

EPA challenge muddles future of Mountain Valley pipeline

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Pieces of the Mountain Valley pipeline awaiting installation in Newport, Va. Pamela King/E&E News

EPA is advising the Army Corps of Engineers not to approve a key federal water permit for the Mountain Valley pipeline without further study, throwing up another roadblock for the embattled natural gas project.

EPA said it identified a number of "substantial concerns" with the Mountain Valley project, which is slated to cross hundreds of streams as it travels from West Virginia to Virginia, according to a [letter](#) released last week by Appalachian Mountain Advocates through a Freedom of Information Act request.

The Biden administration's language validates concerns from environmental groups about how the \$6.2 billion pipeline would affect streams and wildlife along the project's 304-mile-long route. It is also a sharp pivot from the Trump administration, which limited state and tribal environmental reviews of water permits for energy projects.

Jeffrey Lapp, the chief of EPA's wetlands branch in Region 3's Water Division, wrote in the letter that the proposal includes an "insufficient assessment" of the potential for "significant degradation" of U.S. waters, adding that the pipeline in its current state

"may not comply" with guidelines for Section 404 of the Clean Water Act, which regulates the discharge of dredged or fill material into U.S. waters.

Without a 404 permit from the Army Corps, developers cannot trench through streams and wetlands in West Virginia and Virginia to finish building Mountain Valley. Environmental groups say that if the company crosses through streams without the permit, they would be doing so illegally and could face criminal charges.

State approval is also in play. Before the corps can make a decision on a permit, states must decide whether a project meets its water quality certification standards or waive its say over the matter. If Virginia or West Virginia deny the project water quality certification, the corps cannot issue the 404 permit.

While it would be a rare move, EPA also could exercise its authority under the Clean Water Act to "veto" a 404 permit for the pipeline.

In the letter, EPA's Lapp said "it is not apparent that all impacts have been minimized, nor is it evident that the direct, secondary, and cumulative impacts have been thoroughly evaluated and mitigated so that the proposed project will not cause or contribute to significant degradation of the waters of the United States."

He added that developers need to provide more information about how the pipeline would affect watersheds in Virginia and West Virginia that are home to endangered species and harmful substances such as fecal coliform, iron and other metals.

"At this time, EPA recommends that the permit not be issued until modifications described in the attachment, including the recommended special conditions, have been addressed and incorporated into the project," Lapp wrote.

FERC and EPA's 'target'

Army Corps spokesman Chuck Minsker said in an email that the corps will consider EPA's concerns, as well as those brought up through West Virginia's and Virginia's Clean Water Act certification process.

Minsker, citing the corps' regulatory office, said the agency is expecting to receive a state regulatory review from West Virginia around Nov. 29, and a review from Virginia around Dec. 31.

Minsker also confirmed EPA could veto a permit even after it's issued, adding the agency has rarely taken that step. EPA has taken that step 13 times since 1972. The corps, Minsker said, is meeting with EPA to address its concerns, a request EPA made in the letter.

It's not yet clear what EPA's concerns — or the time it takes to address them — might mean for the pipeline's completion.

The main way the Army Corps will weigh in on Mountain Valley is through a separate analysis deciding whether it is in the public interest, according to Lowry Crook, a former Army Corps official under the Obama administration.

"That is the target of EPA's comments," he said. "If EPA leadership is as concerned as the region, they will try to resolve it with the assistant secretary of the Army for civil works, likely with the help of the White House Council on Environmental Quality, before considering a veto."

Crook noted that the Federal Energy Regulatory Commission (FERC) in 2017 issued a **final environmental impact statement** for the pipeline, which the corps participated in.

Unless there are significant changes to the project, the corps would typically rely on FERC's analysis and any additional National Environmental Policy Act documentation would be limited, he said.

FERC is currently in the process of preparing an environmental assessment in response to Mountain Valley's request to amend its original certificate so it can change how it crosses some wetlands and water bodies, according to a **notice** in the *Federal Register*.

The so-called amendment project would change "120 crossings of 182 waterbodies and wetlands from open-cut crossings to trenchless crossings," the notice said.

Analysts at ClearView Energy Partners said in a note to clients today that it does not believe EPA's letter implies "insurmountable obstacles" to the pipeline, but the letter does explicitly recommend the Army Corps solicit substantial additional information, undertake more study and require more monitoring post-construction from the project sponsor.

Clearview noted that FERC in May sent letters to regulators in Virginia and West Virginia indicating that a 404 permit wouldn't be required for underground boring "because the trenchless crossings would avoid in-water work at the relevant waterbodies." Without any discussion in the FERC docket between the commission and the corps, Clearview concluded it cannot ascertain whether the corps may have changed its position that trenchless crossings don't require a 404 permit.

"If the corps maintains the stance that no [Clean Water Act 404 permit] is required, a certificate amendment issued by FERC could be vulnerable on judicial review unless

there is a very strong rationale rebutting the need for EPA's recommendations," Clearview analysts wrote.

Focus on timing

The Army Corps faces no specific deadlines for granting or denying a 404 permit for the Mountain Valley pipeline, said Sam Collinson, a senior adviser at Dawson & Associates, a firm that specializes in permitting, who used to head the Army Corps' regulatory policy office.

There are, however, goals and targets the Army Corps and other agencies seek to meet when conducting reviews to ensure that developers comply with federal laws like the Endangered Species Act, he said.

In May, developers of the Mountain Valley pipeline said they are targeting a "full in-service date" of the summer of 2022 ([*Energywire*](#), May 5).

That announcement was a delay from the company's earlier targeted in-service date of late 2021 ([*Energywire*](#), Dec. 14, 2020).

Natalie Cox, a spokesperson for the Mountain Valley pipeline, said developers have worked "closely" with federal and state agencies since the start of the project to address the pipeline's permit applications.

"These efforts remain ongoing, and we are committed to meeting or exceeding all applicable compliance requirements related to environmental protection," Cox said in an emailed statement.

"We are awaiting approval for all water-related certifications and/or permits for the [Mountain Valley pipeline] project," Cox added.

Watersheds, endangered species

Overall, EPA said the pipeline will affect more than 7 miles of streams and almost 14 acres of wetlands across 11 watersheds in two states, including waters that provide critical habitat to freshwater mussels, trout, and threatened and endangered aquatic species, such as the Roanoke logperch and the Candy darter, a tiny, vibrantly colored fish native to Virginia and West Virginia waters.

EPA also wants more information about the intersection of up to 10 "unique waterbodies" and how Mountain Valley developers will protect those untouched areas, and how areas that are home to endangered species will be restored. Lastly, EPA said Mountain Valley developers should submit a compensatory mitigation plan designed to offset the pipeline's unavoidable disruption of downstream waters.

Clearview noted that EPA is recommending the Army Corps identify and compare the differences between its Clean Water Act 404 application and its now-rescinded Nationwide Permit 12 application, as well as more explanation of why one trenchless crossing method was selected over another. EPA is also calling on the corps and Mountain Valley to provide more detail on why and how crossings of multiple water bodies with a single crossing represent "maximum avoidance and best management practices as required by the regulations."

David Sligh, the conservation director with Wild Virginia, said EPA is essentially calling on developers to characterize the current state of water bodies the pipeline could affect to provide a "baseline," all of which will provide a clearer window into how construction and new discharges may alter the environment.

He also noted EPA is asking questions about a potentially cascading physical and chemical effect — both now and into the future — from the discharge of sediments into waters that may already be impaired.

"Some people might say, 'Well, if it's an itty-bitty stream, who cares?'" said Sligh. "But really, those itty-bitty streams, especially in aggregate, really control a lot of the health of the stream going far down."

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