



September 30, 2020

Via e-Filing

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

**Re: Response to Mountain Valley Pipeline, LLC's September 28, 2020
Answer to Opposition to Resuming Construction
Docket No. CP16-10-000**

Dear Secretary Bose:

On September 28, 2020, Mountain Valley Pipeline, LLC filed a letter regarding its request to resume construction. Mountain Valley's protestations cannot overcome Environmental Condition 9, which is a mandatory condition of the Certificate. It is irrelevant that Mountain Valley was not a party in *Sierra Club v. U.S. Department of the Interior*, 899 F.3d 260 (4th Cir. 2018). In that case, the Fourth Circuit considered an identical mandatory condition in Atlantic Coast Pipeline's FERC Certificate and made clear that proceeding with construction in the absence of all required federal authorizations "would violate FERC's certificate of public convenience and necessity." 899 F.3d at 284 n.11.

The Commission's August 31, 2020 order does not alter the plain language of Environmental Condition 9. In that order, the Commission wrote that after "certain federal authorizations for the project were invalidated or suspended, Commission staff evaluated the circumstances along the pipeline's right-of-way as they existed at the time and determined what course of action would be most protective of the environment." Order Addressing Arguments Raised on Rehearing, 172 FERC ¶ 61,193 (Accession No. 20200831-3081) at ¶18 ("Aug. 31 Order"). At this time, construction along the entire route has been halted since October 2019; new clearing, grading, and trenching of the right-of-way would not be "most protective of the environment"; and Mountain Valley cannot "commenc[e] construction" until it "has received all applicable authorizations required under federal law."¹

In its August 31, 2020 order, the Commission noted that in the Director of OEP's August 29, 2018 letter authorizing partial construction to resume, he took the position that construction would be environmentally protective along portions of the right-of-way that "had been cleared

¹ Certificate Order, 161 FERC ¶ 61,043 at Appendix C, Environmental Condition 9.

and graded.” Aug. 31 Order at ¶18. The undersigned disagreed with that conclusion. *See also* Commissioners LaFleur and Glick Aug. 29, 2018 Joint Statement on Mountain Valley Pipeline Construction (“We have significant concerns with today’s decision to allow construction to resume while required right-of-way and temporary use permits remain outstanding.”). As relevant now, much of the area that Mountain Valley seeks to construct on has not been cleared or graded. *See* Letter from E. Benson (Sierra Club) to K. Bose (FERC), Sept. 25, 2020, at 2 (showing substantial portions of Spreads G and H have not been cleared or graded); *see also* Letter from E. Benson (Sierra Club) to K. Bose (FERC), Sept. 23, 2020, at 5-7 (“September 23 Letter”). These areas include steep slopes in watersheds that contain aquatic habitat of endangered species. There is no credible argument that clearing these areas of felled trees (which provide a protective layer between rainfall and the soil), and proceeding to grade and trench the right-of-way, is the most environmentally protective course of action. *See, e.g.*, MVP Final EIS at 4-81. Unsurprisingly, in July and August 2019, when local residents began observing a marked increase in construction activity in watersheds that contain Roanoke logperch habitat, they also observed unprecedented levels of turbidity in rivers and streams. *See* Motion for Stay, Doc. 16-1 at 4, Case No. 19-1866 (4th Cir.).

In addition, in his August 29, 2018 letter, the Director of OEP prohibited construction between milepost 196.0 and milepost 221.0 because Mountain Valley “ha[d] not obtained the rights-of-way and temporary use permits from the federal government needed for the Project to cross federally owned lands.” FERC, Partial Authorization to Resume Construction (Aug. 29, 2018) at 2. That is still the case. Mountain Valley has not complied with FERC’s request to provide “a more detailed technical explanation and justification regarding the requested reduction of the 25-mile watershed level exclusion zone (MP 196.0 to 221.0) around the Jefferson National Forest (JNF).” Furthermore, FERC cannot predetermine the outcome of the U.S. Forest Service’s NEPA process by constructing the pipeline up to the border of the National Forest lands, thereby rendering the Forest Service’s NEPA analysis “a meaningless formality.” *Arlington Coal. on Transp. v. Volpe*, 458 F.2d 1323, 1333 (4th Cir. 1972). *See* September 23 Letter at 2-3; USDA, Mountain Valley Pipeline and Equitrans Expansion Project, Draft Supplemental EIS (Sept. 2020) at iii (“Under the No Action alternative, the Forest Plan would not be amended, and no concurrence would be provided to the BLM for granting of a ROW across NFS lands for the construction, operation, and maintenance of the MVP.”); *id.* at 11-12 (listing “changed circumstances or new information” that warrant supplemental analysis).

Mountain Valley’s position that FERC should nonetheless allow construction to proceed because the pipeline is purportedly 92% complete is unavailing. As an initial matter, the undersigned are unaware of the math that Mountain Valley is using to arrive at that percentage. The numbers provided by Mountain Valley show that the pipeline is approximately 50% complete (155 miles of 304 miles are fully restored). In any event, reciting this unsupported number does not warrant authorizing new clearing, grading, and trenching that would harm the environment, violate a mandatory condition of the FERC Certificate, and transform the Forest Service’s NEPA review into a paperwork exercise. *See also* Motion to Supplement the EIS, Aug. 27, 2020, at 3-6.

Mountain Valley baselessly claims that Sierra Club “misrepresent[ed]” the Nationwide Permit 12 (“NWP 12”) verification from the U.S. Army Corps of Engineers Huntington District,

but neglects to mention that Sierra Club's letter discussing the Gauley River crossing was filed two days before the Corps issued that verification. In any event, the Corps' action was unlawful because 1) the Corps failed to comply with the Endangered Species Act when it issued NWP 12 in 2017, and 2) the Corps' effort to remove a permit condition that the Fourth Circuit Court of Appeals determined MVP cannot satisfy was ineffective. The pending litigation over the Corps' verifications is yet another reason why authorizing construction at this time would be inappropriate, especially in light of statements that MVP intends to trench through "critical" streams "as quickly as possible before anything is challenged."²

Moreover, contrary to Mountain Valley's arguments regarding the recently issued Biological Opinion, FERC "has an independent duty to determine the lawfulness of its actions: 'Following the issuance of a biological opinion, the Federal agency shall determine whether and in what manner to proceed with the action in light of its section 7 obligations and the ... biological opinion.'" *Grand Canyon Tr. v. U.S. Bureau of Reclamation*, 623 F. Supp. 2d 1015, 1037 (D. Ariz. 2009) (quoting 50 C.F.R. § 402.15(a)). *See also Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1127-28 (9th Cir. 2012) ("an agency cannot meet its section 7 obligations by relying on a Biological Opinion that is legally flawed..."). Here, the new Biological Opinion is legally flawed. For example, the U.S. Fish and Wildlife Service (FWS) is aware that clearing suitable summer habitat can adversely impact the endangered Indiana bat, even if negative surveys suggest the habitat is currently unoccupied. In its Biological Opinion for the Atlantic Coast Pipeline, FWS predicted that "the majority of effects" to the Indiana bat from tree clearing would occur in suitable unoccupied summer habitat. Biological Opinion for Atlantic Coast Pipeline at 100. Yet in its Biological Opinion for MVP, FWS concludes that clearing 1,252.11 acres of this same habitat type will have no adverse impacts on the Indiana bat. *See* FWS, Biological Opinion for Mountain Valley Pipeline (Sept. 4, 2020) at 11, 81. FWS "offers no cogent explanation for this about-face," which also contradicts the best available scientific evidence. *Def. of Wildlife v. U.S. Dep't of the Interior*, 931 F.3d 339, 362 (4th Cir. 2019).

Finally, Mountain Valley dismisses the concerns of local residents regarding the serious public health risks associated with bringing in thousands of out-of-state workers during the ongoing pandemic. Volunteer monitors have already observed MVP crews failing to socially distance and wear masks.³ In a recent letter, more than 20 state legislators expressed grave concerns about the "recent announcement by Mountain Valley Pipeline (MVP) that it intends to bring more than 4,000 out-of-state workers to a concentrated area in rural Southwest Virginia and across the border in West Virginia." Letter from Del. Dawn Adams *et al.* to Gov. Northam *et al.* (Aug. 6, 2020) at 1. *See also id.* ("Bringing thousands of out-of-state workers to a medically

² Equitrans Midstream Corp. (ETRN) Q2 2020 Earnings Call Transcript (Aug. 4, 2020) (statement of Diana Charletta, President and C.O.O., Equitrans Midstream Corp.), available at <https://www.fool.com/earnings/call-transcripts/2020/08/04/equitrans-midstream-corp-etrn-q2-2020-earnings-cal.aspx>. *See also* VADEQ Press Release, *DEQ Issues Stop Work on Two-Mile Section of Mountain Valley Pipeline*, Aug. 2, 2019 ("We are appalled that construction priorities and deadline pressures would ever rise above the proper and appropriate use of erosion control measures," said DEQ Director David Paylor.').

³ *See, e.g.*, <https://www.newrivergeographics.com/mvw/gallery/photo-gallery/april-2020>; Letter from M. Barker (BREDL) to Gov. Northam, Aug. 6, 2020 (Accession No. 20200810-5076) at 5.

underserved area of the Commonwealth in the middle of the COVID-19 pandemic is a dangerous undertaking that would undermine efforts to keep infection rates down and intensive care unit beds available.”); Emily Little, *Northam should halt pipeline construction*, Roanoke Times (July 2, 2020) (“According to the Kaiser Family Foundation, Craig, Giles, Pittsylvania and Roanoke counties have zero ICU beds.”).⁴

Sincerely,



Elly Benson
Senior Attorney
Sierra Club

cc: James Martin (OEP)
Terry Turpin (OEP)
Paul Friedman (OEP)
Melanie Davenport (VADEQ)
Jerome Brooks (VADEQ)

⁴ https://roanoke.com/opinion/commentary/little-northam-should-halt-pipeline-construction/article_203a3536-c40c-5dcd-90d6-e9f28dc4b657.html

CERTIFICATE OF SERVICE

I hereby certify that I have on September 30, 2020, caused the foregoing document to be served upon each person designated on the official service list compiled by the Secretary in this proceeding.

/s/ Elly Benson
Elly Benson
Sierra Club

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