

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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Nos. 18-1743(L), 18-2273

SIERRA CLUB; WEST VIRGINIA RIVERS COALITION;  
WEST VIRGINIA HIGHLANDS CONSERVANCY; APPALACHIAN  
VOICES; and 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;  
PHILIP M. SECRIST, in his official capacity as District Commander of the U.S.  
Army Corps of Engineers, Huntington District; and  
MICHAEL E. HATTEN, in his official capacity as Chief, Regulatory Branch, U.S.  
Army Corps of Engineers, Huntington District,  
*Respondents.*

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On Petitions for Review of Action by the U.S. Army Corps of Engineers

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**FEDERAL RESPONDENTS' COMBINED STATUS REPORT,  
UNOPPOSED PROPOSAL FOR SUBSEQUENT PROCEEDINGS, AND  
UNOPPOSED MOTION FOR VOLUNTARY REMAND AND VACATUR**

Federal Respondents — the United States Corps of Engineers and Corps officials sued in their official capacities (collectively “Corps”) — hereby move for a voluntary remand and vacatur of the verifications by the Corps’ Huntington District that are challenged in these consolidated petitions for review. This unopposed motion serves as the status report and proposal for subsequent proceedings that this Court’s December 18, 2018 order directed Federal Respondents to file by January 18,

2019. As explained below, remand and vacatur is appropriate given intervening precedent in another case. The reasons supporting such relief are explained below. Petitioners and Intervenor have confirmed through counsel that they do not oppose this motion and proposal.

## **BACKGROUND**

1. Atlantic Coast Pipeline, LLC (ACP) proposes to construct an interstate natural gas Pipeline which will cross a number of streams, rivers, and wetlands. The project is subject to the requirements of the Clean Water Act, which prohibits the discharge of any dredged or fill material into waters of the United States without a Corps permit. *See* 33 U.S.C. §§ 1311(a), 1344(a). In these consolidated petitions for review, Petitioners seek review of the verifications issued by the Corps' Huntington District in February and October 2018 that ACP's proposed discharges from construction of the Pipeline in such waters within two counties in West Virginia would comply with Nationwide Permit 12 ("NWP 12").

2. Under Section 404 of the CWA, *id.* § 1344, the Corps may issue general permits for types of activities that "will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment." *Id.* § 1344(e)(1); 33 C.F.R. § 323.2(h)(1). Nationwide Permits are general permits that provide a "standing authorization" under Section 404, provided that the project proponent complies with the permit terms and conditions. *See Crutchfield v. County of Hanover*, 325 F.3d 211, 214 (4th Cir. 2003); 33

C.F.R. §§ 320.1(c), 330.1(c). The Corps issues or reissues Nationwide Permits every five years, most recently in 2017. *See* 82 Fed. Reg. 1860 (Jan. 6, 2017).

NWP 12 authorizes activities “required for the construction, maintenance, repair, and removal of utility lines and associated facilities in waters of the United States,” subject to an acreage limit for each “single and complete project.” *See id.* at 1985. For linear projects like a pipeline, each crossing of waters of the United States is a “single and complete project.” 33 C.F.R. § 330.2(i). In certain circumstances, including in this case, a project proponent seeking to proceed under a Nationwide Permit must provide pre-construction notification and obtain a “verification” from the Corps that the project meets the Nationwide Permit’s terms and conditions. *See id.* §§ 330.1(e)(2), 330.6(a).

When the Corps issues a CWA permit, Section 401 of the Act affords an opportunity for the affected state to impose conditions in addition to those developed and imposed by the Corps. Section 401 of the Act, 33 U.S.C. § 1341, requires permit applicants to provide the Corps with “a certification from the State” that a discharge into covered waters will comply with other applicable provisions of the Act. *Id.* § 1341(a)(1). Under the Act, a state may also waive its opportunity to issue a Section 401 certification by “fail[ing] or refus[ing] to act on a request for certification.” 33 U.S.C. § 1341(a)(1); *see also Sierra Club v. State Water Control Board*, 898 F.3d 383, 388 (4th Cir. 2018). Corps regulations further elaborate that a “waiver may be explicit, or will be deemed to occur if the certifying agency fails or refuses to act.” 33 C.F.R. §

325.2(b)(1)(ii); *see also id.* § 330.4(c)(1); 82 Fed. Reg. at 1861 (“When required, Clean Water Act section 401 water quality certification . . . must be obtained or waived”); *id.* at 1865 (a provisional verification does not authorize an activity “until the project proponent obtains the required water quality certification or waiver”).

NWPs are not valid until the appropriate state agency certifies under Section 401 of the CWA that the discharge does not violate state water quality standards or waives. *See* 33 U.S.C. § 1341(a)(1), (d). In West Virginia, two kinds of Section 401 certifications are available for NWP 12: projects may qualify for An Individual Water Quality Certification or a “blanket certification,” with special conditions, that the West Virginia Department of Environmental Protection (“WVDEP”) provided in an April 2017 certification for Nationwide Permits as a whole.

3. In this instance, ACP relied on West Virginia’s blanket Section 401 certification for NWP 12. Special Condition A of this certification provides that “Individual State Water Quality Certification is required for . . . Pipelines equal to or greater than 36 inches in diameter; [and with certain exceptions] Pipelines crossing a Section 10 river.” ACP’s Pipeline triggers this condition.

ACP submitted to the State of West Virginia an application for an Individual State Water Quality Certification. The State advised the Corps in December 2017 that it waived this individual certification.

In February and October 2018, the Huntington District issued verifications that ACP’s discharges of dredged and fill material into waters of the United States

associated with proposed Pipeline construction within the regulatory boundaries of the Huntington District meets criteria for NWP 12, provided that ACP complies with terms and conditions that include the special conditions in West Virginia's blanket certification of NWP 12.

4. In these consolidated petitions for review, Petitioners challenge the Huntington District verifications. Petitioners contend, *inter alia*, that the verifications are invalid because ACP does not possess an Individual State Water Quality Certification from West Virginia as required by Special Condition A. *See* Petitioners' opening page-proof brief, pp. 42-51 (filed November 20, 2018). On November 27, 2018, a panel of this Court issued a decision in a separate case that addressed a substantially identical argument in consolidated petitions seeking review of the Huntington District's NWP 12 verifications for a different pipeline, *i.e.*, the Mountain Valley Pipeline. *See Sierra Club v. U.S. Army Corps of Engineers*, 909 F.3d 635, 651-655 (4th Cir. 2018). In that case, as here, West Virginia explicitly waived an Individual State Water Quality Certification for a pipeline that meets triggering criteria for Special Condition A. *Id.* at 651. This Court's decision in the Mountain Valley Pipeline case holds that Special Condition A does not encompass the possibility of the state's waiver. *Id.* at 652-653. The decision also holds that even assuming West Virginia could waive Special Condition A, the state's waiver was invalid because it did not result from a notice-and-comment process. *Id.* at 654-655. The court concluded that because the state's waiver was invalid, the Huntington District's verifications

were arbitrary and capricious or contrary to law. *Id.* at 655. Based in part on these holdings, the Court vacated the Huntington District's verifications of NWP 12 for the Mountain Valley Pipeline. *Id.* at 655.

5. Following the panel decision in the Mountain Valley Pipeline case, the Corps moved to defer further briefing in this case to provide additional time to consider whether to seek further review in the Mountain Valley Pipeline case and to evaluate next steps to propose for this case assuming the panel decision in the Mountain Valley Pipeline stands. On December 18, 2018, the Court granted the motion and directed Federal Respondents to file in this case a status report and proposal for subsequent proceedings by January 18, 2019.

### **ARGUMENT**

1. In appropriate circumstances, this Court has discretion to vacate and remand agency actions prior to full briefing on the merits. The Court's exercise of this authority is warranted here because, as explained above, the Huntington District verifications were based in part on the state's waiver and this Court subsequently held in the Mountain Valley Pipeline case that a state waiver under similar circumstances was invalid or procedurally deficient.

2. Courts have discretion to grant, and commonly do grant, requests for voluntary remand of agency actions in order to allow administrative agencies to consider newly-available information, including judicial decisions announced subsequent to an agency's decision. *See, e.g., Limnia, Inc. v. DOE*, 857 F.3d 379, 387

(D.C. Cir. 2017) (Remand is appropriate where the agency “profess[es] intention to reconsider, re-review, or modify the original agency decision that is the subject of the legal challenge.”); *Citizens Against Pellissippi Parkway Extension, Inc. v. Mineta*, 375 F.3d 412, 416 (6th Cir. 2004) (“[W]hen an agency seeks a remand to take further action consistent with correct legal standards, courts should permit such a remand in the absence of apparent or clearly articulated countervailing reason.”); *SKF USA Inc. v. United States*, 254 F.3d 1022, 1028 (Fed. Cir. 2001) (“[T]he agency may seek a remand because of intervening events outside of the agency’s control, for example, a new legal decision.”); *Ethyl Corp. v. Browner*, 989 F.2d 522, 524 (D.C. Cir. 1993). Even in the absence of “intervening events, the agency may request a remand (without confessing error) in order to reconsider its previous position.” *Util. Solid Waste Activities Grp. v. EPA*, 901 F.3d 414, 436 (D.C. Cir. 2018). *Limnia, Inc. v. DOE*, 857 F.3d 379, 387 (D.C. Cir. 2017); *Citizens Against Pellissippi Parkway Extension, Inc. v. Mineta*, 375 F.3d 412, 416 (6th Cir. 2004); *Ethyl Corp. v. Browner*, 989 F.2d 522, 524 (D.C. Cir. 1993) (recognizing “tradition of allowing agencies to reconsider their actions where events pending appeal draw their decision in question”).

3. An order granting remand is appropriate in this case because, as explained above, the Huntington District relied on West Virginia’s December 2017 waiver and this Court subsequently held in the Mountain Valley Pipeline case that a state waiver under similar circumstances was invalid. Federal Respondents believe that a voluntary remand to the Corps to allow the agency to suspend and/or vacate the subject

verifications, following regulatory procedures (*see* 33 C.F.R. § 330.5), based on reconsideration in light of the intervening judicial decision, would by itself be an appropriate disposition consistent with administrative law principles. But given the intervening judicial precedent on the waiver issue, Federal Respondents believe the Court has discretion to order remand *and* vacatur of the challenged Corps verifications.

Notably, regardless of whether vacatur of the 2018 verifications is effectuated at this stage (*i.e.*, prior to full briefing) by Court order or administratively by the Corps on remand, the state of West Virginia and/or ACP potentially may take action in the future to cure the deficiencies in the state's waiver identified in the Mountain Valley Pipeline decision. The Corps retains its authority to take appropriate action in response to new developments.

5. As contemplated by this Court's December 18, 2018 order, the parties conferred regarding a proposal for subsequent proceedings in this case. Petitioners' counsel advised that Petitioners do not object to this motion seeking remand and vacatur. Intervenor's counsel also consented to this motion.

### **CONCLUSION**

For the foregoing reasons, Federal Respondents request an order vacating the subject Huntington District verifications and remanding the matter to the Corps. If the Court grants this motion, no further briefing of the petitions is necessary and the petitions should be terminated.



Respectfully submitted,

/s/ Ellen J. Durkee

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**CERTIFICATE OF COMPLIANCE WITH  
FEDERAL RULE OF APPELLATE PROCEDURE 27**

I hereby certify that this filing complies with the requirements of Fed. R. App. P. 27(d)(1) because it has been prepared in 14-point Garamond, a proportionally spaced font. I further certify that this motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2) because it contains 1,875 words, excluding the parts of the motion exempted under Fed. R. App. P. 27(a)(2)(B), according to the count of Microsoft Word.

*s/ Ellen J. Durkee*

ELLEN J. DURKEE

**CERTIFICATE OF SERVICE**

I certify that all counsel of record in the above-captioned case are registered for electronic service and that on January 18, 2019, a copy of the foregoing was served on all counsel of record by electronic service.

*s/ Ellen J. Durkee*

ELLEN J. DURKEE