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June 26, 2018

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

Re: Court of Appeals for the Fourth Circuit Stay of Clean Water Act Section
404 Permit for the Mountain Valley Pipeline, CP16-10 *et al.*

Dear Ms. Bose:

On behalf of the undersigned organizations, we write to inform you that a condition precedent to Mountain Valley Pipeline, LLC's ("Mountain Valley") ability to conduct construction activities under the October 13, 2017 certificate is no long satisfied, requiring the Commission to take action to stop further construction activities. On June 21, 2018, the U.S. Court of Appeals for the Fourth Circuit issued an order staying the Huntington District of the U.S. Army Corps of Engineers' authorization of the Mountain Valley Pipeline ("MVP") pursuant to Nationwide Permit 12 ("NWP 12") issued under Clean Water Act Section 404, 33 U.S.C. § 1344.¹ The Court's Order directly stayed Section 404 permit coverage for the 591 waterbody crossings within the Huntington District and, as explained further below, establishes that the Corps' coverage of the remainder of the project under NWP 12 is invalid. Because that mandatory federal authorization is now lacking, FERC must not allow

¹ See *Sierra Club v. U.S. Army Corps of Eng'rs*, No. 18-1173 (4th Cir. June 21, 2018), attached as Exhibit A.

pipeline construction to continue, not only within the Corps' Huntington District but anywhere along the pipeline route.

FERC's letter to Mountain Valley dated June 22, 2018 acknowledges only that Mountain Valley will not proceed with construction in waters of the U.S. within the Huntington District. For the reasons below, that limitation is too narrow and any further construction anywhere on the pipeline route violates both Mountain Valley's FERC Certificate and the Clean Water Act.

The Commission's October 13, 2017 Order Issuing Certificates (161 FERC ¶ 61,043) (hereafter "Certificate Order") requires all federal authorizations to be in place in order for construction to take place. Specifically, Environmental Condition 9 mandates that

Mountain Valley and Equitrans must receive written authorization from the Director of OEP **before commencing construction of any project facilities**. To obtain such authorization, Mountain Valley and Equitrans 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 On October 20, 2017, Mountain

² Certificate Order, Appendix C p.5 (emphasis added).

³ *Id.*, ¶ 187 ("In addition to the measures we require here, the Army Corps, the Pennsylvania Department of Environmental Protection (PADEP), WVDEP, and Virginia Department of Environmental Quality (VADEQ) have the opportunity to impose conditions to protect water quality pursuant to sections 401 and 404 of the Clean Water Act. The applicants must obtain all necessary federal and state permits and authorizations, including the water quality certifications, prior to receiving Commission authorization to commence construction.").

Valley Pipeline, LLC accepted the terms of FERC's Order, including Environmental Condition 9.⁴

The Court of Appeals' stay of the Huntington District's Section 404 NWP 12 authorization means that Mountain Valley no longer possesses all "authorizations required under federal law." Under the plain language of Environmental Condition 9, no further construction may proceed pursuant to the Certificate Order. FERC must therefore suspend any previously issued Notices to Proceed which allow construction activity and order Mountain Valley to halt any further construction activity anywhere along the pipeline route.⁵

The cessation of construction along the entire length of the pipeline route is not only required because Environmental Condition 9 prohibits construction in the absence of *all* required federal authorizations, but is also appropriate 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 NWP12 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 unless they have independent utility. In issuing the stay of the Huntington District's NWP 12 authorization, the Court of Appeals rejected the Corps' argument that it could authorize only a portion of the project under a nationwide permit, dismissing the

⁴ See Letter from Jeremiah J. Ashcroft to Kimberly Bose (October 20, 2017), attached as Exhibit B.

⁵ The Petitioners in *Sierra Club v. U.S. Army Corps of Eng'rs* would not object to limited activity necessary to stabilize existing disturbed areas.

Corps' litigation position that ran counter to the agency's long-held, consistent interpretation of its own regulations.

None of the MVP's crossings are eligible for coverage under NWP 12 because certain crossings in the Huntington District cannot comply with at least one condition of NWP 12 that was added through West Virginia's Clean Water Act Section 401 Certification process. The West Virginia Department of Environmental Protection ("WVDEP") certified NWP 12's reissuance under Section 401, subject to certain conditions to protect water quality. Among them is Condition C:

Individual stream crossings must be completed in a continuous, progressive manner and *within 72 hours* during seasonal normal or below normal stream flow conditions. Crossings on the Ohio River, Kanawha River, New River, Monongahela River, and the Little Kanawha River, below the confluence with the Hughes River, are exempt from the 72-hour requirements. All stream activities shall be completed as rapidly as possible.

Condition C's language is unambiguous: "Individual stream crossings *must* be completed ... within 72 hours." The Corps incorporated that condition into NWP 12 for West Virginia pursuant to 33 U.S.C. §1341(d) and 33 C.F.R. §330.4(c)(2).⁶ Accordingly, NWP 12 in West Virginia includes an express condition limiting in-stream construction to a 72-hour window, except in certain streams not affected by the pipelines.

⁶ Corps of Engineers Regulatory Program Reissuance and Issuance of Nationwide Permits with West Virginia Department of Environmental Protection 401 Water Quality Certification (May 17, 2017) at 20, *available at* <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>

Documents in the Corps' records reveal that Mountain Valley cannot comply with West Virginia's 72-hour limit on in-stream construction at all crossings, such that its project is ineligible for coverage under NWP 12. The Petitioners in *Sierra Club* presented the Court with an email exchange between the Corps and Mountain Valley making clear that Mountain Valley cannot comply with Condition C because the crossings of the Elk, Gauley, Greenbrier, and Meadow Rivers will not be completed within 72 hours.⁷ In that exchange, the Corps solicited an "estimate of time required for construction of crossing the Gauley, Elk, Greenbrier and Meadow River." Mountain Valley responded that:

Overall, we are estimating that the entire construction process associated with the crossings of the Elk, Gauley, Greenbrier, and Meadow River crossings will take **a total of 4-6 weeks to complete, 1-3 weeks for each side of the crossings**. This estimation is based on the river size, half-width construction, mobilizing to each river side, staging equipment, pipe welding/bending/placing, installing the portadam and other BMPs, and pre- and post-construction boulder survey/placement technique.

... Actual in stream disturbance associated with installing the portadam will take approximately 2-3 working days. Once the structure is properly installed, the work area is pumped dry, and trench excavation can begin.⁸

In other words, Mountain Valley could use its entire 72-hour window in those rivers just to install the Portadam on one side of the river—with stream-trenching, pipe-laying, and riverbed-reclamation occurring thereafter—before repeating the process on the other side. The upshot is that if it takes 2-3 days just to install the Portadam

⁷ See Petitioners' Second Motion for Preliminary Relief at 5, *Sierra Club v. U.S. Army Corps of Eng'rs*, No. 18-1173 (4th Cir. May 22, 2018), attached as Exhibit C.

⁸ *Id.*

on one side of the river, it is impossible for Mountain Valley to complete crossings of the Elk, Gauley, Greenbrier, and Meadow Rivers in the requisite 72 hours. As a result of Mountain Valley's inability to comply with Condition C, the Corps on May 22, 2018 indefinitely suspended NWP 12 coverage for those waterways.⁹

In their motion for stay, the Petitioners' argued that the Corps' voluntary stay of construction on just those four rivers was inadequate because, under the Corps' regulations and the terms of NWP 12, if a single crossing on a project is ineligible for coverage under NWP 12, then none of the crossings may be permitted under NWP 12 unless they have "independent utility." The Corps' regulations codified at 33 C.F.R. § 330.6(d) address when an NWP may be combined with individual permits and when a project that requires an individual permit is prohibited from using an NWP for any portion of that project. The regulations provide that:

portions of a larger project may proceed under the authority of the NWPs while the [District Engineer] evaluates an individual permit application for other portions of the same project, but ***only if*** the portions of the project qualifying for NWP authorization **would have independent utility and are able to function or meet their purpose independent of the total project. When the functioning or usefulness of a portion of the total project qualifying for an NWP is dependent on the remainder of the project, such that its construction and use would not be fully justified even if the Corps were to deny the individual permit, the NWP does not apply and all portions of the project must be evaluated as part of the individual permit process.**¹⁰

⁹ William J. Miller, Lieutenant Colonel, Huntington District, Letter to Shawn Posey, Mountain Valley Pipeline, LLC (May 22, 2018), attached as Exhibit D.

¹⁰ 33 C.F.R. § 330.6(d) (emphasis added).

When the Corps promulgated that regulation, it explained its import this way: “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.”¹¹

None of the MVP’s waterbody crossings have independent utility. The usefulness of each crossing is entirely dependent on the rest of the crossings in order to fulfill the project’s express purpose to connect areas of alleged natural gas demand in Virginia with supply areas in the Appalachian region. An individual stream crossing has no independent utility; each is dependent on the others to construct the pipeline and carry natural gas from the source to the terminus. Accordingly, the project’s individual stream crossings cannot satisfy the plain meaning of the terms of 33 C.F.R. §330.6(d), and each pipeline must obtain an individual permit for its crossings.¹²

That is precisely the conclusion mandated by the Corps’ addition of Note 2 to NWP 12 in 2017, and its explanation for that inclusion. Note 2 provides that “[u]tility line activities must comply with 33 CFR 330.6(d).” In the preamble to the 2017 reissuance of the NWPs, including the addition of Note 2 to NWP 12, the Corps expounded on the meaning of Note 2.¹³ The Corps received multiple comments

¹¹ 56 Fed. Reg. 14598, 14599 (Apr. 10, 1991).

¹² See *Crutchfield v. U.S.A.C.O.E.*, 154 F. Supp. 2d 878, 896 (E.D. Va. 2001).

¹³ 82 Fed. Reg. 1860, 1888-89 (Jan. 6, 2017).

“object[ing] to the proposed Note 2, stating that only the crossings of waters of the United States that do not qualify for NWP authorization should be evaluated through the individual permit process, allowing the remaining crossings to be authorized by NWP 12.”¹⁴ In response, the Corps rejected the commenters’ contentions and made clear that:

Note 2 is based on the NWP regulations that were published in the Federal Register on November 22, 1991 (56 FR 59110), and represent long-standing practices in the NWP program. Those regulations include the definition of “single and complete project” at 33 CFR 330.2(i) and the provision on combining NWPs with individual permits at 33 CFR 330.6(d). ...

If 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).¹⁵

The Corps also sought to reassure commenters concerned that Note 2 “would allow utility line proponents to break up large utility lines into separate projects and prevent them from being evaluated under the individual permit process.”¹⁶ The Corps responded this way: “The purpose of Note 2 is to prevent the situations the commenters opposing the proposed note are concerned about, to ensure that utility lines with one or more crossings that do not qualify for NWP authorization are evaluated under the individual permit process.”¹⁷

¹⁴ *Id.* at 1888.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

In responding to the motion for stay in the Court of Appeals, neither the Corps nor Mountain Valley claimed that any of the MVP's crossings has independent utility. The Corps did, however, argue that 33 C.F.R. § 330.6(d) and Note 2 to NWP 12 did not mean what the Corps had previously and consistently said they mean. Rather, the Corps suggested that the limitation on splitting projects between individual and nationwide permits applied only where an application for an individual permit for part of a project has already been submitted to the Corps.¹⁸ They thus urged the Court not to stay any further crossings beyond the four major rivers for which the Corps had issued a temporary administrative stay.¹⁹

The Court's Order demonstrates that it disagrees with the Corps' litigation position and accepts Petitioners' position that, if a single waterbody crossing is ineligible for coverage under a nationwide permit, then all of a project's crossings that lack independent utility are likewise ineligible. The Court stayed not just authorization of the four major river crossings but instead the entirety of "the Corps's verification of NWP 12 for the pipeline."²⁰ Because only the Huntington District's verification was challenged in the Petition for Review, the Court's Order only applies directly to the crossings within that district. However, the legal conclusion that the

¹⁸ See Federal Respondents' Opposition to Petitioners' Second Motion to Stay Agency Action at 14-16, *Sierra Club v. U.S. Army Corps of Eng'rs*, No. 18-1173 (4th Cir. May 31, 2018), attached as Exhibit E.

¹⁹ *Id.*

²⁰ Exhibit A at 2. Because a prerequisite to obtaining a judicial stay is that the moving party establish a likelihood of success on the merits, the Court of Appeals necessarily found that Petitioners are likely to succeed on the merits of their arguments under 33 C.F.R. §330.6(d).

Court necessarily reached in staying all of the MVP's crossings within the Huntington District applies equally to the NWP 12 verification in other districts. Nothing in 33 C.F.R. § 330.6(d) nor in any of the Corps' official interpretations thereof distinguishes projects whose NWP verification comes from multiple Corps districts. Rather, because the crossings within the Huntington District were improperly authorized, all of the MVP's crossings in the Pittsburgh and Norfolk Districts are ineligible for coverage under NWP 12. To prevent potentially harmful in-stream work from occurring pursuant to wrongfully issued NWP 12 verifications, and in violation of Environmental Condition 9, FERC must suspend all Notices to Proceed with construction activity and order a halt to any further construction activity until Mountain Valley obtains a valid Clean Water Act Section 404 permit for *all* of the MVP's waterbody crossings.



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On behalf of Appalachian Voices, Chesapeake Climate Action Network, Indian Creek Watershed Association, Sierra Club, West Virginia Rivers Coalition, and Wild Virginia