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February 4, 2022

**Sent by Electronic Mail to CELRP-MVP@usace.army.mil  
and Adam.E.Fannin@usace.army.mil**

United States Army Corps of Engineers, Huntington District

ATTN: Adam Fannin & CELRH-RD-E

Public Notice: LRH 2015-00592-GBR;

LRP-2015-798; NAO-2015-0898

502 Eighth Street

Huntington, WV 25701-2070

**Re: Effect of Vacatur of Biological Opinion on Consideration of DA  
Permits for the Mountain Valley Pipeline Project (Public Notice  
Nos. LRH-2015-00592-GBR, LRP-2015-798, and NAO-2015-0898)**

Dear Mr. Fannin:

On February 3, 2022, the United States Court of Appeals for the Fourth Circuit issued an Opinion and Order vacating and remanding the September 4, 2020 Biological Opinion (“BiOp”) for the Mountain Valley Pipeline Project (“MVP Project”). A copy of the Court’s decision is attached to this letter as Exhibit A. Because the United States Army Corps of Engineers (the “Corps”) intended to rely on the BiOp to support a crucial Section 404(b)(1) Guidelines conclusion and to satisfy its obligations under the Endangered Species Act and its public interest review regulations, the Corps cannot lawfully grant the pending application for Department of the Army (“DA”) permits submitted by Mountain Valley Pipeline, LLC (“Mountain Valley”). For the following reasons, the Corps must deny Mountain Valley’s application.

Under the Section 404(b)(1) Guidelines,

No discharge of dredged or fill material shall be permitted if it ...  
[j]eopardizes the continued existence of species listed as endangered or  
threatened under the Endangered Species Act of 1973, as amended, or  
results in likelihood of the destruction or adverse modification of a  
habitat which is determined by the Secretary of Interior or Commerce,

as appropriate, to be a critical habitat under the Endangered Species Act of 1973, as amended.<sup>1</sup>

That provision creates a substantive Clean Water Act prohibition, embodying the Corps' duties under Section 7(a)(2) of the Endangered Species Act to consult with the United States Fish and Wildlife Service ("FWS") to determine whether actions the Corps is considering authorizing will jeopardize the continued existence of listed species or destroy or adversely modify their critical habitat.<sup>2</sup>

Formal Section 7 consultation is required whenever an agency action "may affect listed species" or their critical habitat.<sup>3</sup> Under the Corps' regulations, it is required to review applications for DA permits for potential impacts on listed species, include a statement specifying whether the proposed activity may affect listed species or their habitat in the public notice of permit applications, and initiate formal consultation with the appropriate wildlife service when proposed activities may affect listed species or their habitat.<sup>4</sup>

Moreover, the Corps' public interest review regulations require the Corps to evaluate and consider a proposal's effect on fish and wildlife values "with a view to the conservation of wildlife resources by prevention of their direct and indirect loss and damage due to the activity proposed in a permit application."<sup>5</sup> Accordingly, the Corps has Clean Water Act obligations, Endangered Species Act obligations, and public interest review obligations to protect listed species and their habitats, and cannot issue a DA permit until the agency has complied with those duties through the procedures required by Section 7 of the Endangered Species Act.

The Public Notice for Mountain Valley's application states that the Federal Energy Regulatory Commission ("FERC") "is the lead federal agency for Section 7" consultation for the Mountain Valley Pipeline Project.<sup>6</sup> FERC engaged in formal consultation with the United States Fish and Wildlife Service ("FWS") on the MVP Project, and determined that the project "may affect" the Roanoke logperch (*Percina rex*), the Indiana bat (*Myotis sodalis*), the northern long-eared bat (*Myotis septentrionalis*), the Virginia spiraea (*Spiraea virginiana*), the gray bat (*Myotis grisescens*), the Virginia big-eared bat (*Corynorhinus townsendii virginianus*), the James spinymussel (*Pleurobema collina*), the clubshell mussel (*Pleurobema clava*),

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1 40 C.F.R. §230.10(b)(3).

2 16 U.S.C. §1536(a)(2).

3 50 C.F.R. §402.14(a).

4 33 C.F.R. §325.2(b)(5).

5 33 C.F.R. §320.4(c).

6 Public Notice at 6 (Mar. 29, 2021).

the snuffbox mussel (*Epioblasma triquetra*), the smooth coneflower (*Echinacea laevigata*), the candy darter (*Etheostoma osburni*) and its habitat, the small whorled pogonia (*Isotria medeoloides*), and the running buffalo clover (*Trifolium stolonniferum*).<sup>7</sup> FERC also determined that the MVP Project was likely to adversely affect many of those species, including the Roanoke logperch, Indiana bat, northern long-eared bat, Virginia spiraea, and the candy darter and its habitat.<sup>8</sup> And as established in comments submitted in November 2021, the MVP Project also may affect the newly-listed Atlantic pigtoe (*Fusconaia masoni*).<sup>9</sup>

FERC's formal consultation with FWS resulted in the September 4, 2020 BiOp. The Corps' Public Notice of Mountain Valley's application states that "[t]he United States Fish and Wildlife Service (USFWS) evaluated the entirety of the MVP Project. The Corps has reviewed the Biological Opinion (BO) issued on September 4, 2020 by the USFWS and has determined that it is inclusive of the Corps' area of responsibility and is sufficient to address the Corps' ESA action area."<sup>10</sup> Stated otherwise, the Corps intended to rely on the BiOp to satisfy its Clean Water Act, Endangered Species Act and public interest review obligations.

Such reliance is no longer permissible. The Fourth Circuit's February 3, 2022 opinion vacated the BiOp in its entirety.<sup>11</sup> The Court held that FWS "failed to adequately evaluate the 'environmental baseline' and 'cumulative effects' for ... the Roanoke logperch and the candy darter" and "that the agency neglected to fully consider the impacts of climate change."<sup>12</sup> The Court also concluded that FWS "failed to incorporate its environmental-baseline and cumulative-effects findings into its

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7 Letter from James Martin, PhD, Fed. Energy Regul. Comm'n, to Cindy Schulz, U.S. Fish & Wildlife Serv., Re: Updated Effects Determinations for the Mountain Valley Pipeline Project (July 8, 2020).

8 *Id.*

9 Letter from Appalachian Mountain Advocates and Southern Environmental Law Center to Adam Fannin, U.S. Army Corps of Eng'rs, Re: Public Comments on Public Notice Nos. LRG-2015-00592-GBR, LRP-2015-798, and NAO-2015-0898 (the Mountain Valley Pipeline Project) and on the FERC Environmental Assessment for the Mountain Valley Pipeline Project at 83–91 (Nov. 19, 2021).

10 Public Notice at 6 (Mar. 29, 2021).

11 *Appalachian Voices v. U.S. Dep't of the Interior*, \_\_\_ F.4th \_\_\_, 2022 WL 320320, at \*1 (4th Cir. Feb. 3, 2022).

12 *Id.* at \*7.

jeopardy determinations for the logperch and darter.”<sup>13</sup> In concluding that the BiOp must be vacated and remanded, the Court cautioned FWS

that when the baseline conditions or cumulative effects *are* already jeopardiz[ing] a species, an agency may not take actions that *deepens* the jeopardy by causing additional harm. ... Put differently, if a species is already speeding toward the extinction cliff, an agency may not press on the gas. We urge the Fish and Wildlife Service to consider this directive carefully while reassessing impacts to the two endangered fish at issue, especially the apparently not-long-for-this-world candy darter.<sup>14</sup>

The Court concluded its opinion with a recognition “that this decision will further delay the completion of an already mostly finished Pipeline, but the Endangered Species Act’s directive to federal agencies could not be clearer: halt and reverse the trend toward species extinction, whatever the cost.”<sup>15</sup>

As a result of the vacatur of the BiOp, the Corps cannot lawfully issue either of the DA permits that Mountain Valley seeks. An agency acts arbitrarily and capriciously when it attempts to support an action with an invalid biological opinion.<sup>16</sup> With regard to the Section 404 application, the Corps also has no support for a factual determination under 40 C.F.R. §230.11 or finding of compliance under 40 C.F.R. §230.12 regarding the 404(b)(1) Guidelines’ prohibition against permitting activities that would jeopardize listed species or adversely affect their habitat.<sup>17</sup> That

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13 *Id.* at \*13.

14 *Id.* at \*14 (cleaned up; emphasis original).

15 *Id.* at \*17 (cleaned up).

16 *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1127–28 (9th Cir. 2012); *Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 532 (9th Cir. 2010); *Pyramid Lake Paiute Tribe of Indians v. U.S. Dep’t of Navy*, 898 F.2d 1410, 1415 (9th Cir. 1990); *Save Our Cabinets v. U.S. Fish & Wildlife Serv.*, 255 F.Supp.3d 1035, 1043-44 (D. Mont. 2017), *judgment entered sub nom. Save Our Cabinets, Earthworks v. U.S. Fish & Wildlife Serv.*, No. 15-69-M-DWM, 2017 WL 2829679 (D. Mont. June 29, 2017); *Ctr. for Biological Diversity v. Nat’l Marine Fisheries Serv.*, 977 F.Supp.2d 55, 91 (D.P.R. 2013), *as amended* (Oct. 23, 2013), *adhered to on reconsideration*, 191 F.Supp.3d 157 (D.P.R. 2016); *Strahan v. Roughead*, 910 F.Supp.2d 358, 381 (D. Mass. 2012); *Nat’l Wildlife Fed’n v. Norton*, 332 F.Supp.2d 170, 180 (D.D.C. 2004).

17 40 C.F.R. §230.10(b)(3). Moreover, any effort by the Corps to attempt to make findings about the risk of jeopardy to affected species and their habitat without the involvement of the FWS would not only be wholly impermissible and violate the Endangered Species Act, it would also violate the principle that determination

is particularly so given the Court’s recognition of “the precarious state of the candy darter.”<sup>18</sup>

The clear-and-present extinction risk to the candy darter also precludes the Corps from issuing to Mountain Valley a Section 10 authorization. Mountain Valley’s proposed trenchless crossing of the Gauley River—an acknowledged Section 10 river—is located squarely in candy darter critical habitat. And the Blackwater and Roanoke River crossings may affect the Roanoke logperch. In short, the Corps cannot authorize Section 10 crossings without formal consultation and a valid biological opinion.

In sum, given the Fourth Circuit’s vacatur of the BiOp, the Corps cannot lawfully issue the permits Mountain Valley seeks. Given the likely adverse effects on the candy darter and its habitat, and given the candy darter’s “precarious state,” the appropriate course would be for the Corps to deny Mountain Valley’s Section 404 permit application as inconsistent with the Section 404(b)(1) Guidelines. At minimum, the Corps must commit not to issue DA permits to Mountain Valley unless and until FWS issues a valid biological opinion under Section 7 of the Endangered Species Act. Accordingly, we respectfully request that the Corps respond to this letter and confirm its commitment not to issue Section 404 or Section 10 permits to Mountain Valley in the absence of a valid biological opinion.

Respectfully submitted,

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regarding compliance with the Section 404(b)(1) Guidelines must be subjected to public notice and comment. *Ohio Valley Envtl. Coal. v. U.S. Army Corps of Eng’rs*, 674 F.Supp.2d 783, 805 (S.D. W. Va. 2009); *Nat’l Wildlife Fed’n v. Marsh*, 568 F.Supp. 985, 994 (D.D.C. 1983).

<sup>18</sup> *Appalachian Voices*, \_\_\_ F.4th at \_\_\_, 2022 WL 320320, at \*17 (4th Cir. Feb. 3, 2022).

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