

**UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION**

_____)	
Mountain Valley Pipeline, LLC)	
_____)	CP16-10-000
Mountain Valley Pipeline Project)	
_____)	

**ANSWER IN OPPOSITION TO REQUEST FOR NOTICE TO PROCEED NO. 1 BY
PRESERVE CRAIG, GREATER NEWPORT RURAL HISTORIC DISTRICT
COMMITTEE, INDIAN CREEK WATERSHED ASSOCIATION, PRESERVE BENT
MOUNTAIN, PRESERVE GILES COUNTY, PROTECT OUR WATER, HERITAGE
AND RIGHTS, SAVE MONROE, SUMMERS COUNTY RESIDENTS AGAINST THE
PIPELINE, PRESERVE MONTGOMERY COUNTY VA, AND PRESERVE MONROE**

Pursuant to 18 C.F.R. § 385.213(a)(3), Preserve Craig, Greater Newport Rural Historic District Committee, Indian Creek Watershed Association, Preserve Bent Mountain, Preserve Giles County, Protect Our Water, Heritage and Rights, Save Monroe, Summers County Residents Against the Pipeline, Preserve Montgomery County VA, and Preserve Monroe (collectively, “Preserve Craig, et al.”) file this answer in opposition to the “Request for Notice to Proceed No. 1,” filed by Mountain Valley Pipeline, LLC (“Mountain Valley”) on January 5, 2018. Mountain Valley has requested that “the Director of the Office of Energy Projects issue a Notice to Proceed with all construction activities for the access roads and yards listed in Attachment A” by January 9, 2018. The Director of the Office of Energy Projects (“OEP”) should deny this request as premature pending the Federal Energy Regulatory Commission’s (“Commission”) decision on the merits of rehearing requests and Mountain Valley’s completion of pre-construction environmental conditions.

I. The Director of OEP Should Not Authorize Construction Until the Commission Issues a Decision on the Merits of Rehearing Requests.

On October 13, 2017, the Commission issued the “Order Issuing Certificates and Granting Abandonment Authority” (“Certificate Order”).¹ Seventeen (17) timely requests for rehearing of that decision were filed pursuant to Natural Gas Act (“NGA”) section 19(a), 15 U.S.C. §717r(a).² That statute requires that a party seek administrative rehearing before the Commission prior to seeking judicial review before the U.S. Court of Appeals.³ The statute on its face provides for rehearing to be completed within 60 days: 30 days for rehearing requests to be filed and 30 days for the Commission to act on such requests.⁴

On rehearing, Preserve Craig, et al. argued that the Certificate Order violated the NGA and National Environmental Policy Act (“NEPA”), and requested that the Commission vacate the decision and remand the matter to its staff for further procedures in accordance with applicable law. Preserve Craig, et al. challenged the Commission’s environmental analysis and approval of the project as a whole based on the administrative record at the time of decision. They concurrently requested a stay of the Certificate Order, arguing that Mountain Valley should not be allowed to begin *any* construction until the challenges to the lawfulness of the Certificate

¹ See eLibrary no. 20171013-4002 (Oct. 13, 2017).

² See eLibrary nos. 20171113-5125, 20171113-5236, 20171113-5259, 20171113-5260, 20171113-5267, 20171113-5277, 20171113-5299, 20171113-5330, 20171113-5331, 20171113-5337, 20171113-5366, 20171113-5371, 20171113-5372, 20171113-5374, 20171113-5375, 20171113-5376, 20171113-5378.

³ See 15 U.S.C. § 717r(a)–(b).

⁴ *Id.*

Order had been resolved.⁵ In support, they cited the irreparable harm that project construction posed to forested lands and groundwater sources.

On December 13, 2017, the Commission issued an “Order Accepting Rehearings for Further Consideration” (“Tolling Order”).⁶ The Commission stated, “rehearing of the Commission’s order is hereby granted for the limited purpose of further consideration, and timely-filed rehearing requests will not be deemed denied by operation of law.”⁷ It did not provide a timeline for a decision on the merits of rehearing. Similarly, the Commission has not yet ruled on the pending requests for stay.

The U.S. Courts of Appeal have held that a party may not seek judicial review of an order that is pending before the Commission on rehearing.⁸ Thus, by issuing an indefinite tolling order, the Commission has blocked parties from seeking timely judicial review under NGA section 19(b). For the Director of OEP to authorize Mountain Valley to begin construction of a challenged project while the Commission is considering the merits of rehearing and stands in the way of judicial review, would be most unjust. It would result in the effective denial of Preserve Craig, et al.’s requested relief in advance of any administrative hearing.

Senator Kaine recently raised this issue with the Commission:

In many cases in which a request for rehearing is filed, FERC issues a tolling order to take more than the allotted 30 days to decide on the request, during which time legal

⁵ Preserve Craig, et al., “Request for Rehearing of Conditional Order Issuing Certificates and Granting Abandonment Authority and Stay,” eLibrary no. 20171113-5372 (Nov. 13, 2017), pp. 52-53.

⁶ See eLibrary no. 20171213- 3061.

⁷ *Id.*

⁸ See, e.g., *ASARCO, Inc. v. F.E.R.C.*, 777 F.2d 764, 772 (D.C. Cir. 1985) (“The course petitioners propose would frustrate the purpose of the application-for-rehearing requirement that § 19(b) makes a condition of judicial review, which is in part ‘to insure that the Commission has an opportunity to deal with any difficulties presented by its action *before* the reviewing court intervenes.’” (quoting *Rhode Island Consumers’ Council v. FPC*, 504 F.2d 203, 212 (D.C.Cir.1974) (emphasis in original)).

options are frozen but construction may proceed. This suggests that even if an original FERC decision changes upon either rehearing or judicial order, it could be moot if the project is already built and any impacts already felt. I would like to know whether this is your interpretation as well, and if so, whether you believe this is consistent with the intent of the rehearing option.⁹

The Director of OEP should reject Mountain Valley's request to begin construction prior to resolution of administrative and judicial appeals as inconsistent with the NGA's provisions granting parties the right to administrative review of a contested order.

II. The Director of OEP Should Not Authorize Construction Until Mountain Valley Completes Pre-Construction Environmental Conditions.

The Certificate Order requires Mountain Valley to complete more than twenty (20) environmental conditions before it may begin construction.¹⁰ Mountain Valley's request to proceed is premature pending its compliance with those pre-construction conditions.

On December 26, 2017, OEP Staff issued the "Post Certificate Environmental Information Request # 1," requesting that Mountain Valley provide information to evaluate Mountain Valley's "completion of compliance with Environmental Conditions appended" to the Certificate Order.¹¹ Mountain Valley filed its responses on January 5, 2017, the same day it filed the "Request for Notice to Proceed No. 1." The OEP Director should not grant Mountain Valley's request until it has independently reviewed and confirmed that the responses demonstrate completion of compliance. Based on Preserve Craig, et al.'s review, the information provided does not demonstrate such compliance.

⁹ Letter from Hon. Tim Kaine to Chair Kevin J. McIntyre (Jan. 5, 2018), *available at* <https://www.kaine.senate.gov/press-releases/kaine-calls-for-ferc-rehearing-on-mountain-valley-and-atlantic-coast-pipelines>.

¹⁰ See Certificate Order, Appendix C, Environmental Conditions 12 -33.

¹¹ eLibrary no. 20171226-3020.

For example, Mountain Valley has not yet complied with Environmental Condition No. 15, which requires that Mountain Valley file all

- b. remaining cultural resources survey reports;
- c. site evaluation reports, avoidance plans, or treatment plans, as required; and comments on the reports and plans from the appropriate State Historic Preservation offices, federal land managing agencies, interested Indian tribes, and other consulting parties...
- e. the FERC staff reviews and the Director of OEP approves all cultural resources reports and plans, and notifies Mountain Valley and/or Equitrans in writing that either treatment measures ... may be implemented or construction may proceed.

According to Mountain Valley's "Response to Post Order Environmental Information Request," Mountain Valley still has not obtained the West Virginia State Historic Preservation Office's (SHPO) review or comments on seven (7) cultural resource reports, or the Virginia SHPO's review or comments on seventeen (17) cultural resource reports.¹² Mountain Valley is also still consulting with the Virginia SHPO and other consulting parties regarding the resolution of adverse effects on several historic districts and treatment plans to address any adverse effects that cannot be avoided, and Commission Staff have not approved those Treatment Plans.¹³

In another example, Mountain Valley has not complied with Environmental Condition No. 32, which requires, "[p]rior to construction, Mountain Valley shall file with the Secretary documentation that The Nature Conservancy (TNC) Property Crossing Plan was provided to the

¹² Mountain Valley, "Response to Post Order Environmental Information Request," eLibrary no. 20180105-5141 (Jan. 5, 2018) ("Response to Post-Order EIR"), pp. 13-14.

¹³ Pursuant to the Programmatic Agreement executed under National Historic Preservation Act section 106 to protect historic resources in Virginia, consulting parties submitted comments on Mountain Valley's proposed Treatment Plans for the Big Stony Creek Historic District, the Greater Newport Rural Historic District, the Bent Mountain Rural Historic District, and the Coles-Terry Rural Historic District on January 4, 2018. Neither Mountain Valley nor Commission Staff have responded to those comments.

TNC for review and comment.”¹⁴ It is Preserve Craig, et al.’s understanding that Mountain Valley has not yet provided a crossing plan that includes mitigation measures to avoid, minimize, or mitigate impacts on the Woltz conservation easement. In fact, on January 5, 2018, Mountain Valley responded that it could not confirm that it had provided the April 21, 2016 crossing plan to TNC for review and comment.¹⁵ Its response suggested that Environmental Condition No. 32 could be satisfied by constructively providing TNC an outdated crossing plan that did not address any of the errors or omissions identified in TNC’s comments, and without consulting with TNC in the intervening twenty (20) months to address their concerns.¹⁶ That interpretation is inconsistent with the Commission’s rules¹⁷ and OEP Staff’s analysis in the Final EIS, and would render Environmental Condition No. 32 meaningless. Rather, Environmental Condition No. 32 requires Mountain Valley to provide TNC with an updated crossing plan that correctly identifies the impacted resources and proposes measures that would mitigate those impacts, which it has not done.

III. CONCLUSION

Preserve Craig, et al. requests that the Director of OEP deny Mountain Valley’s Request to Proceed No. 1 pending resolution of the rehearing requests and Mountain Valley’s compliance with pre-construction conditions.

¹⁴ Certificate Order, Appendix C, Environmental Condition 32 (bold in original).

¹⁵ Response to Post Order EIR, p. 3.

¹⁶ *Id.*

¹⁷ 18 C.F.R. § 380.15(a) – (b). *See also* 18 C.F.R. § 380.12(e)(7) (requiring applicant to describe site-specific mitigation measures to minimize impacts on fish and wildlife); FERC, “Statement of Policy: Certification of New Interstate Natural Gas Pipelines” (1999), Docket No. PL99-3-000, p. 15 (“As part of its environmental review of pipeline projects, the Commission’s environmental staff works to take ... landowners’ concerns into account, and to mitigate adverse impacts where possible and feasible”).

Dated: January 9, 2018

Respectfully submitted,



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SAVE MONROE

/s/ Susan Bouldin

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PRESERVE MONTGOMERY COUNTY
VA

/s/ Roseanna Sacco

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PRESERVE MONROE

DECLARATION OF SERVICE

Mountain Valley Pipeline, LLC's Mountain Valley Pipeline Project (CP16-10-000)

I, Tiffany Poovaiah, declare that I today served the attached "Answer in Opposition to Request for Notice to Proceed No. 1 by Preserve Craig, Greater Newport Rural Historic District Committee, Indian Creek Watershed Association, Preserve Bent Mountain, Preserve Giles County, Protect Our Water, Heritage and Rights, Save Monroe, Summers County Residents Against the Pipeline, Preserve Montgomery County VA, and Preserve Monroe" by electronic mail, or by first-class mail if no e-mail address is provided, to each person on the official service list compiled by the Secretary in this proceeding.

Dated: January 9, 2018

By:



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