



September 23, 2020

Via e-Filing

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

**Re: Opposition to Mountain Valley Pipeline, LLC's September 22, 2020
Request to Resume Certain Construction Activities
Docket No. CP16-10-000**

Dear Secretary Bose:

The undersigned groups strongly oppose Mountain Valley Pipeline, LLC's ("Mountain Valley") request to resume construction while lacking required authorizations from several federal agencies. As the U.S. Court of Appeals for the Fourth Circuit has confirmed, proceeding with construction at this time would be in clear violation of the Commission's Certificate Order. *See Sierra Club v. U.S. Dep't of Interior*, 899 F.3d 260, 284 n.11 (4th Cir. 2018). Accordingly, the Commission must deny Mountain Valley's premature request.

Mountain Valley currently lacks several federal authorizations, including from the U.S. Forest Service, Bureau of Land Management, and U.S. Army Corps of Engineers. The Commission's Certificate Order makes clear that Mountain Valley cannot obtain approval to commence construction activities until it has received all required federal authorizations:

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).

Certificate Order at Appendix C, Environmental Condition 9 (Accession No. 20171013-4002) (emphasis in original). This condition is mandatory. *See id.* at ¶134 ("Applicants must satisfy the environmental conditions contained in Appendix C of this order before they may proceed with their projects.") (emphasis added); *id.* at ¶187 ("The applicants must obtain all necessary federal and state permits and authorizations ... prior to receiving Commission authorization to

commence construction.”). On October 20, 2017, Mountain Valley accepted the terms of the Commission’s Certificate Order, including Environmental Condition 9.¹

The U.S. Court of Appeals for the Fourth Circuit has made clear that this mandatory condition applies where pipeline construction has already begun. *See Sierra Club*, 899 F.3d at 284 n.11 (“FERC’s authorization for [the pipeline] to begin construction is conditioned on the existence of valid authorizations from [the other federal agencies]. **Absent such authorizations, [the pipeline company], should it continue to proceed with construction, would violate FERC’s certificate of public convenience and necessity.**”) (emphasis added). *See also* Letter from J. Martin (FERC) to M. Eggerding (MVP), Partial Approval of Variance Request No. H-12 (May 27, 2020) (“Construction remains contingent on other outstanding federal authorizations pursuant to Environmental Condition 9 of the Order....”). Accordingly, allowing Mountain Valley to proceed with construction at this time would constitute a clear violation of the Commission’s Certificate Order.

Allowing construction to proceed also would be inappropriate because the pipeline’s route remains uncertain. For example, the U.S. Forest Service “needs to re-evaluate the feasibility and practicality of having routes that are not on [National Forest Service] lands.” *Jefferson National Forest; Monroe County, West Virginia; Giles and Montgomery County, Virginia; Mountain Valley Pipeline and Equitrans Expansion Project Supplemental Environmental Impact Statement*, 85 Fed. Reg. 45863, 45864 (July 30, 2020). *See also* FERC, Notification of Stop Work Order (Accession No. 20180803-3076) (“Commission staff cannot predict when these agencies may act or whether these agencies will ultimately approve the same route.”); *Forest Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 692, 714 (10th Cir. 2010) (“[I]t is clear that an agency may violate NEPA, and consequently the APA, when it predetermines the result of its environmental analysis.”).

Nonetheless, Mountain Valley now requests authorization to resume construction activities except for the segments from mileposts 196.2-201.6 and 218.6-220.9. But if construction were to begin prior to receiving all requisite permits and approvals, it would “raise the risk of the ‘bureaucratic momentum’... and could skew the [agencies’] future analysis and decision-making regarding the project ...” *Indigenous Env’tl. Network v. United States Dep’t of State*, 369 F. Supp. 3d 1045, 1050–51 (D. Mont. 2018) (citing *Colorado Wild Inc. v. U.S. Forest Serv.*, 523 F.Supp.2d 1213, 1221 (D. Colo. 2007)). Allowing Mountain Valley to construct the pipeline so that the “completed segments would stand like gun barrels pointing into the heartland” of the national forest lands would inevitably, and improperly, influence the U.S. Forest Service’s decision. *Maryland Conservation Council v. Gilchrist*, 808 F.2d 1039, 1042 (4th Cir. 1986) (internal citation and quotation omitted). If that were to occur, “the options open to the [Forest Service] would diminish, and at some point [its] consideration would become a meaningless formality.” *Arlington Coal. on Transp. v. Volpe*, 458 F.2d 1323, 1333 (4th Cir. 1972). *See also Nat’l Audubon Soc’y v. Dept. of Navy*, 422 F.3d 174, 201 (4th Cir. 2005) (discussing CEQ regulations at 40 C.F.R. § 1506.1(a) that prohibit actions that would limit the choice of reasonable alternatives pending completion of the NEPA process); *N. Cheyenne Tribe*

¹ Letter from Jeremiah J. Ashcroft to Kimberly Bose (Oct. 20, 2017) (Accession No. 20171020-5083).

v. Hodel, 851 F.2d 1152, 1157 (9th Cir. 1988) (“Bureaucratic rationalization and bureaucratic momentum are real dangers[.]”).

Moreover, in its August 29, 2018 letter partially authorizing Mountain Valley to resume construction, FERC staff wrote that “construction is still excluded... between milepost 196.0 and milepost 221.0, *an area encompassing the two watersheds* containing the 3.5 miles of pipeline route across the Jefferson National Forest...” FERC, Partial Authorization to Resume Construction (Aug. 29, 2018) at 2 (emphasis added). FERC staff restricted construction in this 25-mile “exclusion zone” because “Mountain Valley Pipeline 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.” *Id.* That is still the case; there is no change in circumstances that would justify lifting the construction restrictions in the 25-mile exclusion zone. Nonetheless, Mountain Valley now requests that FERC exclude construction only in the *sub*-watersheds shared with the Jefferson National Forest. FERC must reject Mountain Valley’s request to resume construction activities that would substantially increase sediment-loading within these watersheds.

In addition, as explained in the August 27, 2020 motion to supplement the Environmental Impact Statement (“EIS”) filed by several of the undersigned groups, “before FERC may authorize MVP to proceed with construction, FERC must undertake supplemental environmental review.” Motion to Supplement Environmental Impact Statement (Accession No. 20200827-5263) at 2 (“Motion for SEIS”). This includes NEPA review relevant to Mountain Valley’s pending request for authorization to bore under the Roanoke River. As explained in the motion to supplement the EIS, FERC has not yet analyzed the impacts of microtunneling in a NEPA document. Mountain Valley’s variance request “to change the crossing method of Roanoke River from an open cut dry method as indicated in the FEIS to a microtunnel bore method” states that the “Roanoke River is not expected to incur impacts and will be protected using Reinforced Filtration Devices (RFDs)...” Variance Request H-21 at 2 (Accession No. 20200520-5046). But this cursory assertion by the applicant is insufficient. Microtunneling does pose environmental risks, and FERC must disclose and analyze those impacts in a Supplemental EIS.

Mountain Valley acknowledges that “microtunneling typically requires two pits to be excavated, one on each side of the feature to be bored. These pits are typically closer to the feature being crossed than they would be for an HDD...” *Id.* at 6. As FERC has acknowledged elsewhere, bore pit excavations “create the risk of sediment runoff entering the adjacent waterbody.” Draft EIS for Mountain Valley Pipeline, LLC’s Southgate Project, FERC Docket No. CP19-14-000 (July 2019) at 4-34. The approximate bore pit depth is 30.9 feet, which will result in large spoil piles near the river. Variance Request H-21 at 42. FERC also must analyze impacts associated with bore pit stability and groundwater intrusion. Moreover, it is not enough to simply rely on Mountain Valley’s assertion that using a dewatering structure will “greatly reduce[] the amount of turbid water discharging from the work area and potentially mixing with the Roanoke River.” *Id.* at 7. Microtunneling also presents a “risk of collapse.” *Id.* at 6. While Mountain Valley may believe that microtunneling reduces this risk as compared to other methods, FERC has not analyzed or disclosed this risk for microtunneling or any other boring method. These impacts, including but not limited to sediment runoff, groundwater intrusion, and risk of collapse, must also be considered in light of the long duration that this method requires. *See id.* at 7 (“The microtunnel bore construction is expected to take approximately 90 days to

complete.”). Mountain Valley’s assertion that “[t]here are no impacts to aquatic resources associated with this variance” and “no impacts to listed [rare, threatened, and endangered] aquatic species” does not satisfy FERC’s duty to analyze and disclose potential impacts in a NEPA document. *Id.* at 46. Notably, imperiled species are present. *See id.* (“Roanoke logperch were observed while snorkeling...”).

As explained in a recent notice letter by several of the undersigned parties, attached as Exhibit A, there has also been a failure to consult on the potential open-cut crossing of the Gauley River. The new Biological Opinion issued by the U.S. Fish and Wildlife Service does not address the effects of crossing the Gauley River via the dry open-cut method. The location of the Gauley River crossing presents difficult site conditions that decrease the likelihood that Mountain Valley will be able to use the microtunnel method. *See, e.g.*, Motion for SEIS at 28. In its January 2020 Pre-Construction Notification submitted to the U.S. Army Corps of Engineers, Mountain Valley stated that “[i]f either prior to or during boring, Mountain Valley detects or encounters conditions that make boring impracticable, Mountain Valley then proposes to use an open-cut dry ditch methodology to cross” the Gauley River. Mountain Valley Pipeline Project: Pre-Construction Notification Nationwide Permit 12 (Jan. 2020) at 11. *See also id.* at 24 (“If any of the borings is unsuccessful for any reason, the dry open cut method will be utilized.”). An open-cut crossing of the Gauley River indisputably may affect the candy darter and its proposed critical habitat. *See, e.g.*, Biological Opinion (Sept. 4, 2020) (Accession No. 20200904-3027), Appendix B, Table 3.²

In its Supplemental EIS, FERC also must take into account, *inter alia*, (1) aquatic impacts that have already occurred due to inadequate erosion and sedimentation measures and numerous violations of state requirements,³ (2) blasting and slope failure impacts that are more severe than FERC predicted in the EIS, (3) the U.S. Forest Service’s Supplemental EIS, which will include “[a]n evaluation and assessment of erosion and sedimentation and its associated effects to water quality and threatened and endangered aquatic species,” 85 Fed. Reg. 45863, 45865 (July 30, 2020), (4) the updated hydrological analysis of sedimentation for streams near suitable habitat for threatened and endangered species, and (5) the results of section 7 re-consultation.⁴ *See San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 650 (9th Cir.

² The new Biological Opinion contains additional serious deficiencies that preclude FERC’s reliance on it.

³ The risk of additional impacts if MVP is allowed to resume construction is particularly high given statements that they plan to rush construction activities. *See MVP, Request to Resume Certain Construction Activities* (Sept. 22, 2020) at 5 (Mountain Valley wishes to “expedite construction completion” and “complete as many activities as possible before winter.”); Equitrans Midstream Corp. (ETRN) Q2 2020 Earnings Call Transcript (statement of Diana Charletta, President and COO, Equitrans Midstream Corp.) (Aug. 4, 2020), <https://seekingalpha.com/article/4364333-equitrans-midstream-corporation-etrn-ceo-tom-karam-on-q2-2020-results-earnings-call?part=single> (discussing plan to complete crossings of “critical” streams and wetlands “as quickly as possible before anything is challenged.”).

⁴ *See* U.S. Fish & Wildlife Service, *Consultations / Frequently Asked Questions*, <https://www.fws.gov/endangered/what-we-do/faq.html#3> (“The Record of Decision for an EIS should address the results of section 7 consultation.”).

2014) (“We cannot say that Section 7 of the ESA renders NEPA ‘superfluous’ when the statutes evaluate different types of environmental impacts through processes that involve varying degrees of public participation.”).

FERC must conduct this supplemental environmental review before deciding whether to authorize construction to proceed. There is “remaining government action [that] would be environmentally significant,” and FERC still has “a meaningful opportunity to weigh the benefits of the project versus the detrimental effects on the environment.” *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 371 (1989). For example, many of the areas along the MVP route that have not been subject to land-disturbing activities, including trenching and blasting, are characterized by steep slopes and highly erodible soils, and are in watersheds that contain endangered species habitat. *See, e.g.*, Weekly Report No. 145 (Accession No. 20200817-5106) (showing that 19.48% of Spread G and 63.53% of Spread H have been trenched); Letter from R. Caywood (Roanoke County) to K. Bose (FERC) (Accession No. 20200902-5203) (“In Roanoke County, the only pipe in the ground at present is a small section between Route 221 and the Blue Ridge Parkway crossing near Bent Mountain.... Roanoke County remains concerned about the environmental impacts of the project as MVP has been repeatedly cited for DEQ violations since construction started in 2018.”). These areas are at heightened risk of severe erosion and sedimentation impacts, and consequent impacts to water quality and aquatic habitats.

While Mountain Valley has claimed that moving forward with pipeline construction would be the most environmentally protective course of action, the Commission’s own Environmental Impact Statement belies this dubious assertion. Resuming construction activities—including removing felled trees from the right-of-way, using heavy machinery to level the right-of-way, and disturbing massive amounts of soil by excavating trenches and bore pits—would result in further damage to environmental resources.⁵ *See, e.g.*, MVP Final EIS at 4-28 (trenching “may increase the potential for slope failure”); *id.* at 4-52 (construction “could alter the surface and near surface drainage along the pipeline trench, which could increase pre-existing landslide hazard potential”); *id.* (cut slopes created by pipeline trenches and fill slopes composed of excavated material “could be a source of debris flow in the project area triggered by intense and/or prolonged rainfall events”); *id.* at 4-81 (“equipment traffic can compact soil[,] reducing porosity and increasing runoff potential”); *id.* (“backfilling, contouring, and the movement of construction equipment along the right-of-way” affects soil resources); *id.* at 4-85 (“impacts on compaction prone soils would be minimized by limiting construction traffic along the right-of-way”); *id.* at 4-160–61 (discharge of trench water “could increase the potential for sediment-laden water to enter wetlands”).

⁵ For this reason, and as demonstrated by the overwhelming opposition to Mountain Valley’s recent request for a two-year extension, many affected landowners oppose the resumption of construction. *See, e.g.*, Kathy E. Chandler’s Motion to Intervene in Opposition and Comments on Mountain Valley Pipeline, LLC’s Request for an Extension of Time (Sept. 11, 2020); J. Coles Terry III’s Motion to Intervene in Opposition and Comments on Mountain Valley Pipeline, LLC’s Document for the Mountain Valley Pipeline Project (Sept. 11, 2020); Mary Coffey’s Motion to Intervene in Opposition and Comments on Mountain Valley Pipeline’s Request for an Extension of Time (Sept. 9, 2020).

In any event, after construction was halted last year, Mountain Valley requested “approval to perform limited construction activities to enable backfill and stabilization of certain areas under construction” and “activities necessary for the completion and stabilization of areas with work-in-progress, including steep slopes, areas adjacent to streams and wetlands, work related to bores, and work necessary to ensure public safety or protect the integrity of the pipeline.” Letter from M. Eggerding (MVP) to T. Turpin (FERC) (Accession No. 20191022-5177) at 5. While the undersigned groups disagree that all of the requested activities were necessary for stabilization purposes,⁶ that work has now been completed. Moreover, according to Mountain Valley’s October 2019 Interim Stabilization Plan (Accession No. 20191022-5177), Mountain Valley “appl[ied] seed to restore and stabilize the right-of-way.” Since then, Mountain Valley states that it has employed enhanced erosion and sediment control measures along the right-of-way. *See* Biological Opinion (Sept. 4, 2020) (Accession No. 20200904-3027) at 31 (noting that Mountain Valley “has implemented the use of enhanced measures for E&S control... includ[ing] the following: hydraulically applied or pelletized mulch/tackifier..., waterbar end treatments upgraded... to triple stack [compost filter socks]..., increased size of CFS, upgrade of standard silt fence to Priority 1 belted silt retention fence, erosion control blanket installed in flow path and at the outfall end treatments of waterbars (in areas with erosive soils), ... among other enhancements”).

The undersigned groups have highlighted the need for more stringent protections to protect aquatic resources.⁷ Full compliance with applicable requirements is also necessary to help protect these resources.⁸ Such measures would serve to protect environmental resources from further damage. The construction activities that FERC now requests authorization to commence—such as new trenching and excavating bore pits—would have the opposite effect. Mountain Valley cannot now credibly claim that the most environmentally protective course of action entails engaging in soil-disturbing activities that would tear up the protections put in place

⁶ *See, e.g.*, Letter from E. Benson (Sierra Club) to K. Bose (FERC) (Accession No. 20191105-5127). In addition, as the undersigned groups have previously pointed out, FERC’s “cessation order” was not as protective as the measures approved by the U.S. Forest Service after the Fourth Circuit vacated that agency’s authorization for MVP. The Forest Service’s concurrence for the 2018 national-forest-specific stabilization plan specified that “[n]o burying of pipe will occur”; authorized relocating un-welded joints *from* steep slopes *to* existing flat areas of the ROW; directed MVP to “install additional erosion and sediment control measures, as needed, for temporary stabilization”; specified that “[s]eed and mulch...should be applied to all bare soil”; and directed MVP to “[u]se erosion control fabric in places that mulch cannot be used.” *See* USFS Concurrence, Mountain Valley Pipeline Stabilization Plan (Accession No. 20180924-4001).

⁷ *See, e.g.*, Letter from E. Benson (Sierra Club) to K. Bose (FERC) (Accession No 20191203-5113) at 4 (“[M]ore robust erosion and sediment control and stormwater management measures are necessary given the repeated failures and violations that have resulted in ongoing degradation of endangered species habitat.”).

⁸ *See id.* at 8 (citing relevant VADEQ Field Inspection Reports); Laurence Hammack, *Mountain Valley, DEQ reach agreement on environmental fines*, Roanoke Times (Aug. 4, 2020), https://roanoke.com/business/mountain-valley-deq-reach-agreement-on-environmental-fines/article_1e38d87f-ccca-5ede-9726-c5974b4c2782.html.

over the past year, thereby further destabilizing the right-of-way and exacerbating erosion and sedimentation problems.

In addition, as explained in the recent Motion to Supplement the EIS, allowing construction to proceed at this time would inflict significant public health risks on communities along the pipeline route. *See, e.g.*, Motion for SEIS at 41-42; Letter from Del. Dawn Adams *et al.* to Gov. Northam *et al.* (Aug. 6, 2020) (“Bringing thousands of out-of-state workers to a medically 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.”); *id.* (noting that the communities along the MVP route “have high concentrations of older people, poor people, and those with cardiovascular diseases, COPD, and other conditions that place them at high risk during this pandemic”).

In sum, self-interested claims that proceeding with construction would be environmentally beneficial—despite all evidence to the contrary—do not provide an excuse for violating the clear terms of Mountain Valley’s FERC certificate. FERC must prohibit project construction unless and until Mountain Valley has obtained “all applicable authorizations required under federal law.” Certificate Order at Appendix C, Environmental Condition 9. As the Fourth Circuit explained in interpreting an analogous condition in the certificate for the Atlantic Coast Pipeline, “[a]bsent such authorizations, [the pipeline company], should it continue to proceed with construction, would violate FERC’s certificate of public convenience and necessity.” *Sierra Club v. U.S. Dep’t of the Interior*, 899 F.3d 260, 284 n.11 (4th Cir. 2018).

Sincerely,



Elly Benson
Senior Attorney
Sierra Club

David Sligh
Wild Virginia

Peter Anderson
Appalachian Voices

Russell Chisholm
Protect Our Water, Heritage, Rights

Roberta M. Bondurant
Preserve Bent Mountain/BREDL

Bonnie Law
Preserve Franklin

Bill Wolf
Preserve Craig

Mara Robbins
Preserve Floyd

Howdy Henritz
Indian Creek Watershed Association

Anne Havemann
Chesapeake Climate Action Network

Angie Rosser
West Virginia Rivers Coalition

Jason Rylander
Defenders of Wildlife

Gillian Giannetti
Natural Resources Defense Council

Jared Margolis
Center for Biological Diversity

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

CERTIFICATE OF SERVICE

I hereby certify that I have on September 23, 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