Appalachian Mountain Advocates

West Virginia
Post Office Box 507
Lewisburg, WV 24901
(304) 645-9006

Virginia
415 Seventh Street NE
Charlottesville, VA 22902
(434) 529-6787

www.appalmad.org

September 25, 2020

SENT VIA ELECTRONIC MAIL

David Gunter
Jennefer Neumann
United States Department of Justice
Environmental and Natural Resources Division
Appellate Section
David.Gunter2@usdoj.gov
Jennifer.Neumann@usdoj.gov

RE: Request for Administrative Stay of U.S. Army Corps of Engineers' Verificaitons to Mountain Valley Pipeline, LLC Under Nationwide Permit 12

Dear Mr. Gunter and Ms. Neumann –

I write to you, in your capacity as counsel for the U.S. Army Corps of Engineers, to request an administrative stay, pursuant to 33 CFR section 330.5, of the actions by the Huntington, Pittsburgh, and Norfolk Districts issuing, reissuing, and/or reinstating verifications under Nationwide Permit ("NWP") 12 to Mountain Valley Pipeline, LLC, for its natural gas pipeline. My clients—Sierra Club, the Center for Biological Diversity, the West Virginia Highlands Conservancy, the West Virginia Rivers Coalition, Wild Virginia, Indian Creek Watershed Association, the Chesapeake Climate Action Network, and Appalachian Voices (hereinafter, the "Environmental Groups")—intend to file petitions for judicial review of the actions by the Huntington and Norfolk Districts no later than Monday September 28, 2020, and to seek stays pending judicial review. In accordance with FRAP 15, we ask that the Corps administratively stay MVP's verifications pending judicial review for the reasons described below. Because there may soon be no restriction on MVP's activities in waters in West Virginia, we request an answer from the Corps as soon as possible. Unfortunately, we may have to

seek judicial relief prior to receiving an answer from the Corps because of the circumstances.

The Corps should administratively stay the reinstated verifications for two reasons. First, all the verifications are unlawful because the Corps violated the ESA with its 2017 NWP 12 reissuance. *N. Plains Res. Council v. U.S.A.C.O.E.* ("*N.P.R.C.*"), ___ F.Supp.3d ___, 2020 WL 1875455 (D. Mont. 2020); *appeal filed*, No. 20-35412 (9th Cir.). Second, the reinstated Huntington and Pittsburgh District verifications are unlawful because they rely on a legally-defective attempt to modify NWP 12's conditions.

A. The Corps Violated the ESA With Its 2017 NWP 12 Reissuance.

In 2017, despite its estimate that NWP 12 will be used 69,700 times and impact 8,900 acres of waters,[1] the Corps reissued NWP 12 without engaging in formal programmatic consultation with the federal wildlife services (hereinafter, the "Services")—on the NWP program generally or NWP 12 specifically—to consider the cumulative impacts of NWP-authorized activities on protected species or their critical habitat. That failure, which stands in contrast to the Corps' 2007 and 2012 reissuances wherein it *did* conduct programmatic consultation, violates the ESA, as the federal district court in Montana recently held. *N.P.R.C.*, 2020 WL 1875455. Indeed, because of that legal defect, NWP 12 has been remanded "to the Corps for compliance with the ESA." *Id.* at *8.[2] Accordingly, the reinstated verification is arbitrary,

1 When the Corps purported to modify Special Conditions A and C, it recognized that it had previously substantially underestimated the number of NWP 12 activities and their impacts in West Virginia.

2 The Montana district court initially remanded NWP 12 to the Corps, vacated the permit, and enjoined the Corps from authorizing any activities under it until consultation was complete. *N.P.R.C.*, 2020 WL 1875455, at *8. The Court subsequently narrowed the scope of the vacatur and the injunction to oil and gas pipelines, but left its remand order untouched. *Northern Plains Res. Council v. U.S.A.C.O.E.*, Civ. No. 19-44-GF-BMM, 2020 WL 3638125, at *14 (D. Mont. May 11, 2020). The Ninth Circuit denied emergency motions for a partial stay of the district court's orders on May 28, 2020, holding that the Corps had not "demonstrated a sufficient likelihood of success on the merits and probability of irreparable harm to warrant a stay pending appeal." Order, *N. Plains Res. Council v.*

capricious, an abuse of discretion, and otherwise not in accordance with law. *See, e.g.*, *L.E.A.F. v. E.P.A.*, 118 F.3d 1467, 1473 (11th Cir. 1997) (allowing review of substance of prior agency action in later as-applied challenge); *see also Pub. Citizen v. N.R.C.*, 901 F.2d 147, 152-53 (D.C. Cir. 1990) (holding "agencies have an ever present duty to insure that their actions are lawful").

Under ESA Section 7(a)(2), the Corps has a duty to ensure any action it authorizes is not likely to jeopardize the continued existence of threatened or endangered species, or result in the destruction or adverse modification of critical habitat. 16 U.S.C. §1536(a)(2). The ESA's implementing regulations define the types of "action[s]" subject to this requirement to include "all activities *or programs* of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies." 50 C.F.R. §402.02 (emphasis added). Importantly, the Services have concluded the Corps' NWP program is a federal program subject to 50 C.F.R. §402.02. 80 Fed. Reg. 26,832, 26,835 (May 11, 2015).

Federal agencies cannot take an action subject to ESA Section 7(a)(2) without first consulting with the Services if that action "may affect" threatened or endangered species. 50 C.F.R. §402.14(a). For broad federal programs—like the Corps' nationwide permit program—action agencies and the Services must engage in "programmatic consultation" to consider the cumulative impacts of the program and to guide implementation by establishing criteria to avoid, minimize, or offset adverse effects on listed species and critical habitat. *See id.* §§402.02, 402.14(i)(6); *see also* 80 Fed. Reg. at 26,837.

This is where the Corps violated the ESA in issuing NWP 12. *N.P.R.C.*, 2020 WL 1875455, at *7-8. The Corps' reissuance was an action that "may affect" listed species, and thus was subject to the programmatic consultation requirements. *Id.*; *see also* 16 U.S.C. §1536(a)(2); 50 C.F.R. §§402.02 &

U.S.A.C.O.E., No. 20-35412, Doc. 58 (9th Cir. May 28, 2020). The Supreme Court ultimately narrowed the scope of the district court's order to the Keystone XL pipeline. Order in Pending Case, *A.C.O.E. v. N. Plains Res. Council*, No. 19A1053 (U.S. July 6, 2020). The district court's remand order was unaffected by the appellate orders.

402.14(a); *N.P.R.C.*, 2020 WL 1875455, at *4; *N.W.F. v. Brownlee*, 402 F.Supp.2d 1, 9-11 (D.D.C. 2005).

The NWP 12 decision document establishes conclusively that NWP 12 "may affect" listed species and habitat. *N.P.R.C.*, 2020 WL 1875455, at *4-5. In that document, the Corps predicted activities authorized by NWP 12 would "change the chemical and physical characteristics of the waterbody," which in turn "*can affect* the species and quantities of organisms inhabiting the aquatic area." Decision Document at 75 (emphasis added). The Corps also acknowledged

> [s]essile or slow-moving animals in the path of discharges, equipment, and building materials will be destroyed. Some aquatic animals may be smothered by the placement of fill material .... Activities that alter the riparian zone, especially floodplains, *may adversely affect populations of fish and other aquatic animals*, by altering stream flow, flooding patterns, and surface and groundwater hydrology.
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> *****
>
> Activities authorized by this NWP *will result in adverse effects to other wildlife associated with aquatic ecosystems*, such as resident and transient mammals, birds, reptiles, and amphibians, through the destruction of aquatic habitat, including breeding and nesting areas, escape cover, travel corridors, and preferred food sources.

Id. at 76 (emphasis added).

"The ESA provides a low threshold for Section 7(a)(2) consultation[.]" *N.P.R.C.*, 2020 WL 1875455, at *5. Based on the foregoing, the Corps knew NWP 12 would certainly affect species of aquatic life and wildlife that depend on the waters of the United States, including any of the 1,666 species listed as endangered or threatened in the United States among them.[3] *N.P.R.C.*, 2020

3 U.S. Fish & Wildlife Serv., Listed Species Summary (Boxscore), *available at* https://ecos.fws.gov/ecp0/reports/box-score-report.

WL 1875455, at *7. Accordingly, the record for NWP 12 *by itself* establishes the permit "may affect" listed species and their critical habitat.

Despite its recognition of the devastating effects of NWP 12 activities on aquatic species, the Corps nonetheless concluded NWP 12 would have "no effect" on listed species and their habitat. Decision Document at 63-64. NOAA Fisheries—one of the expert agencies charged by Congress with implementing the ESA—disagreed with the Corps' proposed 2017 "no effect" determination and recommended the Corps initiate formal consultation on the 2017 NWPs. NWP031962–63.[4] NOAA Fisheries concluded, "[w]ithout a large-scale examination of the aggregate effects of the activities authorized by NWPs and the procedures established under the NWPs to address potential effects to listed species and critical habitat, we do not believe that the [Corps] can arrive at the conclusion that there is "no effect" from these NWPs on ESA-listed species or designated habitat." *Id.*

Against that backdrop, the Corps' final "no effect" conclusion and its refusal to engage in programmatic consultation is remarkable. Decision Document at 63-64. The Corps relied on the NWPs' General Condition 18 to justify its determination, which requires would-be-permittees to determine whether their activities might affect listed species and, if so, submit a PCN. *Id.* Based on that information, the Corps would initiate project-specific consultation "as appropriate." *Id.* at 64.

At least two federal courts have told the Corps its reliance on project-specific consultation under the general condition is unlawful under the ESA, and programmatic consultation is required. *N.P.R.C.*, 2020 WL 1875455, at *6; *Brownlee*, 402 F.Supp.2d at 9-11 ("[O]verall consultation for the NWPs is necessary to avoid piece-meal destruction of [species] habitat through failure to make a cumulative analysis for the program as a whole."). Project-specific consultation does not cure the failure to conduct programmatic consultation. 50 C.F.R. §402.14(c)(4); *see also Lane Cty. Audubon Soc'y v. Jamison*, 958 F.2d 290, 294 (9th Cir. 1992); *Conner v. Burford*, 848 F.2d 1441, 1453-58 (9th Cir. 1988). Project-specific consultation, therefore, cannot relieve the Corps of its duty to consult on the NWPs' issuance at the

4 References styled "NWP_____" are to the Administrative Record for NWP 12, provided to the petitioners in *Sierra Club v. U.S.A.C.O.E.*, No. 18-1173(L) (4th Cir.).

programmatic level, and cannot justify a "no effects" determination for NWP 12.

The problem with relying on project-specific consultation is it ignores the *cumulative* effects on listed species and critical habitat from the thousands of NWP 12 projects conducted each year. *N.P.R.C.*, 2020 WL 1875455, at *7 ("Project level review, by itself, cannot ensure that the discharges authorized by NWP 12 will not jeopardize listed species or adversely modify critical habitat."). Programmatic consultation is the only way to ensure the piecemeal destruction of habitat from the thousands of activities authorized by NWP 12 each year will not cumulatively jeopardize listed species. For those reasons, NOAA Fisheries told the Corps in response to its proposed 2017 "no effects" determination that "individual activity-specific consultations ... cannot substitute for a broad-scale consultation on the NWPs overall." NWP031991. The Corps' "no effect" determination did not address NOAA Fisheries' comments. Decision Document at 63-64. Instead, the Corps chose to refuse programmatic consultation until it was ordered to do so by the federal courts. NWP036481-82.

The Corps' reliance on General Condition 18 also unlawfully delegates the Corps' ESA duties to permittees. *N.P.R.C.*, 2020 WL 1875455, at *7. The ESA requires the Corps to determine "at the earliest possible time" whether its actions "may affect listed species or critical habitat." 50 C.F.R. §402.14(a). By allowing project applicants to determine in the first instance whether an activity might affect species or habitat, "General Condition 18 turns the ESA's initial effect determination over to non-federal permittees, even though the Corps must make that initial determination." *N.P.R.C.*, 202 WL 1875455, at *7. Such delegation is impermissible under the ESA. *Id.*

In short, the Corps' 2017 NWP 12 reissuance violated the ESA, and that defect fatally infects all of MVP's verifications.

B. The Reinstated Verification Impermissibly Relies on Unlawful Modifications.

To avoid the result in *Sierra Club*, the Corps attempted to change the rules of the game by purporting to modify NWP 12's Special Conditions A and C. Those modifications were unlawful for at least two reasons. First, the Division Engineer lacks the authority to modify NWP 12. Second, the Division Engineer abused whatever discretion he may have when he

purported to modify NWP 12. Because the purported modifications were *ultra vires*, they was ineffective to change NWP 12's conditions. *U.S. v. Cortez*, 930 F.3d 350, 357 (4th Cir. 2019) ("[B]ecause the power of administrative agencies ... is prescribed entirely by statute, *any* 'improper' agency action is 'ultra vires[.]'" (Emphasis original.)); *U.S. v. Smithfield Foods, Inc.*, 191 F.3d 516, 526 (4th Cir. 1999) (holding ineffective a purported permit modification that was legally defective); *see also Dixon v. U.S.*, 381 U.S. 68, 74 (1965) (unlawful agency actions are nullities); *L.E.A.F.*, 118 F.3d at 1473 (holding an unlawful agency action is "void *ab initio*" and cannot serve as basis for later agency action). As a result, the Pipeline remains ineligible for NWP, and the Huntington and Pittsburgh District verifications are unlawful.

1. The Division Engineer Lacks the Authority to Modify NWP 12's Conditions.

The Division Engineer does not have the authority to incorporate the purported modifications to Special Conditions A and C into the Corps' 2017 NWPs. The chain of command is crucial within the Corps, and the purported modifications violate that chain of command.

The CWA authorizes the Secretary of the Army, acting through the Chief of Engineers, to issue NWPs. 33 U.S.C. §§1344(d)-(e). The Chief Engineer has delegated some—*but not all*—of his NWP authority to Division and District Engineers. 33 C.F.R. §§330.1(d), 330.2(g), 330.4(e), 330.5.

The Division Engineer's discretionary authority regarding NWPs is expressly limited by §330.5(c) to modifying, suspending, or revoking "NWP authorizations." 33 C.F.R. §330.5(c); *see also id.* §330.1(d); §330.2(g); §330.4(e). *Authorizations* are distinct from the nationwide permits themselves. *Sierra Club*, 909 F.3d at 651. The Corps' regulations at 33 C.F.R. §330.2(c) provide, "*Authorization* means that specific activities that qualify for an NWP may proceed, provided that the terms and conditions of the NWP are met." In briefing before the Fourth Circuit in *Sierra Club*, the Corps conceded the discretionary authority discussed in 33 C.F.R. §330.5 "applies to the 'authorization,' not to the broader Nationwide Permit."[5] In other words, the Chief Engineer has delegated to the Division Engineer the authority to modify authorizations *only*; the Division Engineer cannot modify the broader

5 Br. for the Federal Respondents at 23, *Sierra Club v. U.S.A.C.O.E.*, No. 18-1173(L) (4th Cir.), *cited in Sierra Club*, 909 F.3d at 651.

NWP's terms and conditions. *Sierra Club*, 909 F.3d at 650 (recognizing the discretionary authority described in 33 C.F.R. §330.5(c) and (d) "specifically refer[s] to the Corps' ability to modify 'authorizations under an NWP' (Section 330.1(d)) and 'NWP authorizations' (Section 330.4(e))").

That distinction is crucial because, here, by operation of CWA Section 401(d), Special Conditions A and C in WVDEP's 2017 Certification became conditions of the broader NWP 12, not conditions on *authorizations*. *See* 33 U.S.C. §1341(d) (providing state water quality certification conditions "shall become a condition on any Federal license or *permit*" (emphasis added)). The Fourth Circuit expressly held in *Sierra Club* that "state conditions *must* be conditions of the NWP." 909 F.3d at 645 (emphasis original).

Thus, only the Chief Engineer may modify the conditions of an existing NWP, as opposed to an authorization, and only in compliance with the procedures in 33 C.F.R. §330.5(b). And, as the Fourth Circuit held in *Sierra Club*, Special Conditions A and C are conditions of the existing NWP 12. Accordingly, if the Corps wanted to grant WVDEP's request to modify Special Conditions A and C, only the Chief Engineer could do so and only by reissuing NWP 12 anew by invoking and implementing the procedures set out in 33 C.F.R. §330.5(b) that require, *inter alia*, compliance with the National Environmental Policy Act and the CWA Section 404(b)(1) guidelines. 33 C.F.R. §330.5(b)(2)-(3).

The Environmental Groups told all this to the Division Engineer in their comments on the proposed modification. But the Division Engineer purported to launder Special Conditions A and C from NWP 12 anyway. That action was unlawful because it was taken "without observance of procedure required by law" and without statutory or regulatory authority. 5 U.S.C. §706(2); *Cortez*, 930 F.3d at 357; *see also Dixon*, 381 U.S. at 74. That unlawful action in turn infects the Huntington and Pittsbugh District's verifications. *See L.E.A.F.*, 118 F.3d at 1473.

2. The Division Engineer Cannot Relax Conditions.

Even if the Division Engineer had discretion to modify NWP 12's Special Conditions A and C, his action here would abuse that discretion. That is because the Corps' regulations—as interpreted by the Fourth Circuit in *Sierra Club*—unambiguously prohibit the Division Engineer from replacing Special Conditions A and C with WVDEP's relaxed conditions.

In *Sierra Club*, the Fourth Circuit construed the discretionary authority delegated to Division and District Engineers to be a one-way ratchet, authorizing only modifications that make an NWP more restrictive and prohibiting modifications that would expand the applicability of an NWP. 909 F.3d at 650-51. The Fourth Circuit expressly stated that the regulations limit the Division and District Engineers "to providing *additional* conditions, above and beyond those found in the NWP," such that "revised" conditions can only be more stringent than the original condition. *Id*. at 650-51 (emphasis original).

The express limits on the Corps' discretionary authority imposed by 33 C.F.R. §330.1(d)—limiting modifications to those that "further condition or restrict"—conclusively demonstrate that "revised" conditions under 33 C.F.R. §330.4(e) can only be more stringent than the original condition, never less so. *Sierra Club*, 909 F.3d at 651. And the Corps itself has explained that the Division Engineer's discretionary action "can not expand a nationwide permit." 56 Fed. Reg. at 59,110.

As explained above, the purported modifications to Special Conditions A and C would expand NWP 12's applicability in West Virginia and make NWP 12 less restrictive. As a result, the purported modifications are not the type the Division Engineer is authorized to make under 33 C.F.R. §330.5(c) because they would not "further condition or restrict" NWP 12 in West Virginia, as required by 33 C.F.R. §330.1(d) and as held by the Fourth Circuit in *Sierra Club*, 909 F.3d at 650-51. Accordingly, the Division Engineer unlawfully accepted the modified Special Conditions, and that unlawful act was void *ab initio*. As a result, Special Conditions A and C remain part of NWP 12, and the Huntington and Pittsburgh District Engineers unlawfully verified that the Mountain Valley Pipeline complies with all the terms and conditions of NWP 12.

CONCLUSION

For the foregoing reasons, the Environmental Groups respectfully request that the U.S. Army Corps of Engineers administratively stay the verifications issued to Mountain Valley Pipeline, LLC, under NWP 12 until judicial review of the Corps' actions is complete. Again, because time is of the essence, the Environmental Groups ask that the Corps respond to this request as soon as possible. Because of the emergent circumstances, the Environmental Groups reserve the right to seek judicial relief before the Corps

responds in order to protect the streams at issue from activities by Mountain Valley Pipeline, LLC.

Respectfully,

/s/ Derek O. Teaney

Derek O. Teaney
Counsel for Sierra Club, Center for Biological Diversity, West Virginia Rivers Coalition, West Virginia Highlands Conservancy, Indian Creek Watershed Association, Wild Virginia, Chesapeake Climate Action Network, and Appalachian Voices

cc (via electronic mail):

George P. Sibley III (gsibley@hunton.com).