



Great Horned Owl © Estate of Roger Tory Peterson. All rights reserved.

# APPALACHIAN MOUNTAIN ADVOCATES

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October 22, 2018

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

Re: Supplement to Oct. 3, 2018 Request for Stop Work Order for Mountain Valley Pipeline, CP16-10 In Light of Suspension of Pittsburgh District NWP 12 Verification

Dear Secretary Bose:

On behalf of the undersigned organizations, we write to further supplement our October 3, 2018 Request for Stop Work Order for the Mountain Valley Pipeline, Docket No. CP16-10, as supplemented on October 8, 2018. On October 19, 2018, the Pittsburgh District of the U.S. Army Corps of Engineers (the “Corps”) suspended its December 19, 2017 and May 17, 2018 authorizations under Nationwide Permit 12 (“NWP 12”) issued to Mountain Valley Pipeline, LLC (“Mountain Valley”) for stream and wetlands crossings in Wetzel and Harrison Counties, West Virginia.<sup>1</sup> The suspension is “[e]ffective immediately.”<sup>2</sup> As a result of the suspension, Mountain Valley lacks the authority to construct a single stream or wetland crossing anywhere along its route and has lost yet another federal authorization that was a condition

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<sup>1</sup> Letter from Jon T. Coleman, Acting Chief, Regulatory Division, Norfolk District, U.S. Army Corps of Eng’rs, to Robert Cooper, Mountain Valley Pipeline, LLC, Re: Nationwide Permit 12 Verification Suspension (Oct. 19, 2018), attached as Exhibit A.

<sup>2</sup> Exhibit A at 1.

precedent to its ability to conduct construction activities under the October 13, 2017 certificate. The Commission must take action to stop further construction activities. The Corps' suspension of the Pittsburgh District NWP 12 verifications underscores that the Stop Work Order must prohibit construction activities anywhere along the Pipeline's route.

Frankly, it is astounding that the Commission has not yet issued a Stop Work Order in response to Mountain Valley's loss of its Clean Water Act authorizations. As discussed more fully below, the United States Court of Appeals for the Fourth Circuit has stated that a natural gas company violates its FERC certificate when it continues construction in the absence of all federal approvals.<sup>3</sup> But not only is Mountain Valley's continuing construction unlawful, it is also, in the view of the U.S. Court of Appeals for the Fourth Circuit, "wasteful and inefficient."<sup>4</sup> To obtain involuntary early possession of hundreds of parcels in eminent domain proceedings from landowners with whom Mountain Valley did not reach an agreement for an easement, Mountain Valley insisted time and time again that Pipeline construction must proceed in a linear fashion or it would suffer irreparable economic loss.<sup>5</sup> Mountain

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<sup>3</sup> *Sierra Club v. U.S. Dep't of the Interior*, 899 F.3d 160, 284 n.11 (4th Cir. 2018).

<sup>4</sup> *East Tennessee Natural Gas Co. v. Sage*, 361 F.3d 808, 828 (4th Cir. 2004).

<sup>5</sup> *Mountain Valley Pipeline, LLC v. An Easement to Construct, Operate and Maintain a 42-inch Gas Transmission Line*, Civ. No. 2:17-cv-04214, 2018 WL 1004745, at \*9–10 (S.D. W. Va. Feb. 21, 2018); *Mountain Valley Pipeline, LLC v. Simmons*, 307 F.Supp.3d 506, 527 (N.D. W. Va. 2018); *Mountain Valley Pipeline, LLC v. Easements to Construct, Operate, and Maintain a Natural Gas Pipeline*, Civ. No. 7:17-cv-00492, 2018 WL 648376, at \*14 (W.D. Va. Jan. 31, 2018).

Valley is therefore exposing itself to financial costs in constructing the Pipeline up to the edge of a water of the United States, skipping the waterbody, and resuming construction on the other side. The consequences of such wasteful and inefficient construction methods do not fall solely on Mountain Valley. The Commission has previously authorized a natural gas company to revise its cost-based recourse rates to reflect construction cost increases due to “move-around” charges.<sup>6</sup> By pursuing more costly construction methods, Mountain Valley is increasing the likelihood that it will need to seek revisions to its rate schedule, and such revisions could affect the public convenience and necessity of the Pipeline. Accordingly, to protect the public interest from the consequences of Mountain Valley’s apparent willingness to unnecessarily increase the construction costs of the Pipeline, the Commission should issue a Stop Work Order.

Moreover, as explained in our October 3 Request for Stop Work Order and October 8 supplement thereto, 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).<sup>7</sup>

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<sup>6</sup> *In re Transwestern Pipeline Co, LLC*, 126 FERC ¶61118 (Feb. 13, 2009).

<sup>7</sup> Certificate Order, Appendix C p.5 (emphasis added).

The Certificate Order specifically recognizes the Clean Water Act Section 404 permit as one of the “authorizations required under federal law.”<sup>8</sup> On October 20, 2017, Mountain Valley Pipeline, LLC accepted the terms of FERC’s Order, including Environmental Condition 9.<sup>9</sup> The United States Court of Appeals for the Fourth Circuit has interpreted a similar condition in the certificate authorizing the construction of the Atlantic Coast Pipeline to prohibit further construction under a certificate if a required federal authorization is lost during the construction process.<sup>10</sup>

The Corps’ suspension of the Pittsburgh District’s Section 404 NWP 12 authorization means that Mountain Valley no longer possesses all “authorizations required under federal law.” Indeed, it now lacks authorization to construct the *any* of the 1,237 waterbody crossings along its route. Under the plain language of Environmental Condition 9, no further construction may proceed pursuant to the Certificate Order. The Commission must therefore issue a Stop Work Order under Environmental Condition 2(b) and the Commission’s regulations at 18 C.F.R.

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<sup>8</sup> *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.”).

<sup>9</sup> See Letter from Jeremiah J. Ashcroft to Kimberly Bose (October 20, 2017), attached as Exhibit B.

<sup>10</sup> *Sierra Club v. U.S. Dep’t of the Interior*, 899 F.3d 160, 284 n.11 (4th Cir. 2018).

§375.308(x)(7) suspending any previously issued notices to proceed which allow construction activity and halting further construction activity anywhere along the pipeline route.

The Corps suspended the Pittsburg District Section 404 NWP 12 authorization because, as a result of the U.S Court of Appeals for the Fourth Circuit’s October 2, 2018 order vacating Mountain Valley’s Huntington District NWP 12 authorization and the Norfolk District’s October 5, 2018 suspension of the NWP 12 verifications in that district, “1,119 verifications are currently suspended along the majority of the pipeline route.”<sup>11</sup> Accordingly, the Pittsburgh District found “it appropriate to suspend [Mountain Valley’s] authorization at this time.”<sup>12</sup> The Corps’ suspension necessarily implies that the Court’s vacatur of the Corps’ NWP 12 authorization in the Huntington District establishes that the authorization of the remainder of the project under NWP 12 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.<sup>13</sup>

Without any valid and effective Section 404 authorization from the Corps, Mountain Valley cannot construct a single stream or wetland crossing along its route. In accordance with Environmental Condition 9, the Commission must therefore issue a stop work order suspending any previously issued notices to proceed which allow

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<sup>11</sup> Exhibit A at 1.

<sup>12</sup> *Id.*

<sup>13</sup> 33 C.F.R. §330.6(d).

construction activity and halting further construction activity anywhere along the pipeline route until Mountain Valley obtains an individual Clean Water Act Section 404 permit for *all* of the MVP's waterbody crossings.

Moreover, the stop work order must apply to *all* construction along the MVP route, not just the pipeline's waterbody crossings. As we established in our October 3, 2018 Request for Stop Work Order, allowing Mountain Valley to continue construction up to the presently identified stream crossing locations runs the risk that sections of the pipeline that will have been already constructed will need to be moved, adding unnecessary expense and environmental impact. Further, any such construction threatens to improperly influence the Corps' individual permitting process. *See Maryland Conservation Council, Inc. v. Gilchrist*, 808 F.2d 1039, 1042 (4th Cir. 1986) (halting a county's construction of a road up to the boundaries of a park, the crossing of which required completion of an environmental impact statement by Secretary of the Interior, because "[t]he decision of the Secretary of the Interior to approve the project ... would inevitably be influenced if the County were allowed to construct major segments of the highway before issuance of a final EIS. The completed segments would 'stand like gun barrels pointing into the heartland of the park ...' *Named Individual Members of the San Antonio Conservation Society v. Texas Highway Department*, 400 U.S. 968, 971, 91 S.Ct. 368, 369, 27 L.Ed.2d 338 (1970) (Black, J., dissenting from denial of certiorari)").

The Commission lacks the discretion *not* to take action in light of Mountain Valley's loss of its authorization under Section 404 of the Clean Water Act to construct

a single stream or wetland crossing. The U.S. Court of Appeals for the Fourth Circuit has interpreted continuing construction in the absence of such federal authorizations to constitute a violation of the certificate.<sup>14</sup> The Commission does not have discretion to allow a certificate holder to construct a natural gas pipeline in continuing and ongoing violation of its certificate.

For the foregoing reasons, the Corps' October 19, 2018 suspension of Mountain Valley's NWP 12 authorization in the Corps' Pittsburgh District requires that the Commission issue a stop work order halting all on-the-ground construction activities and revoke or suspend all notices to proceed for the Mountain Valley Pipeline, both within waters of the United States and elsewhere, until the Corps has completed its individual Section 404 permit review process. On behalf of Appalachian Voices, Chesapeake Climate Action Network, Indian Creek Watershed Association, New River Conservancy, Sierra Club, West Virginia Highlands Conservancy, West Virginia Rivers Coalition, and Wild Virginia, we hereby request that FERC immediately issue such an order or otherwise respond to this request for a Stop Work Order by October 26, 2018.

Sincerely,



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Benjamin A. Lockett  
Derek O. Teaney  
Appalachian Mountain Advocates  
P.O Box 507  
Lewisburg, WV 24901

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<sup>14</sup> *Sierra Club v. U.S. Dep't of the Interior*, 899 F.3d 160, 284 n.11 (4th Cir. 2018).

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



**CERTIFICATE OF SERVICE**

I hereby certify that I have on October 22, 2018, caused the foregoing document to be served upon each person designated on the official service list compiled by the Secretary in this proceeding.

Sincerely,

A handwritten signature in black ink, appearing to read "Benjamin A. Lockett", written over a horizontal line.

Benjamin A. Lockett  
Appalachian Mountain Advocates



REPLY TO  
ATTENTION OF

**DEPARTMENT OF THE ARMY**  
**CORPS OF ENGINEERS**  
**PITTSBURGH DISTRICT**  
**1000 LIBERTY AVENUE**  
**PITTSBURGH PA 15222-4186**

October 19, 2018

Regulatory Division  
LRP-2015-798

Mr. Robert Cooper  
Mountain Valley Pipeline, LLC  
2200 Rice Drive, Suite 200  
Canonsburg, PA 15317

Dear Mr. Cooper:

I refer to your project to construct a natural gas pipeline that is 303 miles in length and 42 inches in diameter, known as the Mountain Valley Pipeline (MVP). This letter pertains specifically to the 32 miles of the proposed pipeline and 15 miles of proposed access roads located within the United States Army Corps of Engineers' (Corps) Pittsburgh District's (LRP) area of regulatory responsibility. Please reference the December 19, 2017, and May 18, 2018 Nationwide Permit (NWP) verification letters, project number LRP-2015-798, issued to you authorizing your project under NWP No. 12 (Utility Line Activities). Impacts to waters of the United States associated with LRP's portion of the MVP are 59 separate stream crossings and 62 separate wetland crossings. These impacts are located within Wetzel and Harrison Counties, West Virginia.

As you are aware, on October 2, 2018, the United States Court of Appeals for the Fourth Circuit vacated the Corps' verification of MVP's compliance with NWP 12 within the Corps' Huntington District (LRH). In view of the Court's order vacating the LRH verifications, on October 5, 2018, the Corps' Norfolk District exercised its authority under 33 CFR 330.5 and suspended its verification of MVP's crossings within the Commonwealth of Virginia. Because the central portion of the MVP traverses this District, and because 1,119 verifications are currently suspended along the majority of the pipeline route, this District finds it appropriate to suspend your authorization at this time.

Therefore, exercising our authority under 33 CFR 330.5, we hereby suspend the December 19, 2017, and May 18, 2018 verification letters authorizing you to construct those portions of the MVP under NWP 12 within LRP. Effective immediately you must stop all activities conducted in reliance upon the authorization of the NWP 12. You may take measures necessary to stabilize any work in progress. This suspension will remain in effect until the authorization is reinstated, modified, or revoked.

Within 10 days of receipt of this notice of suspension, you may request a meeting with the Pittsburgh District to present information on this matter. Within a reasonable

period of time after this notice (or meeting, if requested), the Corps may take action to reinstate, modify, or revoke the authorization. If you have any questions and/or concerns about this permit verification suspension, please contact me via telephone at (412) 395-7188 or by email at [jon.t.coleman@usace.army.mil](mailto:jon.t.coleman@usace.army.mil).

Sincerely,

Jon T. Coleman  
Acting Chief  
Regulatory Division

cc (email only):  
Michael Hatten (Corps – Huntington District)  
Todd Miller (Corps – Norfolk District)  
Matt Hoover (MVP)  
Brian Bridgewater (WV DEP)



625 Liberty Avenue, Suite 1700 | Pittsburgh, PA 15222  
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October 20, 2017

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

Re: Mountain Valley Pipeline, LLC  
Docket No. CP16-10-000  
Acceptance of Certificates

Dear Ms. Bose:

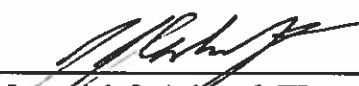
On October 13, 2017, 2017, in the docket noted above, the Federal Energy Regulatory Commission ("Commission") issued an order granting a certificate of public convenience and necessity ("Order") to Mountain Valley Pipeline, LLC ("Mountain Valley") to construct and operate its proposed Mountain Valley Pipeline Project ("Project"). The Order also issued a blanket construction certificate and a blanket open-access transportation certificate to Mountain Valley.

Pursuant to Ordering Paragraph (C) of the Order and Section 157.20(a) of the Commission's regulations, Mountain Valley accepts the certificate for the Project, the blanket construction certificate, as well as the blanket open-access transportation certificate, subject to all of its legal rights. Mountain Valley reserves the right to file a request for rehearing or clarification and to review its acceptance of the certificates should the terms of the Order change as a result of any rehearing request or petition for judicial review that may be filed by any party.

Mountain Valley appreciates the efforts of the Commission and its Staff in processing the application and issuing the Order.

Respectfully submitted,

MOUNTAIN VALLEY PIPELINE, LLC,  
by and through its operator,  
EQM GATHERING OPCO, LLC

By:  \_\_\_\_\_ MTE  
Jeremiah J. Ashcroft III  
President

cc: All Parties