Copy of Motion for Preliminary Relief Without Exhibits

No. 18-1173

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SIERRA CLUB, WEST VIRGINIA RIVERS COALITION, INDIAN CREEK WATERSHED ASSOCIATION, APPALACHIAN VOICES, and CHESAPEAKE CLIMATE ACTION NETWORK,
Petitioners

v.

UNITED STATES ARMY CORPS OF ENGINEERS; and MARK T. ESPER, in his official capacity as Secretary of the U.S. Army; TODD T. SEMONITE, in his official capacity as U.S. Army Chief of Engineers and Commanding General of the U.S. Army Corps of Engineers; PHILIP M. SECRIST, in his official capacity as District Commander of the U.S. Army Corps of Engineers, Huntington District, and MICHAEL E. HATTEN, in his official capacity as Chief, Regulatory Branch, U.S. Army Corps of Engineers, Huntington District
Respondents

PETITIONERS' MOTION FOR PRELIMINARY RELIEF

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INTRODUCTION

Petitioners Sierra Club, West Virginia Rivers Coalition, Indian Creek Watershed Association, Appalachian Voices, and Chesapeake Climate Action Network (hereinafter, collectively, "Sierra Club") seek judicial review of the December 22, 2017 authorization by the U.S. Army Corps of Engineers (the "Corps") of the discharge of dredged and fill material into waters of the United States associated with the Mountain Valley Pipeline project (the "Pipeline") under Nationwide Permit 12 ("NWP 12")—a general permit issued under Section 404(e) of the Clean Water Act ("CWA"), 33 U.S.C. § 1344(e). Because discharges under that authorization and the attendant stream-trenching that will occur are likely to cause irreparable harm to Sierra Club and its members before a ruling on the merits, Sierra Club respectfully requests that this Court suspend the authorization pending judicial review. Counsel for Respondents and Respondent-Intervenor have been informed of Sierra Club's intent to file this motion. They oppose the motion and intend to file responses in opposition within ten days.

BACKGROUND

On October 23, 2015, Mountain Valley Pipeline, LLC ("MVP") applied to the Federal Energy Regulatory Commission ("FERC") for a Certificate of Public Convenience and Necessity under Section 7 of the Natural Gas Act ("NGA"), 15 U.S.C. § 717f, to construct and operate a 303.5-mile-long natural gas pipeline

stretching from Wetzel County, West Virginia, to Pittsylvania County, Virginia. *Mountain Valley Pipeline, LLC*, 161 FERC ¶61,043 at PP1, 7, 2017 WL 4925425, at *1-2 (Oct. 13, 2017). Roughly 164 miles of the Pipeline and approximately 132 miles of access roads are located in the Corps' Huntington District in West Virginia. Ex. 1 at 1. As it cuts through West Virginia's forests and streams, the Pipeline and its access roads will require 594 crossings of waters of the United States in the Huntington District, resulting in the discharge of fill material into miles of streams and acres of wetlands. *Id.* at 1-2.

The Corps permits dredge-and-fill projects under Section 404 in two ways. It can issue individual permits tailored to specific activities, 33 U.S.C. § 1344(a), or it can issue general, nationwide permits ("NWPs") for defined sets of activities that are similar in nature and would cause only "minimal adverse environmental effects," *id.* § 1344(e)(1). But even when categories of activities are "delineated in objective, measurable terms," it is often difficult to determine *ex ante* that they will have only minimal impacts nationwide. *O.V.E.C. v. Bulen*, 429 F.3d 493, 501 (4th Cir. 2005). To overcome that difficulty, the Corps' NWP program relies on "a three-tiered approach to ensure compliance" with the statutory requirements of the CWA. *Issuance and Reissuance of Nationwide Permits*, 82 Fed. Reg. 1860, 1985 (Jan. 6, 2017). First, the Corps develops general conditions applicable to all NWPs, as well as activity-specific thresholds and conditions for each permit. *Id.* at 1864.

The Corps' regional offices may then add regional conditions, which further restrict the use of NWPs in their jurisdictions. *Id.* at 1861. Finally, district-level officers may review individual projects on a case-by-case basis and impose project-specific conditions necessary to ensure impacts are minimal. *Id*. at 1862.[1]

To facilitate this three-tiered approach, many NWPs require would-be-permittees submit their projects to the Corps for "verification"—a process "designed to ensure that the NWPs authorize only those categories of activities that have no more than minimal individual and cumulative adverse environmental effects." *Id.* at 1985. After receiving a request for verification, the Corps first confirms "that the proposed activities comply with all applicable general conditions" of the permit before determining whether any project-specific "special conditions" are necessary to avoid more-than-minimal environmental impacts. *Id.* at 1862, 1971; 33 C.F.R. § 330.4(b)(1).

Ultimately, the Corps can verify a project only if it "complies with the general permit's conditions, will cause no more than minimal adverse effects on the environment, and will serve the public interest." *Sierra Club v. U.S.A.C.O.E.*,

1 The Corps' general permitting regulations distinguish between an NWP's "terms"—defined as the "limitations and provisions included in the description of the NWP itself"—and its "conditions"—any "additional provisions [that] place restrictions or limitations on all of the NWPs" or that the Corps imposes during the regional or project-specific review stage. 33 C.F.R. § 330.2(h). Both are prerequisites to verification under an NWP. *Id.* § 330.3(a).

803 F.3d 31, 39 (D.C. Cir. 2015). If, however, "an activity does not comply with the terms and conditions of an NWP," the Corps must "notify the [applicant] and instruct him on the procedures to seek authorization under a[n appropriate] general permit or individual permit." 33 C.F.R. § 330.6(a)(2).

In January 2017, the Corps reissued its suite of 52 NWPs. *See generally* 82 Fed. Reg. 1860. One of those permits, NWP 12, permits discharges from utility crossings, including natural gas pipelines, "provided the activity does not result in the loss of greater than 1/2-acre of waters" at each discrete crossing. *Id*. at 1985. For projects, like the Pipeline, that require separate Corps approval under the Rivers and Harbors Act, 33 U.S.C. § 407, NWP 12 requires the prospective permittee to submit project-specific, pre-construction notification to the Corps for verification. 82 Fed. Reg. at 1986.

Because NWP 12 authorizes discharges into protected waters, its reissuance triggered another important provision of the CWA. Section 401 of the Act, 33 U.S.C. § 1341, provides that federal permits or licenses that result in discharges into waters of the United States cannot issue without "certification" by the affected state that the discharges will comply with all state water quality standards. The certification requirement "provides the states with a first line of defense against federally licensed or permitted activities that may have adverse effects on the state's waters," allowing them to determine whether those activities would frustrate

their efforts to attain and preserve water quality. *U.S. v. Marathon Dev. Corp.*, 867 F.2d 96, 100 (1st Cir. 1989) (internal quotation marks omitted). A permit is effective only if the state concludes that the permitted activities will not violate applicable state water quality standards—or if the state waives its certification rights by inaction. 33 U.S.C. § 1341(a)(1). However, a state can tailor its certification by imposing special conditions on certification, which become conditions of the federal permit as a matter of course. *Id.* § 1341(d); *PUD No. 1 of Jefferson Cnty. v. Washington Dep't of Ecology*, 511 U.S. 700, 708 (1994).

The West Virginia Department of Environmental Protection ("WVDEP") took just that approach in response to NWP 12, certifying the permit on April 13, 2017, subject to several "special conditions" designed to protect water quality. Ex. 2 at 1, 10-11 (hereinafter, the "Certification"). Foremost among them was a requirement that "[p]ipelines equal to or greater than 36 inches in diameter" possess an individual, project-specific water quality certification. *Id.* at 10; Ex. 1 at 43; Ex. 3 at 20. The Certification imposes the same individual, project-specific water quality certification requirement on pipelines that cross rivers protected by Section 10 of the Rivers and Harbors Act, 33 U.S.C. § 403.[2] Ex. 2 at 10; Ex. 1 at 43; Ex. 3 at 20. The Corps accepted WVDEP's conditions as "appropriate to the scope and degree of th[e] impacts" associated with pipeline projects and, consistent

2 Section 10 of the Rivers and Harbors Act prohibits the obstruction of any navigable-in-fact waterbody unless authorized by the Corps.

with Section 401 and its own permitting regulations, incorporated them into NWP 12. *See* 33 C.F.R. §§ 330.4(c)(2), 325.4(a). Accordingly, NWP 12 in West Virginia, as issued by the Corps on May 17, 2017, includes an express condition that "Individual State Water Quality Certification is *required* for...[p]ipelines equal to or greater than 36 inches in diameter...[or] [p]ipelines crossing a Section 10 river[.]" Ex. 3 at 20 (emphasis added).

MVP applied to WVDEP for an individual Section 401 certification of its use of NWP 12, and on March 23, 2017, WVDEP issued that certification. Ex. 4. After Sierra Club filed a timely petition for review in this Court of WVDEP's individual certification, Ex. 5, WVDEP sought a voluntary remand and asked this Court to vacate that certification. Ex. 6. In its motion, WVDEP admitted that "the information used to issue the Section 401 Certification needs to be further evaluated and possibly enhanced" and that it "need[ed] to reconsider its antidegradation analysis in the Section 401 Certification[.]" *Id.* at 2. WVDEP further "commit[ed] to doing so as expeditiously as possible." *Id.* On October 17, 2017, this Court granted WVDEP's motion, vacated MVP's individual Section 401 Certification, and remanded the matter to the agency under 15 U.S.C. § 717r(d)(3). Ex. 7.

On remand, rather than reconsidering its antidegradation analysis per its commitment to this Court, WVDEP opted to abdicate its responsibilities under

Section 401 of the CWA and, on November 1, 2017, waived its authority to certify the Pipeline under Section 401. Ex. 8. As a result of that waiver, MVP does not possess an individual water quality certification under Section 401 of the CWA.

On February 25, 2016, MVP requested that the Corps' Huntington District verify that the 42-inch Pipeline's 591 crossings of West Virginia's streams and wetlands were eligible for coverage under NWP 12. Ex. 1 at 1-2. Three of the rivers that the Pipeline would cross—the Gauley River, the Greenbrier River, and the Elk River—are Section 10 rivers. *Id.* at 5. MVP updated its application on February 17, 2017, and submitted additional information on December 18, 2017. *Id.* at 1. On December 22, 2017, the Corps issued the verification challenged here, acknowledging the Pipeline's size and impacts on Section 10 rivers, but nonetheless concluding that it "me[t] the criteria" for NWP 12, subject to several additional project-specific conditions not relevant to this action. *Id.* at 2, 4-7.

JURISDICTIONAL STATEMENT

Section 19(d)(1) of the NGA, 15 U.S.C. § 717r(d)(1), places review of the Corps' action in this Court's jurisdiction:

> [T]he United States Court of Appeals for the circuit in which a facility subject to...section 717f of this title is proposed to be constructed, expanded, or operated shall have original and exclusive jurisdiction over any civil action for the review of an order or action of a Federal agency...acting pursuant to Federal law to issue...any permit, license, concurrence, or approval...required under Federal law [for that facility].

Because the Pipeline is proposed to be built in West Virginia and Virginia, both of which lie within this Circuit, and because the Corps' authorization of the Pipeline under NWP 12 is a "permit...required under Federal law," jurisdiction exists under Section 19(d)(1).

The Petitioners are non-profit organizations whose members reside, work, and recreate in the areas that will be affected by the Pipeline. As set out in the declarations of Sierra Club's members, the construction and operation of the Pipeline will cause those members concrete, particularized, and imminent harm. *See* Ex. 9 (Declaration of Tammy Capaldo); Ex. 10 (Declaration of Maury Johnson); Ex. 11 (Declaration of Naomi Cohen). This Court can redress that harm by setting aside the Corps' verification of the Pipeline under NWP 12. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Sierra Club, therefore, has Article III standing to seek judicial review.

STANDARD OF REVIEW

Sierra Club asks this Court to maintain the *status quo* by suspending the Corps' verification of the Pipeline under NWP 12 pending resolution of the merits. A movant qualifies for such preliminary relief upon showing

> (1) that he will likely prevail on the merits of the appeal, (2) that he will suffer irreparable injury if the stay is denied, (3) that other parties

> will not be substantially harmed by the stay, and (4) that the public interest will be served by granting the stay.

Long v. Robinson, 432 F.2d 977, 979 (4th Cir. 1970). *See also Hilton v. Braunskill*, 481 U.S. 770, 776 (1987).

Because Section 19(d)(1) of the NGA does not specify a standard of review, the Court should apply the standard set forth in the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706. *See AES Sparrows Point LNG, LLC v. Wilson*, 589 F.3d 721, 727 (4th Cir. 2009) (applying APA standard to petition under Section 19(d)(1) of the NGA). *See also Crutchfield v. Hanover Cnty.*, 325 F.3d 211, 216-17 (4th Cir. 2003) (applying APA standard in reviewing the Corps' verification of a project under an NWP). Under that standard, the Court must set aside any agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

ARGUMENT

I. Sierra Club Is Likely To Succeed On The Merits Because MVP Cannot Satisfy The Conditions of NWP 12, Rendering The Corps' Verification of The Pipeline Under NWP 12 Not In Accordance With Federal Law.

A. The Pipeline does not meet the express terms of NWP 12.

The Corps' permitting regulations unambiguously require that, "for a valid authorization to occur," a "prospective permittee must satisfy *all* terms and conditions of an NWP." 33 C.F.R. § 330.4(a) (emphasis added). When a state agency places conditions on its water quality certification for an NWP, as WVDEP

did in this case, those conditions become express conditions of the federal permit. 33 U.S.C. § 1341(d); 33 C.F.R. § 330.4(c)(2). As such, WVDEP's requirement that pipelines greater than 36 inches in diameter or that cross Section 10 rivers possess an individual water quality certification is a condition of NWP 12 on equal footing with any other term or condition of that permit. The language of the condition in NWP 12 regarding individual water quality certifications is unambiguous: "Individual State Water Quality Certification is *required* for...[p]ipelines equal to or greater than 36 inches in diameter...[or] [p]ipelines crossing a Section 10 river[.]" Ex. 3 at 20 (emphasis added). The plain meaning of the term "required" is "'demanded as necessary or essential[.]'" *U.S. v. Bazile*, 209 F.3d 1205, 1207 (10th Cir. 2000) (interpreting "required" in the U.S. Sentencing Guidelines by quoting Webster's Ninth New Collegiate Dictionary (1991)). Moreover, WVDEP did not include in its condition an option for a waiver of individual certification. That is, the condition does not read "Individual State Water Quality Certification *or waiver thereof* is required." Because MVP did not obtain an individual water certification and does not possess one, its 42-inch pipeline that crosses three Section 10 waters cannot satisfy the plain language of the condition.

B. WVDEP lacks authority to modify either NWP 12 or its prior Certification of NWP 12.

WVDEP's November 1, 2017 waiver of authority to issue an individual certification does not change that result. Once a state certifies a federal permit

under Section 401, any conditions placed on that certification become enforceable conditions of the federal permit. 33 U.S.C. § 1341(d). In other words, "[w]hatever freedom the states may have to impose their own substantive policies in reaching initial certification decisions, the picture changes dramatically once that decision has been made and a federal agency has acted upon it." *Keating v. F.E.R.C.*, 927 F.2d 616, 623 (D.C. Cir. 1991). A state's unilateral about-face simply cannot alter the terms and conditions of the federal permit. *See Triska v. Dep't of Health and Envtl. Control*, 355 S.E.2d 531, 534 (S.C. 1987).

And for good reason: state-imposed conditions protecting water quality often factor into the federal agency's permitting analysis—as they did in this case. Although water quality certification is the province of the states, the Corps' review at the regional- and project-level evaluation stages requires a determination that activities permitted under an NWP will result in only minimal impacts under Section 404(e) and are in the public interest. 82 Fed. Reg. at 1876, 1969, 2004. In reissuing NWP 12, the Corps explicitly recognized that regional conditions, including conditions "added to the NWPs as a result of water quality certifications...by states," are an "important mechanism for ensuring compliance with" Section 404(e)'s minimal impacts requirement. *Id.* at 1876. Corps regulations similarly recognize that the public interest review "take[s] into account the existence of controls imposed under other federal, state, or local programs." 33

C.F.R. § 325.4(a)(2). In other words, the Corps' decision as to whether additional region- or project-specific conditions are necessary to ensure compliance with the CWA proceeds against the backdrop of any state-imposed conditions under Section 401. Allowing a state to alter that backdrop after the fact would undermine the integrity of the Corps' review.

Even assuming that a modification to WVDEP's Certification *could* affect the terms of a federal permit, WVDEP lacked authority to make any such modification in this case. West Virginia regulations authorizing WVDEP to implement Section 401 do not empower the agency to modify previously issued certifications. W. Va. C.S.R. § 47-5A-1 *et seq.* Neither does federal law. Section 401 allows "a state to revoke a prior certification...but only pursuant to the terms of, and for the reasons indicated in, section 401(a)(3)." *Keating*, 927 F.2d at 622. None of the circumstances described in that section are present here.[3]

Furthermore, federal regulations promulgated by the Environmental Protection Agency ("EPA") interpreting Section 401 provide that a state's certification may only be modified "in such manner as may be agreed upon by the

3 Section 401(a)(3) contemplates the revocation of a certification for a federal *construction* permit as a valid certification for a second federal permit for *operation* of the same facility within 60 days of notice of the second permit when there are "changes since the construction license or permit certification was issued in (A) the construction or operation of the facility, (B) the characteristics of the waters into which such discharge is made, (C) the water quality criteria applicable to such waters or (D) applicable effluent limitations or other requirements." 33 U.S.C. § 1341(a)(3).

certifying agency, the licensing or permitting agency, *and* the Regional Administrator" of the EPA. 40 C.F.R. § 121.2(b) (emphasis added). That regulation ensures that any *post hoc* changes to a federal permit have the concurrence of the federal licensing authority and EPA. Here, even if the actions by WVDEP and the Corps could be construed as an agreement to modify the April 13, 2017 Certification issued by WVDEP for NWP 12, there is no evidence that the Regional Administrator of EPA ever agreed to such a modification. Because the Regional Administrator's agreement is a condition precedent to the modification of a certification, and because WVDEP is not authorized by state law to modify previously issued certifications, any effort by WVDEP to modify its Section 401 Certification for NWP 12 is a mere nullity. *Dixon v. U.S.*, 381 U.S. 68, 74 (1965) (holding that an *ultra vires* administrative action is a mere nullity).

Finally, WVDEP's November 1, 2017 waiver of its individual Section 401 authority with respect to the Pipeline cannot be construed as a lawful modification to the long-effective Section 401 Certification for NWP 12 because it was not subject to the requisite public participation procedures. WVDEP's April 13, 2017 Certification of NWP 12 was the subject of public notice and comment (Ex. 12)—a requirement imposed by Section 401 itself, 33 U.S.C. § 1341(a)(1). Pursuant to that requirement, West Virginia has promulgated legislative rules requiring public notice and comment on Section 401 certifications. W. Va. C.S.R. § 47-5A-5.

Because of the importance of those public participation provisions, WVDEP lacks the authority to unilaterally modify a previously issued and duly promulgated Section 401 certification without providing for public notice and comment. *Cf. U.S. v. Smithfield Foods, Inc.*, 191 F.3d 516, 524, 526 (4th Cir. 1999) (upholding district court ruling that prior, valid CWA permit could not be modified by later state agency action that did not comply with procedural requirements); *Citizens for a Better Env't—Calif. v. Union Oil Co. of Calif.*, 83 F.3d 1111, 1120 (9th Cir. 1996) (same). Accordingly, even if WVDEP's November 1, 2017 waiver of its Section 401 authority were to be construed as an attempt to modify the condition of NWP 12 requiring that pipelines greater than 36 inches in diameter or that cross Section 10 rivers possess an individual certification, such an effort would be ineffective as a matter of law.

C. Neither the Corps nor WVDEP can expand the applicability of NWP 12 without formal modification of the permit by the Corps after public notice and comment.

Even if WVDEP had the authority to modify its April 13, 2017 Certification of NWP 12 without EPA's concurrence and had validly exercised that authority, WVDEP lacks the authority to unilaterally modify the terms and conditions of NWP 12. As a result of WVDEP's April 13, 2017 certification of NWP 12, it is now a condition of NWP 12 itself that pipeline projects in West Virginia greater than 36 inches in diameter or that cross Section 10 rivers must possess an

individual water quality certification from WVDEP. 33 U.S.C. § 1341(a); 33 C.F.R. § 330.4(c)(2). As such, that requirement—like any other term or condition of an NWP—can be modified only as the Corps' general permitting regulations allow.

Those regulations are unequivocal: once the Corps issues an NWP, its terms and conditions can be relaxed only by formal modification or wholesale reissuance—both of which require full notice and comment. 33 C.F.R. §§ 330.1(b); 330.5(b). Although the Corps retains some discretion in authorizing projects under an already-issued NWP, it can exercise that discretion "only to *further condition or restrict the applicability* of the NWP." 33 C.F.R. § 330.1(d) (emphasis added). *See also id.* § 330.2(g) (Corps' discretionary authority includes the ability to "add[] conditions" to an NWP authorization). That discretion is a one-way valve that only allows permits to become more stringent. By contrast, the rules plainly provide that "modifications to...existing NWPs" require "the Corps give[] notice and allow[] the public an opportunity to comment on and request a public hearing." *Id.* §§ 330.1(b), 330.5(b).

In short, on April 13, 2017, WVDEP certified NWP 12 under Section 401, subject to the condition that pipelines like MVP's are required to have an individual water quality certification. Ex. 2. The Corps incorporated that requirement as a condition of NWP 12 in West Virginia. Ex. 3 at 20. Because

WVDEP lacks the authority to modify a condition of a NWP after its issuance, its November 1, 2017 waiver can have no effect on the condition in NWP 12 that large-diameter pipelines and those crossing Section 10 rivers must have an individual Section 401 certification. Moreover, the Corps has not purported to reissue NWP 12 or subjected any proposed modification to public notice and comment. Consequently, the Corps' verification of the Pipeline's application to use NWP 12 cannot be construed as a valid modification of NWP 12. The Corps and MVP were thus bound by the terms and conditions of NWP as they existed when the Corps issued its regionally-conditioned NWP 12 on May 17, 2017.

The ultimate result of WVDEP's November 1, 2017 waiver is that MVP is ineligible to use NWP 12 in West Virginia, and, if it is to obtain a Section 404 permit for its discharges, it must obtain an individual permit under 33 U.S.C. § 1344(a). Because the Pipeline cannot satisfy the terms and conditions of NWP 12, the Corps verified the project in contravention of its own regulations and, consequently, federal law. Accordingly, Sierra Club is likely to succeed on the merits of its petition for review.

II. Without Preliminary Relief, Sierra Club Will Suffer Irreparable Harm.

As it snakes some 300-miles up and over the Appalachian Mountains, the Pipeline will inflict significant environmental damage to the forests, streams, and wetlands in its path. Most significant to Sierra Club's claim here are the Pipeline's

impacts to aquatic resources at stream- and wetland-crossings in West Virginia. Those crossings will entail diverting water from the streams using one of three methods, digging a trench through the streambed up to eight-feet deep, placing the 42-inch-diameter pipe in the trench, and backfilling the trench. Ex. 13 at 2-42 to 2-46.

Although it represents only one of the nearly 600 crossings at issue in this case, the Pipeline's proposal to cross the Greenbrier River is a case study in the irreparable harm that will occur absent preliminary relief. Attached to this motion is a report by licensed geologist Dr. Pamela C. Dodds detailing the impacts of that crossing. Ex. 14. Dr. Dodds explains that, because bedrock is present at the Greenbrier crossing site, blasting is unavoidable. *Id.* at 4. Blasting at the crossing site has the potential to directly displace, injure, or even kill aquatic organisms. *Id.* In addition, blasting will further harm fisheries and other aquatic life by increasing turbidity in the Greenbrier or, as FERC recognized in its environmental review of the project, contaminating the water with chemical by-products. *Id.* at 4, 22.

More troubling still, blasting will reduce groundwater recharge, likely altering the flow of groundwater to the wetlands and waterbodies along the Greenbrier River valley. *Id.* at 4. That, in turn, could alter the flow of the Greenbrier itself, especially in times of drought. *Id.* at 22. This is of particular concern because the Greenbrier and its tributaries are within the "Zone of Critical

Concern" for the nearby Big Bend Public Service District, which supplies public water from an intake just downstream of the Pipeline crossing. *Id.* at 3.

For Sierra Club and its members, those impacts will hit close to home. Attached to this motion are declarations from Sierra Club members detailing specific, irreparable harms that will result if construction proceeds as planned. For example, Sierra Club member Tammy Capaldo owns the property on which the Pipeline proposes to cross the Greenbrier River. Ex. 9 at ¶¶1, 3. As explained in her declaration, the Pipeline's construction on her property, including the crossing of the Greenbrier and its water quality effects, would impact Ms. Capaldo's aesthetic and recreational enjoyment of her property and may ultimately lead her to "abandon [her] dream" of living along the river she "hold[s] so dear." *Id.* at ¶¶4, 18, 34. Moreover, Ms. Capaldo is a customer of the Big Bend Public Service District. *Id.* at ¶31.

Maury Johnson—a member of the Sierra Club, the West Virginia Rivers Coalition, the Indian Creek Watershed Association, and the Chesapeake Climate Action Network—owns, operates, and resides on a 160-acre organic farm in Monroe County, West Virginia. Ex. 10 at ¶¶3, 6. As proposed, the Pipeline would cross three streams on his farm, all of which share a hydrologic connection with a domestic water well Mr. Johnson uses for cooking, cleaning, and watering livestock. *Id.* at ¶¶8-9. The three Pipeline crossings will release sediment and other

pollutants into the aquifer that feeds his well or otherwise impact the flow of groundwater so as to render it "unusable." *Id.* at ¶10. And like Ms. Capaldo, Mr. Johnson will suffer aesthetic and recreational injuries as Pipeline construction disturbs wildlife habitats, fishing holes, hiking trails, and even the location where Mr. Johnson was baptized as a young man. *Id.* at ¶¶12, 15-16, 19-20.

The Supreme Court has recognized that environmental harms like those described above, "by [their] very nature, can seldom be adequately remedied by money damages and [are] often permanent or at least of long duration, *i.e.*, irreparable." *Amoco Prod. Co. v. Vill. Of Gambell*, 480 U.S. 531, 545 (1987). *See also Nat'l Audubon Soc'y v. Dep't of Navy*, 422 F.3d 174, 201 (4th Cir. 2005) (same). The requirement that a movant suffer irreparable injury "does not focus on the significance of the injury," but rather whether, "irrespective of its gravity, [it] is irreparable—that is, whether there is any adequate remedy at law." *Sierra Club v. Martin*, 933 F.Supp. 1559, 1570–71 (N.D. Ga. 1996), *rev'd on other grounds*, 110 F.3d 1551 (11th Cir. 1997).

Moreover, the "dredging and filling of wetlands that may occur while [a c]ourt decides [a] case cannot be undone." *Sierra Club v. U.S.A.C.O.E.*, 399 F.Supp.2d 1335, 1348 (M.D. Fla. 2005), *order vac'd in part*, 464 F.Supp.2d 1171 (M.D. Fla. 2006), *aff'd*, 508 F.3d 1332 (11th Cir. 2007). There simply "is no adequate remedy at law to compensate the public for the harm caused by the

disposal of fill material into waters...or in wetlands." *U.S. v. Malibu Beach, Inc.*, 711 F.Supp. 1301, 1313 (D.N.J. 1989). In the words of Ms. Capaldo, the law "simply cannot put a price tag" on those resources. Ex. 9 at ¶33.

III. Preliminary Relief Will Not Substantially Harm the Corps or MVP.

In contrast to the real and permanent environmental harms discussed above, equitable relief would pose only minimal or temporary injury to the Corps and MVP. "Although the Corps has an identifiable interest in defending the validity of permits it has issued and the permitting process itself, the effect of an injunction on these interests seems rather inconsequential." *O.V.E.C. v. U.S.A.C.O.E.* (*O.V.E.C. II*), 528 F.Supp.2d 625, 632 (S.D.W.Va. 2007).

As for MVP, any "[l]oss of anticipated revenues generally does not constitute harm to others affected by injunctions in environmental cases." *Anglers of the AU Sable v. Forest Serv.*, 402 F.Supp.2d 826, 839 (E.D. Mich. 2005) (citing *Nat'l Parks Conservation Ass'n v. Babbitt*, 241 F.3d 722, 738 (9th Cir. 2001)). Monetary loss is relevant to the balance of harms only when it "threatens the very existence of the movant's business." *Wisc. Gas Co. v. F.E.R.C.*, 758 F.2d 669, 674 (D.C. Cir. 1985). *Accord Fed. Leasing, Inc. v. Underwriters at Lloyd's*, 650 F.2d 495, 500 (4th Cir. 1981). This is not such a case, as MVP has maintained that it will build the Pipeline even if construction is delayed until 2019. Ex. 15 at 179-80 (Tr. of Testimony of MVP's Sr. V-P for Constr. & Eng'ing, Robert Cooper).

In any case, temporary delays in construction, and any associated economic loss, cannot outweigh the permanent environmental damages that will occur absent preliminary relief because irreparable environmental injury outweighs economic harm in the balance of equities. *League of Wilderness Defs. v. Connaughton*, 752 F.3d 755, 765 (9th Cir. 2014); *Sierra Club v. U.S.A.C.O.E.*, 645 F.3d 978, 996-97 (8th Cir. 2011). "Money can be earned, lost, and earned again;" but a wetland, once filled, "is gone" forever. *O.V.E.C. II*, 528 F.Supp.2d at 632.

IV. The Public Interest Favors Preliminary Relief.

Where environmental resources are threatened, "the balance of harms will usually favor the issuance of an injunction." *Amoco Prod. Co.*, 480 U.S. at 545. *See also Nat'l Wildlife Fed'n v. Burford*, 676 F.Supp. 271, 279 (D.D.C. 1985). More specifically, the "public has an interest in the integrity of the waters of the United States and in seeing that administrative agencies act within their statutory authorizations and abide by their own regulations." *O.V.E.C. v. Bulen*, 315 F.Supp.2d 821, 831 (S.D.W.Va. 2004). In fact, the CWA itself embodies the "balance Congress sought to establish between economic gain and environmental protection." *O.V.E.C. II*, 528 F.Supp.2d at 633. Ensuring its mandates are thoroughly carried out is therefore always in the public interest. *See*, *e.g.*, *Johnson v. Dep't of Agric.*, 734 F.2d 774, 788 (11th Cir. 1984) ("Congressional intent and statutory purpose can be taken as a statement of public interest.").

CONCLUSION

Because Sierra Club is likely to prevail on the merits and the other factors all favor preliminary relief, Sierra Club respectfully requests that this Court maintain the *status quo* and suspend the Corp's verification of NWP 21 for the Pipeline pending resolution of the merits of Sierra Club's petition for review.

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Respectfully submitted,

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