng'rs*, (4th Cir. Nov. 7, 2018) (No. 18-2273), attached as Exhibit A.

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. For that reason, the undersigned respectfully request that the Commission issue a Stop Work Order to Atlantic as soon as possible, but no later than November 14, 2018. That date is key because the undersigned have reason to believe that Atlantic intends to resume tree-felling activities along the pipeline route when the window for such activity reopens 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 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).[2]

FERC's Order specifically recognizes the Clean Water Act Section 404 permit as one of the "authorizations required under federal law."[3] As the Fourth Circuit explained

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[2] Certificate Order, App. A ¶ 10.

[3] *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.").

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 Court of Appeals' Order staying the Huntington District's Section 404 NWP 12 authorization means that Atlantic no longer possesses all "authorizations required under federal law." Under the plain language 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.

The cessation of construction along the entire length of the pipeline route is required not only because Environmental Condition 10 prohibits construction in the absence of *all* required federal authorizations, but also because the Court's stay 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 Fourth Circuit recognized that principle in its Order vacating a NWP 12 verification in a related case against Mountain Valley Pipeline LLC ("Mountain Valley").[4] The Court in that case vacated the Corps' NWP 12 authorization on the basis that Mountain Valley Pipeline ("MVP") could not comply with Special Condition C of NWP 12 in West Virginia at four crossings. Special Condition C mandates that "[i]ndividual stream crossings must be completed in a continuous, progressive manner within 72 hours."[5] MVP could not comply with this requirement at four different river crossings. Nevertheless, the Court's Order vacating NWP 12 coverage was not 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]

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[4] *Sierra Club v. U.S. Army Corps of Eng'rs*, 905 F.3d 285 (4th Cir. 2018).

[5] *Id*. 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 20 (May 17, 2017), 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] *Sierra Club*, 905 F.3d at 285 ("Accordingly, we VACATE, in its entirety, the Corps' verification of the Pipeline's compliance with NWP 12.").

[7] *Id*.; s*ee 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-

Here, the inability of Atlantic to comply with Special Condition L[8] at its Greenbrier River crossing thus means that *none* of the ACP's crossings may be authorized by NWP 12 and must all be evaluated as part of the Corps' individual permit process.

Only the Huntington District's verifications were challenged in the Petition for Review at issue in No. 18-2273; accordingly, the Court's Order in that case may only apply directly to the crossings within the Huntington District. However, the legal conclusion that the Court necessarily reached in granting the petitioners' motion requesting a stay of the Huntington District's NWP 12 verification in its entirety applies equally to the NWP 12 verifications in other districts. 33 C.F.R. § 330.6(d) compels this result. Because the crossings within the Huntington District were improperly authorized, all of the ACP's crossings in the Pittsburgh, Norfolk, and Wilmington Districts are ineligible for coverage under NWP 12.[9] FERC must

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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)").

[8] West Virginia's Special Condition L to NWP 12 states:

> No structure authorized by this permit shall impede or prevent fish movement upstream or downstream.

In clear violation of Special Condition L, ACP intends to dam the entire span of the Greenbrier River in order to construct the ACP. See Exhibit B, attached, for a more detailed explanation of Special Condition L's application to Atlantic's Greenbrier River crossing plan.

[9] 33 C.F.R. § 330.6(d).

therefore issue a stop work order suspending *all* construction in order to comply with the plain meaning of Environmental Condition 10.

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 verification 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"[10] as well as potential "[p]roject modifications to minimize adverse project impacts." [11] Those modifications could include "reductions in scope and size" of the project.[12] 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"[13] and prohibit the issuance of a permit if

[10] 33 C.F.R. § 320.4(a)(2)(ii)

[11] *Id.*, § 320.4(r)(1)(i).

[12] *Id.*

[13] *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.")

"there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem."[14] 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."[15] The Corps must also consider avoiding "sites having unique habitat or other value, including habitat of threatened or endangered species,"[16] of which there are many along the pipeline route.[17] 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 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 [the Corps] may act or whether [the agency] will

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[14] *Id.*, § 230.10(a).

[15] *Id.*, § 230.10(a)(1)(ii), (a)(2).

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

[17] *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).

> ultimately approve the same route. Should the [Corps] authorize an alternative [route], 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.[18]

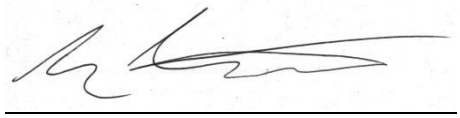
FERC should issue a full stop work order not only to avoid unnecessary adverse impacts from construction of facilities that may ultimately have to be removed, but also to avoid improperly influencing the Corps' consideration of alternatives and Atlantic's compliance with the 404(b)(1) Guidelines' restrictions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

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

that FERC immediately issue such an order or otherwise respond to this request for a Stop Work Order by November 14, 2018.

Sincerely,



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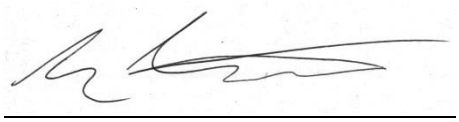
On behalf of Appalachian Voices, Chesapeake Climate Action Network, Sierra Club, West Virginia Rivers Coalition, West Virginia Highlands Conservancy, and Wild Virginia

CERTIFICATE OF SERVICE

I hereby certify that I have on November 9, 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,



Benjamin A. Luckett
Appalachian Mountain Advocates

EXHIBIT A

FILED: November 7, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-2273
(LRH-2014-00484-GBR)

SIERRA CLUB; WEST VIRGINIA RIVERS COALITION; WEST VIRGINIA HIGHLANDS CONSERVANCY; APPALACHIAN VOICES; CHESAPEAKE CLIMATE ACTION NETWORK

Petitioners

v.

UNITED STATES ARMY CORPS OF ENGINEERS; MARK T. ESPER, in his official capacity as Secretary of the U.S. Army; TODD T. SEMONITE, in his official capacity as U.S. Army Chief of Engineers and Commanding General of the U.S. Army Corps of Engineers; JASON A. EVERS, in his official capacity as District Commander of the U.S. Army Corps of Engineers, Huntington District; MICHAEL E. HATTEN, in his official capacity as Chief, Regulatory Branch, U.S. Army Corps of Engineers, Huntington District

Respondents

ATLANTIC COAST PIPELINE LLC

Intervenor

O R D E R

Upon review of submissions relative to petitioners' motion for stay pending review, the court grants the motion.

Entered at the direction of Chief Judge Gregory with the concurrence of Judge Wynn and Judge Thacker.

For the Court

/s/ Patricia S. Connor, Clerk

EXHIBIT B

No. 18-2273

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SIERRA CLUB, et al.
Petitioners

v.

UNITED STATES ARMY CORPS OF ENGINEERS, et al.
Respondents

PETITIONERS' MOTION FOR STAY PENDING REVIEW

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INTRODUCTION

The United States Army Corps of Engineers ("Corps") has once more unlawfully authorized a natural gas pipeline under Nationwide Permit ("NWP") 12 that cannot comply with all the terms and conditions of that permit. Ex. 1. And upon that authorization's issuance, Atlantic Coast Pipeline, LLC ("ACP") provided notice to Petitioners (collectively, "Sierra Club")—in accordance with this Court's August 23, 2018 Order (No. 18-1743, ECF #42)—that ACP intends to resume in-stream construction activities as soon as November 8, 2018. Ex. 2. To prevent the imminent irreparable harm that would result, Sierra Club files this Motion for Stay Pending Review.[1] The Corps and ACP intend to file responses opposing this motion.[2]

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1 On August 23, 2018, this Court denied Sierra Club's stay motion in related petition No. 18-1743 without prejudice because (1) "the record lacks clear evidence that ACP is unable to comply with the 72-hour condition," (2) "the Corps has voluntarily suspended all NWP 12 verifications for ACP in West Virginia," and (3) "ACP has committed 'to provide written notice to Petitioners prior to resuming any work authorized under NWP 12 so that Petitioners may review the Corps' decision and pursue further relief from the Corps or this Court.'" No. 18-1743, ECF #42 at 1 (quoting No. 18-1743, ECF #31 at 6). The record for the Corps' new decision includes clear evidence that ACP is unable to comply with NWP 12's terms and conditions, the new decision ended the Corps' suspension of ACP's verifications, and ACP has provided the advance notice required by the Court.

2 On October 23, 2018, Sierra Club asked the Corps to stay the Reinstatement pending judicial review. Ex. 4. On October 31, 2018, the Corps denied that request. Ex. 22.

One condition of NWP 12 in West Virginia—Special Condition L—prohibits in-stream structures that impede or prevent fish movement upstream or downstream. Ex. 3 at 5. Another condition—Special Condition C—limits stream-crossing durations to 72 hours. *Id.* at 4-5. ACP's revised Greenbrier River crossing plan—approved by the Corps in its October 19, 2018 reinstatement of ACP's NWP 12 verifications (hereinafter, "the Reinstatement")—cannot comply with Special Condition L or Special Condition C. Accordingly, Sierra Club is likely to succeed on the merits.

BACKGROUND

This petition seeks judicial review of the Reinstatement—a verification that ACP's project (the "Pipeline") is authorized under NWP 12. It is related to Petition No. 18-1743, which seeks review of the February 7, 2018 verification (hereinafter, the "Original Verification," attached as Exhibit 5). Motions to consolidate the two petitions are pending.

ACP plans to construct a natural gas pipeline from West Virginia to North Carolina. Ex. 5 at 1. The Pipeline and its access roads will require 156 waterbody crossings in the Corps' Huntington District. Ex. 1 at 2. The Pipeline will cross one major river in the Huntington District: the Greenbrier River—a navigable-in-fact river under Section 10 of the Rivers and Harbors Act. *Id.* at 1.

The Corps permits dredge-and-fill projects under Section 404 of the Clean Water Act ("CWA") in two ways: through individual permits tailored to specific activities, or through NWPs for defined activities similar in nature and causing only "minimal adverse environmental effects." 33 U.S.C. §§1344(a), (e)(1).

In January 2017, the Corps reissued its suite of NWPs. *See generally* 82 Fed. Reg. 1860 (Jan. 6, 2017). One of those permits, NWP 12, authorizes discharges related to utility lines, including natural gas pipelines. *Id*. at 1985.

NWP 12's reissuance in 2017 triggered CWA Section 401, 33 U.S.C. §1341. Section 401 provides that federal authorizations resulting in discharges into protected waters cannot issue without "certification" by the affected state that the discharges will comply with state water quality standards. States can impose special conditions in a certification, which become conditions of the federal permit. *Id.* §1341(d).

The West Virginia Department of Environmental Protection ("WVDEP") certified NWP 12's reissuance under Section 401 on April 13, 2017, subject to conditions to protect water quality. Ex. 26. Among them are Special Conditions C and L:

> C. Individual stream crossings must be completed … within 72 hours ….
>
> *****

L. No structure authorized by this permit shall impede or prevent fish movement upstream or downstream.

Ex. 3 at 4-5. The Corps incorporated those conditions into NWP 12 for West Virginia, as the CWA and Corps regulations require. *Id.*; 33 U.S.C. §1341(d); 33 C.F.R. §330.4(c)(2).

ACP proposes to construct the Pipeline through the Greenbrier River near Clover Lick, West Virginia. Ex. 6 at K-17. That crossing is 177-feet wide at the centerline and will require in-stream blasting. *Id.*

ACP originally planned to cross the Greenbrier with a "cofferdam" method. *Id.* That method would have used steel frames with waterproof fabric constructed halfway across the river to allow ACP to work in one half of the river at a time, leaving the river flowing—and allowing fish to pass—on the other side. Ex. 7 at 15-16. However, that method would have required ACP to weld pipe segments together in the middle of the river, adding time to the construction's duration. *Id*.

On February 7, 2018, the Corps issued the Original Verification. Ex. 5. Sierra Club petitioned this Court for review of that verification and sought a stay pending review. No. 18-1743, ECF #20. Sierra Club argued that the Corps unlawfully approved ACP's Pipeline under NWP 12 because the record would not support the conclusion that ACP could comply with Special Condition C using cofferdams and blasting in the Greenbrier River. *Id*.

On July 27, 2018, the Corps indefinitely suspended the Original Verification while it examined the Greenbrier River crossing's compliance with Special Condition C. Ex. 9. Based in part on that suspension, this Court denied Sierra Club's stay motion without prejudice. No. 18-1743, ECF #42.

During the suspension, ACP revised its Greenbrier River crossing plan—tacitly admitting that the two-phased cofferdam approach and its attendant in-trench welding could not be completed within 72 hours. Ex. 10. ACP now intends to use "a dry-cut dam-and-pump construction method." Ex. 11 at 3. With that method, "pumps and hoses are used … to isolate and transport the stream flow around the construction work area." Ex. 7 at 14-15. Using that method will require ACP to dam the Greenbrier River's entire width using a water-filled bladder and then use pumps to take water from upstream of the dam and discharge it downstream of the in-stream construction site. Ex. 10 at 4, Attach. A. The new method will also require ACP to install a timber-mat bridge with in-stream supports across the width of the Greenbrier and leave that bridge in place for six months. *Id.* at 3, 4. Damming the entire width of the Greenbrier River will enable ACP to reduce the duration of in-stream construction by pre-bending, welding, and weighting the Pipeline segment before placing it in the trench. *Id*.

On October 19, 2018, the Corps issued the Reinstatement, which includes "Special Condition 6" requiring ACP to construct the Greenbrier River crossing

using the method described in ACP's revised crossing plan. Ex. 1 at 6. In issuing the Reinstatement, the Corps expressly determined that the Pipeline "meet[s] the criteria for NWP 12," *id.* at 2, notwithstanding that ACP's revised Greenbrier River crossing plan violates Special Condition L and Special Condition C. On October 26, 2018, Sierra Club filed this petition for review and, on October 31, 2018, filed motions to consolidate this petition with Petition No. 18-1743.

STANDARD OF REVIEW

Four factors govern a stay pending review:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Hilton v. Braunskill, 481 U.S. 770, 776 (1987).

In this petition for review under Section 19(d)(1) of the Natural Gas Act, 15 U.S.C. §717r(d)(1), the Court should apply the Administrative Procedure Act and set aside any agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(A).

ARGUMENT

I. Sierra Club Is Likely To Succeed On The Merits Because The Corps Arbitrarily and Capriciously Determined That the Pipeline Complies With All NWP 12's Terms and Conditions.

A. The Pipeline cannot satisfy Special Condition L.

Sierra Club is likely to succeed on the merits of this petition because agency action that "runs counter to the evidence before the agency" is arbitrary and capricious. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S 29, 43 (1983). The Reinstatement is arbitrary and capricious because:

(1) a condition of NWP 12 in West Virginia prohibits structures that impede or prevent fish movement upstream or downstream (Ex. 3 at 5);

(2) ACP's revised Greenbrier River crossing plan requires it to dam the entire width of the Greenbrier River using a water-filled bladder (Ex. 10 at 4-5, Att. A);

(3) the Corps knew both (a) that the Greenbrier River supports an important fishery in West Virginia (Ex. 11 at 8), and (b) that ACP's water-filled bladder will obstruct the entire River (*id.* at 3); and

(4) the Corps, nonetheless, determined the Pipeline "meet[s] the criteria for NWP 12" (Ex. 1 at 2).

Special Condition L is a condition of NWP 12 itself. 33 U.S.C. §1341(d); 33 C.F.R. §330.4(c)(2). The condition's language is unambiguous: "No structure authorized by this permit shall impede or prevent fish movement upstream or downstream." Ex. 3 at 5. The NWPs plainly and unambiguously define the term "structure" to "include, without limitation … *any* ... *manmade obstacle or obstruction*." Ex. 3 at 38 (emphasis added).

When the Corps included the definition of "structure" in the NWPs in 2007, it explained it derived the definition from its Rivers and Harbors Act regulations at 33 C.F.R. §322.2(b). 72 Fed. Reg. 11092, 11175 (Mar. 12, 2007). When it finalized that regulatory definition of "structure" in 1986, the Corps explained that it intends obstacles and obstructions to be considered "structures" "whether permanent or not." 51 Fed. Reg. 41206, 41208 (Nov. 13, 1986).

Moreover, the text of NWP 12 itself provides that it "authorizes … *structures* … in navigable waters … associated with the construction … of utility lines[, and] also authorizes *temporary structures* … necessary to conduct the utility line activity." Ex. 3 at 1-2 (emphasis added). Thus, the term "structure" as used in NWP 12, unambiguously includes temporary manmade obstacles and obstructions like the water-filled bladder authorized by the Reinstatement, and such structures are among the activities expressly authorized by the terms of NWP 12. It was

against that backdrop that WVDEP used the term "structure" in Special Condition L when it added it to NWP 12 in April 2017.

The Corps denied Sierra Club's request for an administrative stay of the Reinstatement pending judicial review on the basis of a *post-hoc* "clarification" from WVDEP of Special Condition L. Ex. 22 at 1. In that clarification, WVDEP maintained that (1) the term "structure" in Special Condition L does not apply to temporary structures like the bladder dam and (2) that the "structure authorized by [NWP 12]" is the "permanent pipeline, not the temporary bladder." Ex. 23.

WVDEP's *post-hoc* interpretation of Special Condition L, which the Corps found "reasonable" (Ex. 22 at 1), impermissibly conflicts with the unambiguous meaning of "structure" apparent on the face of NWP 12. *See Colautti v. Franklin*, 439 U.S. 379, 392 n.10 (1979) ("As a rule, a definition which declares what a term 'means' excludes any meaning that is not stated."). Because it relies on "an improper interpretation of a decidedly unambiguous regulation," this Court should reject the effort by the Corps and WVDEP to contort the plain language of NWP 12 and Special Condition L to justify the Corps' unlawful action. *Sierra Club v. U.S. Forest Serv.*, 897 F.3d 582, 602-03 (4th Cir. 2018).

WVDEP was not writing on a blank slate when it attached Special Condition L to NWP 12 in April 2017. Rather, it had in front of it the text of NWP 12, which unambiguously defines "structure" to "include, without limitation, …

any … manmade obstacle or obstruction[,]" Ex. 3 at 38, and expressly provides that "[t]his NWP … authorizes temporary structures … necessary to conduct the utility line activity[,]" *id.* at 2. Those provisions leave no doubt that the term "structure" includes *any* manmade obstruction—temporary or otherwise.

Even if there were doubt that the term "structure" lacks an implicit temporal component, such doubt would be eliminated by examining (1) the Corps' stated intent to define "structure" in the NWPs as it has in its regulations under the Rivers and Harbors Act in 33 C.F.R. §322.2(b), 72 Fed. Reg. at 11175, and (2) the Corps explanation that it intends any obstacle or obstruction—"whether permanent or not"—to be a structure under the River and Harbor Act definition, 51 Fed. Reg. at 41208.

In its denial of Sierra Club's request for stay, the Corps did not grapple with its prior unambiguous definitions of "structure," and instead stated, without explanation, that it found WVDEP's analysis reasonable. Ex. 22 at 1. But WVDEP's explanation of its proffered interpretation of "structure" is not reasonable.

WVDEP's position relies on long-repealed regulatory definitions of the terms "permanent structure" and "temporary structure." Ex. 23 at 1; Ex. 24 at (2002 version of W. Va. Code R., Title 47, §5A). Those regulatory definitions were previously part of WVDEP "legislative rules" governing certifications under

CWA Section 401. Ex. 24. But the West Virginia Legislature repealed those definitions at WVDEP's request in 2014, indicating that neither WVDEP nor the Legislature wanted to define the terms "permanent structure" or "temporary structure" in that way any longer. Ex. 25. The regulations were not, as WVDEP claims, in effect in April 2017 when it included Special Condition L in its Section 401 Certification of the 2017 NWP 12. Ex. 26.

It has long been the law in West Virginia that, "when an act of the Legislature is repealed without a saving clause, … it must be considered … as if it had never existed." *Jefferson Cty. Citizens for Econ. Pres. v. Cty. Comm'n of Jefferson Cty.*, 686 S.E.2d 16, 17 (W. Va. 2009) (citing *Curran v. Owens*, 15 W.Va. 208 (1879)). And "legislative rules in West Virginia are authorized by acts of the Legislature and … should be[treated] as statutory enactments." *Appalachian Power Co. v. State Tax Dep't*, 466 S.E.2d 424, 435 (W. Va. 1995). Accordingly, the repealed regulations on which WVDEP relied must be treated as if they had never existed and cannot provide context for the meaning of the term "structure" as WVDEP used it in April 2017 in Special Condition L.

But even if the repealed regulations were to be considered in construing "structure," they would remain of no help to WVDEP or the Corps. The repealed regulations did not define the term "structure;" rather, they differentiated "permanent" structures from "temporary" structures for purposes of calculating

monetary mitigation. W. Va. C.S.R. §§47-5A-2.13, -2.16, -.6.2.d.1 (2002) (repealed). The use of the phrase "[n]o structure" in Special Condition L—unadorned by any temporal modifier—unambiguously indicates a prohibition on *all* types of structures that impede fish movement, regardless of whether temporary or permanent. Had WVDEP intended to prohibit only *permanent* structures that impede fish movement, it easily could have written Special Condition L differently. Indeed, in light of the Corps' long-standing definition of the term "structure" to include any manmade obstruction, temporary or permanent, if WVDEP wanted "structure" to mean something different it was obligated to explicitly say so. *Cf. Yelder v. Horsnby*, 666 F. Supp. 1518, 1520-21 (M.D. Ala. 1987) (explaining the hierarchy of interpretive guideposts "[w]hen … confronted with a state agency's interpretation of a federal regulation" as first, the unambiguous language of the regulation; second, the federal agency's prior interpretations, and last, a construction by a state agency).

The Corps' adoption of WVDEP's position that NWP 12 solely authorizes the pipeline, and not the bladder dam, is equally untenable. A party must obtain a Section 404 permit to discharge fill material into the Greenbrier River. 33 U.S.C. §1344(a). Corps regulations define "fill material" to include "material placed in waters of the United States where the material has the effect of … [c]hanging the bottom elevation of any portion of a water," including "materials used to create

any structure or infrastructure[.]" 33 C.F.R. §323.2(e). Moreover, Corps regulations define the term "discharge of fill material" to include "dams and dikes." *Id.* §323.2(f). Without question, ACP needs a Section 404 permit to dam the Greenbrier River by placing a water-filled bladder on the riverbed; the bladder is fill material that has the effect of raising the bottom elevation of a portion of the Greenbrier River.

NWP 12, through the Reinstatement, purports to be that Section 404 permit. Indeed, NWP 12 expressly provides that "this NWP … *authorizes* temporary structures, fills, and work … necessary to conduct the utility line activity." Ex. 3 at 2. ACP's proposed bladder dam is necessary to install the Pipeline through the Greenbrier River and, hence, would be authorized expressly by NWP 12, if ACP could otherwise satisfy all the terms and conditions of NWP 12. Consequently, the insistence by the Corps and WVDEP that NWP 12 authorizes only the Pipeline and not the bladder dam is inconsistent with the Corps' definition of "fill material" and the unambiguous language of NWP 12.

Not only is the water-filled bladder plainly a "structure," it also impermissibly prevents fish movement upstream and downstream. Its purpose is to prevent all flow in the Greenbrier River to create a dry workspace. Ex. 10 at 4. Without question, the section of the Greenbrier River crossed by the Pipeline is fish habitat. ACP's Greenbrier River crossing plan recognizes that the candy

darter—a fish species proposed for protection under the Endangered Species Act—is assumed present in this stretch of the Greenbrier, Ex. 10 at Attach. A, and the Final Environmental Impact Statement ("FEIS") (on which the Corps was a cooperating agency) confirms the presence of that species in the upper reaches of the Greenbrier. Ex. 6 at 4-216. Movement upstream and downstream by candy darters and other fishes will be prevented by the bladder dam.

Notwithstanding the status of the Greenbrier River as a warm-water fishery and the Reinstatement's requirement in Special Condition 6 that ACP install an impassable dam across the Greenbrier River, the Corps "determined that [ACP's] proposed discharge[s] of dredged and/or fill material … meet the criteria for NWP 12." Ex. 1 at 2. That determination is arbitrary and capricious because it is directly contradicted by the record. *State Farm*, 463 U.S. at 43. Moreover, it is "otherwise not in accordance with law" because the Corps' own regulations at 33 C.F.R. §330.4(a) provide that "[a] prospective permittee must satisfy all terms and conditions of an NWP for a valid authorization to occur." Consequently, Sierra Club is likely to succeed on the merits.

B. The Pipeline cannot satisfy Special Condition C.

The Corps' determination that ACP's Greenbrier River crossing will comply with Special Condition C's 72-hour limitation, Ex. 1 at 2, is arbitrary and capricious because (1) it runs counter the record and (2) lacks a satisfactory

explanation. The bridge that ACP intends to construct across the Greenbrier and leave in place for six months to facilitate its revised crossing method is a necessary part of the crossing plan and, hence, subject to the 72-hour limitation.

Special Condition C unambiguously provides that "stream crossings must be *completed* within 72 hours." Ex. 3 at 4 (emphasis added). The verb "to complete" means "to bring to an end and especially into a perfected state." *Merriam-Webster Online Dictionary*, http://www.merriam-webster.com/dictionary/complete. "Complete" encompasses "everything necessary for completed work." *Harvey v. United States*, 105 U.S. 671, 688 (1881); *see also Swanson v. S. Or. Credit Serv., Inc.*, 869 F.2d 1222, 1228 (9th Cir. 1988) ("The word 'complete' means 'possessing all necessary … elements; not lacking in anything necessary.'" (quoting Webster's Third New Int'l Dictionary 465 (1971))). The bridge is necessary to construct ACP's Greenbrier River crossing. And to bring the Greenbrier River crossing into a perfected state, ACP must remove all materials it takes into the river to install the Pipeline. Construction of the Greenbrier River crossing begins with the installation of the bridge and ends with its removal.

Without the bridge, ACP cannot implement its revised crossing plan. ACP expressly states that it will use the bridge to put the water-filled bladder in place. Ex. 10 at 4. Moreover, the bridge makes it possible for ACP to "walk" a nearly 200-foot long, pre-welded and pre-weighted segment of 42-inch diameter pipe

across the Greenbrier River and lower it into the trench. *Id.* at 4-5. Importantly, the bridge was not part of ACP's original construction plans and, hence, is necessary only to implement the dam-and-pump method. Ex. 13.[3] Because the presence of the bridge in the Greenbrier River is a necessary condition only to implement the dam-and-pump crossing method, the construction and removal of the bridge must be included in the determination of whether the Greenbrier crossing will be *completed* within 72 hours.

The record shows that ACP intends to leave the bridge in place for six months. Ex. 10 at 3. On its face, that violates Special Condition C, and Sierra Club is likely to succeed on its claim that the Corps' compliance conclusion is arbitrary and capricious because it is counter to the record. *State Farm*, 463 U.S. at 43.

To avoid that conclusion, the Corps asserts without explanation that it concurs with an assertion by WVDEP that the time required for installation and removal of the bridge is not included in the 72-hour limit. Ex. 1 at 2. WVDEP's assertion also lacks explanation. *See* Ex. 12. Because its position that the time associated with bridge construction and removal is not included in Special

3 ACP asserts that the bridge will be "utilized as a crossing for equipment supporting all of the project's construction operations in this area," Ex. 10 at 3, but that explanation is a pretense to justify the prolonged presence of the bridge in the river before and after the 72-hour period. The absence of the bridge from ACP's original plans for its Greenbrier River, Ex. 13, indicates that the bridge is not necessary for any of ACP's construction operations *except* the Greenbrier River crossing.

Conditions C's 72-hour limit is contrary to the condition's plain use of the word "completed," bedrock principles of administrative law require—at the very least—some explanation from the Corps. *N.C. Wildlife Fed'n v. N.C. Dep't of Transp.*, 677 F.3d 596, 601 (4th Cir. 2012). In the absence of a sound explanation, Sierra Club is likely to succeed on its claim that the Corps' issuance of the Reinstatement is arbitrary and capricious. *Sierra Club v. Dep't of Interior*, 899 F.3d 260, 293 (4th Cir. 2018).

C. The Pipeline cannot comply with 33 C.F.R. §330.6(d).

NWP 12's Note 2 provides that "[u]tility line activities must comply with 33 CFR 330.6(d)." Ex. 3 at 3. Section 330.6(d) prohibits the use of an NWP for any portion of a project when any other portion is ineligible for the NWP. 33 C.F.R. §330.6(d). Because of the Greenbrier River crossing's defects, ACP's use of NWP 12 cannot comply with Note 2 or 33 C.F.R § 330.6(d). As a result, Petitioners are likely to succeed on their claim that the Reinstatement is unlawful *in its entirety*. *Sierra Club v. U.S. Army Corps of Eng'rs*, 905 F.3d 285 (4th Cir. 2018) (vacating an NWP 12 verification "in its entirety" under 33 C.F.R. §330.6(d) based on the ineligibility of 4 out of 591 crossings).

II. Irreparable Harm Will Result Absent A Stay.

Irreparable harm is imminent: ACP intends to resume in-stream construction work as soon as November 8, 2018, Ex. 2, and intends to complete construction of

one segment of the Pipeline in the Huntington District—"Spread 2A"—by the Fourth Quarter of 2018. Ex. 7 at 9. Thus, ACP will cross waterbodies in that segment—including Valley Fork and an unnamed tributary of Shock Run—before resolution of this petition on the merits.

Petitioners' member Steve Carruth regularly swims downstream of Valley Fork and enjoys the views of Valley Fork while eating at a restaurant one-tenth of a mile downstream from the Pipeline crossing. Ex. 14, ¶¶4-6, 10-11. ACP will use explosives to cross Valley Fork in 2018. Ex. 7 at 9; Ex. 6 at K-10. Carruth fears that the view and his enjoyment of the natural setting of Valley Fork will forever be altered by blasting and large-scale construction. Ex. 14, ¶11.

Petitioners' member Allen Johnson hunts near an unnamed tributary of Shock Run—another stream that ACP will use explosives to cross in 2018. *See* Ex. 15 ¶¶14; Ex. 7 at 9; Ex. 6 at K-18. That unnamed tributary flows into nearby Shock Run, which WVDEP designates as a Tier 3 water. *Id*. Tier 3 waters are "outstanding national resources" and in no case may their quality be degraded. W. Va. Code R. §47-2-4.1.c. Johnson is devastated that a pristine stream he visits every year will be forever changed by such invasive construction techniques. Ex. 15, ¶¶16-17. The "outstanding national resource," Shock Run, will inevitably be degraded by blasting and invasive construction methods in the unnamed tributary in its upstream headwaters.

ACP's imminent construction through Valley Fork and the unnamed tributary to Shock Run threaten to cause irreparable harm. The Supreme Court holds that environmental harms, "by [their] very nature, can seldom be adequately remedied by money damages and [are] often permanent or at least of long duration, *i.e.*, irreparable." *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987). Blasting through streams used by Sierra Club's members would cause long-term harm not compensable by damages. *Mountaineers v. U.S. Forest Serv.*, 445 F. Supp. 2d 1235, 1251 (W.D. Wash. 2006); *Provo River Coal. v. Pena*, 925 F. Supp. 1518, 1524 (D. Utah 1996). The "dredging and filling of [waterbodies] that may occur while [a c]ourt decides [a] case cannot be undone." *Sierra Club v. U.S. Army Corps of Eng'rs*, 399 F. Supp. 2d 1335, 1348 (M.D. Fla. 2005); *see also United States v. Malibu Beach, Inc.*, 711 F. Supp. 1301, 1313 (D.N.J. 1989) (same). Finally, the Pipeline construction's lethal effect on aquatic life "is, by definition, irreparable." *Humane Soc'y v. Gutierrez*, 523 F.3d 990, 991 (9th Cir. 2008).

Moreover, although ACP may not begin working in streams such as the Greenbrier River and Big Spring Fork until June or July 2019, a stay now should prevent irreparable harm in the vicinity of those streams and would preserve the Corps' ability to thoroughly consider alternatives to crossing those streams. Petitioners' members use the Greenbrier River and Big Spring Fork in the vicinity

of the Pipeline's crossings, and their declarations describe the irreparable harm that will befall those streams and the surrounding areas—and their uses of them. Johans Decl., Ex. 16; Condon Decl., Ex. 17; Graves Decl., Ex. 18; Tomasik Decl., Ex. 19; Higgins Decl., Ex. 20; Willis Decl., Ex. 21.

In fact, ACP's construction schedule dictates that it begin tree clearing for the Pipeline segment that includes the Greenbrier crossing in September 2018, and the segment that includes Big Spring Fork crossing in November 2018. Ex. 7 at 9. ACP's financial investment in those initial activities may limit the scope of the available alternatives on remand. "The difficulty of stopping a bureaucratic steam roller, once started," is a legitimate judicial consideration on whether to stay administrative action pending review. *Sierra Club v. Marsh*, 872 F.2d 497, 504 (1st Cir. 1989). This Court has recognized that phenomenon and committed to prohibiting piecemeal construction of major infrastructure projects when such construction may limit decisionmakers' future options. *Md. Conservation Council, Inc. v. Gilchrist*, 808 F.2d 1038, 1042 (4th Cir. 1986). A judicial stay of ACP's federal authorization from the Corps to construct the Pipeline through waterbodies in the Huntington District should lead to ACP foregoing continued construction in the vicinity of the Greenbrier River and Big Spring Fork because, as this Court concluded in *Department of Interior*, "ACP would violate [its] FERC certificate of public convenience and necessity" if it were to "continue to proceed with

construction" without all required valid federal authorizations. 899 F.3d at 294 n.11.

III. Preliminary Relief Will Not Substantially Harm the Corps or ACP.

In contrast to the real and permanent environmental harms discussed above, equitable relief would pose only minimal or temporary injury to the Corps and ACP. Although the Corps has interests in defending its permits and permitting process, "the effect of an injunction on these interests seems rather inconsequential." *Ohio Valley Envtl. Coal. v. U.S. Army Corps of Eng'rs*, 528 F. Supp. 2d 625, 632 (S.D. W. Va. 2007).

As for ACP, any loss of anticipated revenues generally does not constitute harm to others affected by injunctions in environmental cases. *Nat't Parks Conservation Ass'n v. Babbitt*, 241 F.3d 722, 738 (9th Cir. 2001). Monetary loss is relevant to the balance of harms only when it "threatens the very existence of the movant's business." *Wisc. Gas Co. v. F.E.R.C.*, 758 F.2d 669, 674 (D.C. Cir. 1985); *accord Fed. Leasing, Inc. v. Underwriters at Lloyd's*, 650 F.2d 495, 500 (4th Cir. 1981).

Moreover, ACP cannot now object to the consequences of seeking a permit for which it is ineligible. Any injury it may claim from a stay would be self-inflicted, and a party may not claim equity in its own defaults. *Long v. Robinson*, 432 F.2d 977, 981 (4th Cir. 1970). Parties must "avail themselves of opportunities

to avoid" claimed injuries. *DiBiase v. SPX Corp.*, 872 F.3d 224, 235 (4th Cir. 2017). ACP is a sophisticated party; it should have known that WVDEP had prohibited structures that prevent fish movement and imposed a 72-hour limit on in-stream construction, and that Corps regulations prohibit the piecemeal use of NWP 12. Nonetheless, ACP proposed its revised Greenbrier River crossing plan with full knowledge that its compliance with NWP 12's special conditions would be subject to scrutiny, and committed to fully obstruct the flow of the Greenbrier River anyway. ACP never pursued an individual Section 404 permit, instead electing to gamble that its ineligibility for NWP 12 would escape detection. This Court should not insure ACP against potential losses to which it willingly exposed itself.

IV. The Public Interest Favors Preliminary Relief.

This Court concluded that the public interest lies in a stay of a pipeline's invalid NWP 12 verifications when it issued a stay pending review in *Sierra Club v. U.S. Army Corps of Engineers*, No. 18-1173, ECF #58 (4th Cir. June 21, 2018). The CWA embodies the "balance Congress sought to establish between economic gain and environmental protection." *Ohio Valley Envtl. Coal.*, 528 F. Supp. 2d at 633. Ensuring Congressional mandates are carried out is always in the public interest. *See*, *e.g.*, *Johnson v. U.S. Dep't of Agric.*, 734 F.2d 774, 788 (11th Cir. 1984).

CONCLUSION

For the foregoing reasons, Sierra Club requests that this Court stay the Reinstatement in its entirety pending review.

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Respectfully submitted,

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