

173 FERC ¶ 61,252
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: James P. Danly, Chairman;
Neil Chatterjee and Richard Glick.

Mountain Valley Pipeline, LLC

Docket No. CP16-10-000

ORDER PARTIALLY LIFTING STOP WORK ORDERS AND ALLOWING
CERTAIN CONSTRUCTION TO RESUME

(Issued December 17, 2020)

1. On October 15, 2020, Mountain Valley Pipeline, LLC (Mountain Valley) filed a request for authorization to resume certain construction activities for the Mountain Valley Pipeline Project. For the reasons discussed below, this order partially authorizes Mountain Valley's request.

I. Background

2. On October 13, 2017, the Commission issued Mountain Valley a certificate of public convenience and necessity authorizing the construction and operation of the Mountain Valley Pipeline Project.¹ Mountain Valley commenced construction of the project in February 2018.²

3. On July 27, 2018, the U.S. Court of Appeals for the Fourth Circuit issued an order vacating authorizations issued by the Department of the Interior's Bureau of Land Management (BLM) and the Department of Agriculture's Forest Service (Forest Service) for the project.³ Thereafter, on August 3, 2018, Commission staff issued a Notification

¹ *Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043 (2017), *order on reh'g*, 163 FERC ¶ 61,197 (2018), *aff'd sub. nom. Appalachian Voices v. FERC*, No. 17-1271, 2019 WL 847199 (D.C. Cir. Feb. 19, 2019) (unpublished).

² *See* Mountain Valley's Weekly Status Report Nos. 14 and 15 (filed February 7 and 15, 2018, respectively) (construction did not commence until after February 2, 2018).

³ *Sierra Club, Inc. v. U.S. Forest Serv.*, 897 F.3d 582 (4th Cir. 2018) (vacating the authorization for the pipeline to cross approximately 3.5 miles of the Jefferson National Forest in West Virginia and Virginia).

of Stop Work Order for the project;⁴ subsequently, on August 29, 2018, Commission staff authorized partial construction to resume, based on staff's assessment that completing construction and restoration as quickly as possible would best protect the environment (together, August 2018 Stop Work Order).⁵ Staff did not allow construction to resume between mileposts 196.0 and 221.0 (25-mile exclusion zone), an area encompassing the two watersheds containing the 3.5 miles of pipeline right-of-way that cross the Jefferson National Forest.⁶ Staff designated a conservative exclusion zone, using the U.S. Geological Survey's designation for hydraulic unit code 12 (HUC-12) watersheds, in order to ensure Mountain Valley would not engage in any activities that could impact waterbodies in the Jefferson National Forest pending subsequent analysis of project turbidity and sedimentation.

4. On October 11, 2019, the U.S. Court of Appeals for the Fourth Circuit issued an order granting a stay of the November 2017 Biological Opinion and Incidental Take Statement issued by the U.S. Fish and Wildlife Service (FWS) for the project.⁷ On October 15, 2019, Commission staff issued a Cessation of Certain Activities Order for the project, directing Mountain Valley to cease construction activity along all portions of the project, except for work to restore and stabilize the right-of-way, which staff believed would be more protective of the environment than leaving the area in an unstable condition (October 2019 Cessation Order).⁸

⁴ *Mountain Valley Pipeline LLC*, Notification of Stop Work Order, Docket No. CP16-10-000 (August 3, 2018) (delegated order).

⁵ *Mountain Valley Pipeline LLC*, Docket No. CP16-10-000 (August 29, 2018) (delegated order) (Director of OEP's August 29, 2018 Partial Authorization to Resume Construction Order).

⁶ In addition, the August 2018 Stop Work Order also prohibited construction at the crossing of the Weston and Gauley Bridge Turnpike on lands owned by the U.S. Army Corps of Engineers, in Braxton County, West Virginia. On October 24, 2020, Commission staff allowed construction at the crossing to resume.

⁷ *Wild Virginia, Inc. v. Dep't of the Interior*, No. 19-1866 (4th Cir. Oct. 11, 2019) (order granting stay and holding case in abeyance).

⁸ *Mountain Valley Pipeline LLC*, Docket No. CP16-10-000 (October 15, 2019) (delegated order) (Director of OEP's October 15, 2019 Cessation of Certain Activities Order).

5. Following reinitiated consultation under section 7 of the Endangered Species Act, on September 4, 2020, FWS issued a revised Biological Opinion and Incidental Take Statement for the project.⁹

6. On September 22, 2020, as supplemented on September 25, 2020, Mountain Valley Pipeline, LLC (Mountain Valley) filed a request for authorization to resume certain construction activities for the Mountain Valley Pipeline Project. Specifically, Mountain Valley requested that the Commission: (1) lift the October 2019 Cessation Order; (2) approve construction of the Greene Interconnect Project; (3) provide final approval for the Roanoke River bore, and (4) modify the August 2018 Stop Work Order to allow construction in the 25-mile exclusion zone except for the segments from mileposts 196.2 to 201.6 and 218.6 to 220.9.

7. On October 9, 2020, the Commission issued an order partially authorizing Mountain Valley's September 22, 2020 request (October 2020 Order).¹⁰ The Commission allowed construction along all portions of the project to resume, except for construction within the 25-mile exclusion zone.¹¹ The Commission did not approve Mountain Valley's request to reduce the 25-mile exclusion zone around the Jefferson National Forest, stating that Mountain Valley had not provided sufficient information to support its request but noting that "subsequent review of Mountain Valley's analysis may confirm that potential sedimentation from these areas would not impact the Jefferson National Forest" ¹²

8. On October 15, 2020, Mountain Valley filed a request that the Commission reduce the exclusion zone around the Jefferson National Forest and allow construction to resume outside of the proposed reduced exclusion zone. As support for its request, Mountain Valley provided: (1) detailed figures showing the results of its sedimentation modeling for the 25-mile exclusion zone on a catchment-by-catchment level;¹³ and (2) an elevation chart representing the ground elevation along the project alignment between mileposts

⁹ See Commission staff's September 4, 2020 Memo (providing FWS's revised Biological Opinion).

¹⁰ *Mountain Valley Pipeline, LLC*, 173 FERC ¶ 61,027 (2020) (October 2020 Order).

¹¹ *Id.* P 47.

¹² *Id.* P 24.

¹³ A catchment is a topographically defined drainage basin where precipitation and stormwater runoff drains into a common outlet such as a stream.

196.0 and 221.0 to demonstrate that construction within the requested non-federal lands will not drain into the Jefferson National Forest.

II. Discussion

9. Commission staff has reviewed Mountain Valley's request and supporting information and, based on this review, we agree that project construction activities in the area from milepost 201.6 to 218.6 would not contribute sediment to any portion of the Jefferson National Forest or contribute sediment or turbidity to any waterbody that subsequently flows into the Jefferson National Forest.

10. A number of individuals and organizations filed comments objecting to Mountain Valley's request to reduce the size of the exclusion zone. Indian Creek Watershed Association and Preserve Monroe state that the land immediately adjacent to the Jefferson National Forest, located on Peters Mountain, is comprised of steep slopes and a karst system at the base of the mountain.¹⁴ They claim that the trees that have been felled in this area, and which have been left on the right-of-way, are preventing erosion, and that the clearing of vegetation and stumps and grading should not be permitted this late in the year as it would be harmful to the environment, including water resources and threatened and endangered species.¹⁵

11. As stated in our October 2020 Order, completion of construction and final restoration, where permitted, is best for the environment and affected landowners.¹⁶ As trees were felled in the right-of-way, including between mileposts 201.6 to 218.6, prior to the August 2018 Stop Work Order, a disturbed right-of-way already exists. These areas will experience temporary increases in sediment yields when construction resumes; however, mitigation measures including the Commission's *Upland Erosion Control, Revegetation, and Maintenance Plan* (FERC Plan) and *Wetland & Waterbody Construction and Mitigation Procedures* (Procedures) and Mountain Valley's Winter

¹⁴ Indian Creek Watershed Association's October 19, 2020 Comments at 2; Preserve Monroe's October 16, 2020 Comments at 2.

¹⁵ Indian Creek Watershed Association's October 19, 2020 Comments at 2-3; Preserve Monroe's October 16, 2020 Comments at 2. Additionally, Indian Creek Watershed Association, Preserve Monroe, and others claim that the 25-mile exclusion zone should be extended. We find these claims to be unsubstantiated. Based on Commission staff's review of Mountain Valley's catchment definition and sedimentation analysis, an extension of the exclusion zone is not warranted.

¹⁶ October 2020 Order, 173 FERC ¶ 61,027 at PP 28-32.

Construction Plan¹⁷ along with mandatory environmental conditions in the Certificate Order for the Project provide a framework to ensure the protection of the environment during construction of the Project. In addition, the eventual successful completion of permanent restoration and establishment of perennial vegetation would have environmental benefits compared to the currently disturbed right-of-way and the ongoing maintenance of temporary erosion controls.

12. Sierra Club states that the Commission should solicit feedback on Mountain Valley's request from the Forest Service "in light of the 'bureaucratic steam roller' effect such a decision would have on the Forest Service's process."¹⁸ Relatedly, Protect Our Water, Heritage, Rights and Preserve Giles County state that reducing the exclusion zone would be an "irretrievable commitment to resources, in violation of [the National Environmental Policy Act], while the public is still reviewing and commenting on the [Forest Service/BLM] Draft Supplemental Environmental Impact Statement."¹⁹

13. A Practicality Analysis was conducted by BLM in 2018, which found that none of the alternative routes analyzed would be practical and result in greater collocation on federal lands than the currently proposed route through the Jefferson National Forest.²⁰ In September 2020, BLM prepared an addendum to its 2018 analysis, in which two additional alternative routes were analyzed. In the addendum, BLM concluded that "neither of these alternatives represent a practical alternative that provides for greater

¹⁷ The Winter Construction Plan outlines special procedures and best management practices that are implemented during the winter season construction period, including stabilization and erosion and sediment control measures.

¹⁸ Sierra Club's October 16, 2020 Comments at 2 (quoting *Sierra Club v. Marsh*, 872 F.2d 497, 504 (1st Cir. 1989)).

¹⁹ Protect Our Water, Heritage, Rights' October 16, 2020 Comments at 1; Preserve Giles County's October 19, 2020 Comments at 1. The Forest Service and BLM have prepared a Supplemental Environmental Impact Statement in response to the Fourth Circuit's decision vacating its prior authorization. The Forest Service and BLM issued a Draft Supplemental Environmental Impact Statement on September 25, 2020, and a Final Supplemental Environmental Impact Statement on December 11, 2020.

²⁰ Forest Service and BLM's September 25, 2020 Draft Supplemental Environmental Impact Statement, Supporting Documents – 2018 Practicality Analysis.

collocation on federal land.”²¹ Accordingly, as we have noted previously,²² the record gives us no reason to assume that there will be a change to the proposed route through the Jefferson National Forest,²³ and authorizing the resumption of work outside of the Jefferson National Forest is permissible and does not improperly limit options available to BLM and Forest Service.

14. For the reasons discussed above, we approve Mountain Valley’s request to resume construction activities between mileposts 201.6 to 218.6.²⁴ We modify Commission staff’s August 2018 Stop Work Order and October 2019 Cessation Order accordingly.

The Commission orders:

(A) The Director of OEP’s August 29, 2018 Partial Authorization to Resume Construction Order is modified as described in the body of this order

(B) The Director of OEP’s October 15, 2019 Cessation of Certain Activities Order, as subsequently modified by the Commission’s October 9, 2020 order, is modified as described in the body of this order.

By the Commission. Commissioner Glick is dissenting with a separate statement attached.

Commissioner Clements is not participating.

(S E A L)

Kimberly D. Bose,
Secretary.

²¹ Forest Service and BLM’s September 25, 2020 Draft Supplemental Environmental Impact Statement, Supporting Documents – September 2, 2020 BLM Practicality Analysis Addendum at 4.

²² See October 2020 Order, 173 FERC ¶ 61,027 at P 22.

²³ Additionally, we note that the preferred alternative in the Forest Service and BLM’s Final Supplemental Environmental Impact Statement, issued on December 11, 2020, is the currently proposed route.

²⁴ Based on the precision of the materials Mountain Valley provided, Commission staff recommends that the segments from mileposts 196.0 to 196.2 and 220.9 to 221.0 remain inside the exclusion zone, and we agree.

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Mountain Valley Pipeline, LLC

Docket No. CP16-10-000

(Issued December 17, 2020)

GLICK, Commissioner, *dissenting*:

1. Today's order grants Mountain Valley Pipeline, LLC (MVP) authorization to resume construction activities in the 25-mile exclusion zone bordering the Jefferson National Forest. That is a serious mistake. Since the Commission authorized the MVP Pipeline Project (Project), the federal courts have repeatedly invalidated the various federal permits that MVP requires to complete its route. As a result, MVP is still missing necessary permits, including authorization to cross the Jefferson National Forest. Given the MVP permits' checkered litigation record, we should not authorize MVP to commence piece-meal construction, including construction affecting a national forest, before it has all the permits needed to complete the Project along its current route.¹

2. MVP obtained its original certificate from the Commission in October 2017.² A condition of that certificate—Environmental Condition 9—required MVP to show that it had all necessary permits required under federal law before it could begin construction.³ On January 22, 2018, Commission staff authorized MVP to commence construction after finding that it had satisfied that condition.⁴ Ever since, the courts have invalidated one MVP permit after another, repeatedly bringing construction to a halt.⁵ For example, in 2018, the U.S. Court of Appeals for the Fourth Circuit vacated the authorization to cross

¹ *Mountain Valley Pipeline, LLC*, 173 FERC ¶ 61,027 (2020) (Glick, Comm'r, dissenting at P 1).

² *Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043 (2017).

³ *Id.* App. C, Environmental Condition 9.

⁴ See Branch Chief's January 22, 2018 Notice to Proceed with Construction at Certain Yards and Access Roads issued in Docket No. CP16-10-000.

⁵ Director of the Office of Energy Projects' August 3, 2018 Notification of Stop Work Order issued in Docket No. CP16-10-000; MVP also voluntarily suspended work in waters of the United States after the court vacated nationwide permits. See Mountain Valley's October 9 and 22, 2018 Letters; Director of OEP's October 15, 2019 Cessation of Certain Activities Order issued in Docket No. CP16-10-000.

the Jefferson National Forest issued by the Bureau of Land Management (BLM) and the U.S. Forest Service⁶ as well as the U.S. Army Corps of Engineers' (Corps) Nationwide Permit No. 12.⁷ In addition, the Fourth Circuit also stayed the U.S. Fish and Wildlife Service's (FWS) Biological Opinion and Incidental Take Statement for the Project.⁸ And, earlier this month, the Fourth Circuit stayed the recently reissued Nationwide Permit No. 12, depriving MVP of authority to cross more than 400 wetlands and waterbodies along the Project route.⁹

3. Under those circumstances, we should not be allowing MVP to recommence construction at this time. As an initial matter, I believe that allowing MVP to recommence construction without all necessary permits violates Environmental Condition 9 of its certificate. As noted, Environmental Condition 9 requires MVP to secure all federal permits before it can take any action to construct the pipeline.¹⁰ The most logical interpretation of that condition is that, to the extent MVP lacks federal permits, it should not be allowed to begin any construction along the pipeline, including by recommencing construction that was halted due to court order.

4. Although unstated in today's order, the Commission has previously taken the position that Environmental Condition 9 is relevant only when a project developer first begins construction.¹¹ That interpretation is nonsensical and waters down an important environmental and landowner protection measure. If the public interest requires a pipeline to have its ducks in a row when it first begins construction, I see no reason why it is not equally important to require the pipeline to meet the same condition every time it recommences construction, especially after having a necessary permit invalidated by court order. The Commission's failure to take Environmental Condition 9 seriously, and

⁶ *Sierra Club, Inc. v. U.S. Forest Serv.*, 897 F.3d 582 (4th Cir. 2018).

⁷ *Sierra Club v. U.S. Army Corps of Eng'rs*, 905 F.3d 285 (4th Cir. 2018).

⁸ *Wild Virginia, Inc. v. U.S. Dep't of the Interior*, No. 19-1866 (4th Cir. Oct. 11, 2019).

⁹ *Sierra Club v. U.S. Army Corps of Eng'rs*, No. 20-2039, No. 20-2042, 2020 WL 7039300 (4th Cir. Dec. 1, 2020). In response, MVP has sought an amendment to its certificate seeking a major design change regarding its method for crossing those wetlands and waterbodies. See Mountain Valley Pipeline, LLC's November 18, 2020 Abbreviated Application for Limited Amendment to Certificate of Public Convenience and Necessity and Request for Expedited Action.

¹⁰ *Mountain Valley*, 173 FERC ¶ 61,027 (Glick, Comm'r, dissenting at P 7).

¹¹ *Id.* P 18.

its contention that the condition is relevant only when a pipeline first commences construction, makes the condition look like an excuse for justifying the Commission's practice of granting conditional certificates and not a serious attempt to protect the environment or the public interest. It is that kind of hand-waving analysis that has earned the Commission a reputation for "rubber stamping" interstate natural gas pipelines.

5. Allowing MVP to recommence construction now is also bad policy. The 25-mile exclusion zone abutting the Jefferson National Forest is designed to protect the critical resource that is the national forest, particularly wetlands within the forest, and we should not be undermining those protections before BLM and the Forest Service decide whether to reissue MVP's authorization to cross the forest lands, along with whatever new protections it may require. In any event, as I have previously explained, allowing MVP to take actions that may harm the Jefferson National Forest or affect the pending route approvals puts the cart before the horse in a way that is inconsistent with our responsibility to the public interest. Particularly given the history of this proceeding, and the numerous defeats that MVP's permits have suffered in court, the Commission should demand an affirmative reason to believe that the Project will go forward as planned, such as having all necessary permits, before authorizing additional construction.

6. In response, the Commission takes the bewildering position that because "the record gives . . . no reason to assume that there will be a change to the proposed route," it will assume that the project will go ahead on the current route.¹² That type of perfunctory reasoning simply does not cut it. It is the Commission's job to protect the public interest throughout construction of a new pipeline and we are not taking that responsibility seriously if we brush aside concerns about the invalidated permits and treat the absence of conclusive evidence that the pipeline route will change as a basis to assume that a project will go forward as planned, even while key permits remain outstanding. Once again, that approach is exactly what earns this Commission its unfortunate reputation as a rubber stamp.

For these reasons, I respectfully dissent.

Richard Glick
Commissioner

¹² *Mountain Valley Pipeline, LLC*, 173 FERC ¶ 61,252, at P 13 (2020).