

**ORAL ARGUMENT HAS NOT BEEN SCHEDULED**

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**In the United States Court of Appeals  
for the District of Columbia Circuit****Nos. 17-1271, 18-1002, 18-1175, 18-1177, 18-1186, 18-1216 & 18-1223 (consolidated)**

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APPALACHIAN VOICES, *ET AL.*,  
*Petitioners,*

v.

FEDERAL ENERGY REGULATORY COMMISSION,  
*Respondent.*

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ON PETITIONS FOR REVIEW OF ORDERS OF THE  
FEDERAL ENERGY REGULATORY COMMISSION

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**RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION'S  
OPPOSITION TO THE AUGUST 17, 2018 EMERGENCY MOTION FOR STAY  
OF BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE, *ET AL.***

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August 23, 2018

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**GLOSSARY**

Advisory Council	Advisory Council on Historic Preservation
Blue Ridge or Movants	Collectively, Blue Ridge Environmental Defense League, Ben Rhodd and Steve Vance, Tribal Historic Preservation Officers for the Rosebud Sioux Tribe and the Cheyenne River Sioux Tribe, Preserve Montgomery County VA, and Mike and Elizabeth Reynolds.
Certificate Order	<i>Mountain Valley Pipeline, LLC</i> , 161 FERC ¶ 61,043 (2017)
Commission or FERC	Federal Energy Regulatory Commission
EIS	Environmental Impact Statement
Mountain Valley	Mountain Valley Pipeline, LLC
Preservation Officers	Ben Rhodd and Steve Vance, Tribal Historic Preservation Officers for the Rosebud Sioux Tribe and the Cheyenne River Sioux Tribe
Project	Mountain Valley Pipeline Project
Programmatic Agreement	Programmatic Agreement for the Mountain Valley Pipeline Project between FERC, the Advisory Council, State Historic Preservation Offices of West Virginia and Virginia, Forest Service, Bureau of Land Management, and the National Park Service
Rehearing Order	<i>Mountain Valley Pipeline, LLC</i> , 163 FERC ¶ 61,197 (2018)

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**INTRODUCTION**

Petitioners Blue Ridge Environmental Defense League, *et al.* (collectively Blue Ridge or movants)<sup>1</sup> return to this Court for the second time seeking, again, the extraordinary remedy of indefinitely delaying the Mountain Valley Pipeline Project

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<sup>1</sup> The emergency motion was filed by petitioners in case no. 18-1177: Blue Ridge Environmental Defense League, Ben Rhodd and Steve Vance, Tribal Historic Preservation Officers for the Rosebud Sioux Tribe and the Cheyenne River Sioux Tribe (Preservation Officers), Preserve Montgomery County VA, and Mike and Elizabeth Reynolds. Blue Ridge Environmental Defense League is also a petitioner in case no. 18-1002.



(Project). In February 2018, the Court denied Blue Ridge's initial request for a stay, finding that it had failed to satisfy the stringent standards for such extraordinary relief. *See Appalachian Voices v. FERC*, No. 17-1271, *et al.* (D.C. Cir. Feb. 2, 2018) (denying motions for stay and a petition for writ of mandamus).<sup>2</sup>

Blue Ridge's current emergency motion comes two weeks after FERC staff issued an order directing Mountain Valley Pipeline, LLC (Mountain Valley) to *halt* all construction activity associated with the Project. While FERC staff has since permitted limited construction activities between mileposts 0-64 and 71-77 in West Virginia, the urgent need for extraordinary action by this Court is premised upon the purported threat to a parcel of property that appears to be located nearly 200 miles away in Virginia, where construction activity remains halted. In short, Blue Ridge has offered no justification for interrupting the ordinary process of judicial review that is well underway and which will have this case fully briefed by the end of December. *See Appalachian Voices v. FERC*, Nos. 17-1271, *et al.* (D.C. Cir. Aug. 16, 2018) (amended briefing schedule).

The Fourth Circuit, the home of the Project, has also declined to interrupt the Commission's review of the Project or disrupt the normal course of judicial review

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<sup>2</sup> Blue Ridge purports to incorporate the arguments raised by another petitioner, Appalachian Voices, in its January 2018 motion for stay and petition under the All Writs Act filed by that party. Motion at 3. The Court rejected those arguments in its February 2, 2018 Order.

of FERC action, as contemplated under the Natural Gas Act. Just last month, that court of appeals affirmed the district court's dismissal of a constitutional challenge (based on landowner concerns with eminent domain rights that attach to the FERC-issued certificate) that would have halted forward progress of the Project. *Berkeley v. Mountain Valley Pipeline and FERC*, 896 F.3d 624 (4th Cir. July 25, 2018); *see id.* at 631 (“meaningful judicial review” available in the court of appeals after the Commission issues a rehearing order; “Congress contemplated construction would be allowed to continue while FERC reviews a petition for rehearing”). *See also* Order, No. 18-1042 (4th Cir. Feb. 15, 2018) (denying an emergency motion under the All Writs Act to prevent the exercise of eminent domain authority pending judicial review). And in June, in *Bold Alliance v. FERC*, No. 18-1533 (4th Cir. June 7, 2018), the Fourth Circuit denied a motion for stay pending judicial review of a petition challenging the authority of FERC officials to issue notices to proceed with pipeline construction.<sup>3</sup>

These decisions involving the Mountain Valley Pipeline Project are consistent with a uniform line of federal appellate and district court decisions rejecting similar efforts to halt the effectiveness of FERC natural gas infrastructure

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<sup>3</sup> On August 14, 2018, in case nos. No. 17-2399, *et al.*, a group of environmental and landowner petitioners asked the Fourth Circuit to stay all construction of the Project. That motion remains pending.

decisions prior to judicial review on the merits. Over the last seven years, on review of FERC natural gas certificate decisions, the courts of appeals and district courts have rejected all such efforts, including most recently:

- *Appalachian Voices v. FERC*, No. 18-1114 (4th Cir. Mar. 21, 2018) (denying motion for stay and petition for writ of mandamus concerning Commission's conditional approval of the Atlantic Coast Pipeline);
- *Coalition to Reroute Nexus v. FERC*, Nos. 17-4302 and 17-4308 (6th Cir. Mar. 15, 2018) (denying motions for stay and petition for writ of mandamus concerning Commission's approval of Nexus pipeline);
- *Allegheny Def. Project v. FERC*, Nos. 17-1098, *et al.* (D.C. Cir. Feb. 16, 2018 & Nov. 8, 2017) (twice denying stay of pipeline construction based on challenge to FERC's indirect impacts analysis of Atlantic Sunrise Pipeline);
- *N.Y. State Dep't of Envtl. Conservation & Protect Orange Cnty. v. FERC*, Nos. 17-3770 & 17-3966 (2d Cir. Dec. 7 & 15, 2017) (denying stays of Millennium pipeline construction based on Clean Water Act waiver and bald eagle protection);
- *Adorers of the Blood of Christ v. FERC*, No. 5:17-cv-3163 (E.D. Pa. Sept. 28, 2017) (denying preliminary injunction to stop pipeline construction pending religious freedom challenge), *aff'd*, 879 F.3d 197 (3d Cir. July 25, 2018); and
- *Urban v. FERC*, No. 17-1005, 2017 WL 6461823 (N.D. Ohio Dec. 19, 2017) (dismissing challenge to FERC pipeline order for lack of subject matter jurisdiction and denying preliminary injunction).<sup>4</sup>

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<sup>4</sup> Other stay denials are listed at pages 3-4 of FERC's July 27, 2018 opposition to a motion to stay the Project filed July 20, 2018 by other petitioners in D.C. Cir. Nos. 17-1271, *et al.*

There is no basis for reaching a different result here. The requested stay would upset the Commission's public interest balance and imperil the Project. It should therefore be denied.

## BACKGROUND

### A. The Certificate And Rehearing Orders

This case arises from the Commission's issuance of a conditional certificate of "public convenience and necessity" for the Mountain Valley Pipeline Project, a 303.5-mile-long new pipeline system running from Wetzel County, West Virginia to Pittsylvania County, Virginia. *Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043, at P 1 (2017) (Certificate Order), *reh'g denied*, 163 FERC ¶ 61,197 (2018) (Rehearing Order).<sup>5</sup> Before issuing the certificate, the Commission balanced the public benefits of the Project against potential adverse consequences (*see* Certificate Order, 161 FERC ¶ 61,043 at PP 30-31) and determined that the Project is "required by the public convenience and necessity" (*id.* P 62), and would "develop gas infrastructure that will serve to ensure future domestic energy supplies and enhance the pipeline grid by connecting sources for natural gas to markets in the Northeast, Mid-Atlantic, and Southeast regions." *Id.* P 41.

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<sup>5</sup> The Certificate Order also authorized Equitrans, L.P. to modify its transportation system to provide additional service from western Pennsylvania to an interconnect with the Project in West Virginia. 161 FERC ¶ 61,043 at P 1-2. Blue Ridge does not raise any issue with respect to that decision.

Consistent with its responsibilities under the Natural Gas Act and the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.*, the Commission considered all views in both its Certificate and Rehearing Orders and its comprehensive Environmental Impact Statement (EIS) for the Project. The environmental review included the consideration of more than 400 oral comments made at 13 public comment sessions and more than 2,000 written comments. *See* Certificate Order, 161 FERC ¶ 61,197 at PP 122-23, 127-28. While the Commission found that the Project would result in some adverse environmental impacts, it concluded that virtually all of those impacts would be reduced to less-than-significant levels by compliance with 33 mandatory conditions to avoid, minimize, and mitigate potential environmental impacts associated with the Project. *See id.* P 130 and App. C.

**B. The Commission Has Issued A Stop Work Order**

In a July 27, 2018 decision, the Fourth Circuit remanded for further consideration the U.S. Forest Service's decision to amend the Jefferson National Forest Land Resource Management Plan to accommodate the Project's right-of-way and pipeline construction. *Sierra Club, Inc. v. U.S. Forest Serv.*, Nos. 17-2399, *et al.*, 2018 WL 3595760, at \*1 (4th Cir. July 27, 2018).<sup>6</sup> That court also

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<sup>6</sup> The Project will pass through the Jefferson National Forest for a total of 3.5 miles in three segments between Project mileposts 196.2 and 197.8, mileposts

found that, because the Bureau of Land Management did not expressly find that the use of an existing right-of-way would be impracticable, that agency failed to comply with the dictates of the Mineral Leasing Act. *Id.* at \*16.

On August 3, 2018, in response to the Fourth Circuit's decision, the Director of FERC's Office of Energy Projects issued an order directing Mountain Valley to immediately cease all construction activity along the entire pipeline route. (A copy of the August 3 order is attached as Exhibit 1.) In recognition that an immediate cessation of construction activities could have significant safety and environmental impacts, the order excepted those "measures deemed necessary by those land managing agencies or FERC staff to ensure the stabilization of the right of way and work areas." *See* Exhibit 1 at 1. The Commission directed Mountain Valley to submit for approval a plan to stabilize the right-of-way and work areas during the work stoppage period.

On August 10, 2018, the Director issued an order approving portions of Mountain Valley's stabilization plan. (A copy of the August 10 order is attached as Exhibit 2.) On August 20, 2018, the Director further authorized Mountain Valley to conduct stabilization activities (completion of certain bores, limited

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218.5 and 219.4, and mileposts 219.8 and 220.8. *See* Certificate Order, 161 FERC ¶ 61,043 at P 223.

trenching and pipe laying activities) in six areas of special environmental concern.

(A copy of the August 20 letter is attached as Exhibit 3).<sup>7</sup>

**C. The Commission Has Permitted Limited Construction Activities In West Virginia To Minimize Environmental Impacts**

In an August 15, 2018 order, the Director of FERC's Office of Energy Projects explained that FERC staff had determined that protection of the environment along the Project right-of-way would be best served by permitting construction activities between milepost 0 and milepost 77, excluding the right-of-way between mileposts 64 and 71. (A copy of the August 15 order is attached as Exhibit 4.) Eighty percent of this segment has been cleared and, at some points, pipe has been brought to the right-of-way, trenching has occurred, and some pipe is already in the ground. *See* Exhibit 4 at 1. In light of these circumstances, FERC staff concluded that completing construction and restoration activities would protect the environment to the maximum extent possible while the relevant agencies determine how to comply with the Fourth Circuit's July 27 decision. By contrast, simply maintaining current conditions could have adverse consequences:

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<sup>7</sup> The six areas are (1) along the Blue Ridge Parkway, and between mileposts (2) 98.8-99.0, (3) 179.09-179.10, (4) 224.5-224.8, (5) 245.88-245.89, and (6) 247.8-248.3. *See* Aug. 17, 2018 letter from Mountain Valley to FERC (available on FERC's public filing system at [https://elibrary.ferc.gov/idmws/file\\_list.asp?document\\_id=14697913](https://elibrary.ferc.gov/idmws/file_list.asp?document_id=14697913)).

Maintaining the status quo would result in significant areas being subject to erosion and soil movement for an indeterminate period, possibly negatively affecting plant and wildlife habitat and adjacent water bodies. At the same time, requiring restoration of the right-of-way immediately to pre-construction conditions would require significant construction activity, including earth moving, with concomitant environmental impacts, and might result in the same areas having to be disturbed twice, if construction is later reauthorized.

*Id.* at 2.

The stop work modification excluded the right-of-way between mileposts 64 and 71, which encompasses the crossing of the Weston and Gauley Bridge Turnpike Bridge Trail, in order to accommodate any alternatives analysis that the Bureau of Land Management may wish to conduct in response to the Fourth Circuit's July 27 decision. *Id.*<sup>8</sup> The August 15 letter also emphasized that "construction activity along all other portions of the project from Milepost 77 to Milepost 303 and in all other work areas remains subject to the August 3, 2018 stop work order." *Id.*

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<sup>8</sup> The August 15 letter also explained that Mountain Valley could proceed with the mechanical installation of equipment at the Bradshaw, Harris, and Stallworth Compressor Stations, since the construction of access areas and ground disturbance had been completed prior to the August 3, 2018 stop work order. *See* Exhibit 4 at 2.



## ARGUMENT

“A stay is not a matter of right, even if irreparable injury might otherwise result.” *Nken v. Holder*, 556 U.S. 418, 433-34 (2009) (citation and internal quotations omitted). To obtain such extraordinary relief, a movant must establish: (1) a strong showing that it is likely to prevail on the merits of its appeal; (2) that, without such relief, it will be irreparably injured; (3) a lack of substantial harm to other interested parties; and (4) that the public interest favors a stay. *Wash. Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). Courts “must balance the competing claims of injury and must consider the effect . . . of the granting or withholding of the requested relief,” and must “pay particular regard for the public consequences . . . .” *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 9 (2008) (internal quotation omitted). Blue Ridge has not justified its request for the extraordinary remedy of a stay.

### **I. Blue Ridge Has Not Established An Irreparable Injury**

A claim of irreparable injury absent a stay must be “both certain and great; it must be actual and not theoretical.” *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). Unsupported assertions are insufficient. *Cuomo v. NRC*, 772 F.2d 972, 978 (D.C. Cir. 1985). The party seeking relief “must provide proof that the harm has occurred in the past and is likely to occur again, or proof indicating that the harm is certain to occur in the near future.” *Wis. Gas Co.*, 758 F.2d at 674.

Here, the only specific allegation of harm is that the “[p]ipeline construction and any related excavation” threaten archeological sites on the property of Dale Angle, a member of the Blue Ridge Environmental Defense League. Motion at 13. But Blue Ridge’s filing indicates that Mr. Angle’s property is located in Rocky Mount, Virginia (*see* Motion, Exhibit E), which is near milepost 263. *See* Final EIS, Appendix B at B-37 (attached as Exhibit 5). As FERC staff recently emphasized, “construction activity along all . . . portions of the project from Milepost 77 to Milepost 303 and in all other work areas remains subject to the August 3, 2018 stop work order.” *See* Exhibit 4 at 2.

Blue Ridge also alludes to other potential sites of cultural significance that could “be affected by pipeline construction.” Motion at 13. Although not specified in Blue Ridge’s motion, it appears these sites are located in Franklin and Roanoke Counties, Virginia (*see id.* Exhibit D), which are generally located between mileposts 247 and 280 – well outside any area where construction is occurring.

Blue Ridge also asserts – without any support – that “stabilization measures authorized by FERC will adversely affect” an archeological site located on Mr. Angle’s property. Motion at 13. In the absence of any details whatsoever, it is difficult to assess this claim. But any significant stabilization work authorized by the Commission to ensure safety and minimize environmental impacts is generally

confined to areas where the pipeline route has already been trenched and/or pipe has been strung along the route. *See* Exhibit 2, Attachment 1. Blue Ridge does not contend that either circumstance pertains to Mr. Angle's property.

Even if Blue Ridge could establish irreparable injury, any such injury must be balanced against the other stay factors which, as shown below, weigh heavily against the granting of a stay. *See Winter*, 555 U.S. at 9 (courts must balance competing claims of injury, must consider the effect of granting or withholding the requested relief, and must "pay particular regard for the public consequences"); *Va. Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) (same).

## **II. Blue Ridge Has Not Established A Likelihood Of Success On The Merits**

Blue Ridge cannot meet the "independent, free-standing requirement" to demonstrate a likelihood of success on the merits. *Sherley v. Sebelius*, 644 F.3d 388, 393 (D.C. Cir. 2011) (quoting *Winter*, 555 U.S. at 22). Blue Ridge's motion is premised on a single issue: the claim that the Commission violated section 106 of the National Historic Preservation Act, 16 U.S.C. § 470f, by failing to consult with the Tribal Historic Preservation Officers of the Rosebud Sioux Tribe and Cheyenne River Sioux Tribe. The Tribes, whose present day tribal lands are in the midwestern and western regions of the United States, indicate that they have cultural ties to the Project area. Motion at 7-8.

As explained below, the Court lacks jurisdiction to consider this claim.

First, the real parties in interest – the Preservation Officers – were not parties to the proceeding below and thus cannot press any claims before this Court. Second, none of the movants raised this claim in a timely request for rehearing. In any event, even if the Court could consider this claim, the record demonstrates that the Commission reasonably carried out its obligations under the National Historic Preservation Act.

**A. The Preservation Officers Were Not Parties To The FERC Proceeding And Cannot Seek Judicial Review**

Under section 19 of the Natural Gas Act, 15 U.S.C. § 717r(a), only “parties” to FERC proceedings may seek judicial review of an aggrieving Commission order. In this case, the Preservation Officers did not seek to intervene in the FERC proceedings until May 2018 – nearly seven months after issuance of the Certificate Order and five months after the Preservation Officers claim to have become aware of the Project. *See* Rehearing Order, 163 FERC ¶ 61,197 at P 13. The Commission denied the Preservation Officers’ request to intervene, finding that such late intervention would “delay, prejudice, and place additional burdens on the Commission and the certificate holder.” *Id.* P 14.

The Preservation Officers did not seek rehearing of this decision. They are therefore barred from pressing *any* claim before this Court. *See* 15 U.S.C. § 717r(a) (“No proceeding to review any order of the Commission shall be brought

by any person unless such person shall have made application to the Commission for a rehearing thereon.”). Moreover, even if the Preservation Officers had sought rehearing and thus could pursue an appeal, they could only seek review of the Commission’s decision to deny them party status. A “would-be intervenor is a party to a proceeding in a limited sense, restricted to the proceedings upon the application for intervention; he is aggrieved by the denial of his application; he is not a party to the proceeding in the full sense of the term and is not aggrieved by the final order upon the merits of the controversy.” *Pub. Serv. Comm’n of N.Y. v. FPC*, 284 F.2d 200, 204 (D.C. Cir. 1960); *see also N. Colo. Water Cons. Dist. v. FERC*, 730 F.2d 1509, 1515 (D.C. Cir. 1984) (“Such a petitioner [whose party status has been denied] must obviously be considered a party for the limited purpose of reviewing the agency’s basis for denying party status.”); *New Energy Capital Partners, LLC v. FERC*, 671 Fed. Appx. 802, 804 (D.C. Cir. 2016) (same).

**B. None Of The Movants Has Challenged The Commission’s Tribal Consultation In A Timely-Filed Request for Rehearing**

None of the movants raised any issues regarding the Preservation Officers’ participation in the National Historic Preservation Act consultation process in a timely-filed request for rehearing. While the movants did seek rehearing of an April 6, 2018 letter from a FERC staff member (*see* Motion, Exhibit B), that letter simply responded to comments submitted by the Preservation Officers. (The April 6 letter is attached as Exhibit 6.) As the Commission explained in a recent order,

the “letter [was] not a final decision or order;” it did “not impose any new obligation, deny any new right, or change any legal relationship.” *Mountain Valley Pipeline, LLC*, 164 FERC ¶ 61,086, P 15 (Aug. 3, 2018). The letter merely responded to the Preservation Officers’ concerns by “describ[ing] the steps that have already been taken by the Commission in compliance with section 106 of the [National Historic Preservation Act.]” *Id.*

If any of the movants wanted to take issue with the Commission’s tribal outreach, they “should have done so in response to the Certificate Order or other final order related to the section 106 process.” *Id.* To the extent the movants’ request for rehearing of the April 6 letter constituted a request for rehearing of the Certificate Order (issued in October 2017), the Commission found that it could not entertain that request as it was filed beyond the 30-day statutory rehearing deadline. *See* Rehearing Order, 163 FERC ¶ 61,197 at P 15.

**C. The Commission Reasonably Declined To Reopen National Historic Preservation Act Consultations**

Section 106 of the National Historic Preservation Act, 16 U.S.C. § 470f, requires that the Commission take into account the effect of its authorizations on historic properties and afford the Advisory Council on Historic Preservation (Advisory Council) a reasonable opportunity to comment. Section 106 and its accompanying regulations require agencies to make a reasonable and good faith effort to consult with Indian tribes that attach religious and cultural significance to

historic properties that may be affected by a federal project. *See* 36 C.F.R. §§ 800.2(c)(2)(ii).

In order to implement a particular program regarding the identification and resolution of any adverse effects to historic properties, agencies and the Advisory Council may negotiate a programmatic agreement. *Id.* § 800.14(b). Such a programmatic agreement binds the agency and “satisfies the agency’s section 106 responsibilities for all individual undertakings of the program covered by the agreement until it expires or is terminated by the agency.” *Id.* § 800.14(b)(2)(iii).

In this case, on December 20, 2017, the Commission executed a programmatic agreement with the Advisory Council, State Historic Preservation Offices of West Virginia and Virginia, Forest Service, Bureau of Land Management, and the National Park Service (Programmatic Agreement). *See* Rehearing Order, 163 FERC ¶ 61,197 at P 251. One month later – in January 2018 – the Preservation Officers first advised the Commission of their interest in the Project. *See* Motion at 4.

**1. The Commission made reasonable and good faith efforts to identify and consult with potentially interested tribes**

Blue Ridge claims that it is “clear” that the Commission did not undertake a good faith effort to identify Indian tribes for consultation prior to execution of the Programmatic Agreement. Motion at 9. The record, however, demonstrates that the Commission conducted extensive outreach and consultations with the West

Virginia and Virginia State Historic Properties Officers, interested Indian tribes, government agencies, and the public regarding potential impacts on historic properties resulting from the Project. *See* Final EIS at 4-402 to 4-432.

With respect to Indian tribes in particular, the Commission used ethnographic sources, such as the Handbook of North American Indians, and other data to identify tribes that historically used or occupied the Project area. *See id.* at 4-424. The Commission also contacted Native American organizations and state-recognized tribes. The Commission's efforts identified 32 potentially-interested Indian tribes or organizations (*id.* at Table 4.10.5-1) and distributed to them (a) a Notice of Intent to conduct an environmental analysis for the Project, (b) individual letters to tribal leaders informing them about the Project and requesting comments or information about important resources that may be affected, (c) copies of the draft Environmental Impact Statement, and (d) emails advising that the draft Environmental Impact Statement was available for comment. As a result of this outreach, one tribe requested a copy of the draft Environmental Impact Statement, another sought a map of the Project, and a third requested notifications of any cultural resources identified during excavations. *Id.*

In a separate Native American contact program, Mountain Valley reached out to 39 tribes (most of which were also contacted by FERC) informing them about the Project and requesting comments. *See* Final EIS at 4-428. In response to



this outreach, one tribe requested the opportunity to review archaeological reports from certain counties in West Virginia and Virginia, and one expressed concern regarding potential impacts to wildlife and human remains. *Id.* at Table 4.10.5-2.

The Commission's outreach did not include the Sioux tribes represented by the Preservation Officers because FERC staff found no documentation that they ever occupied the Project area or had a historical interest in West Virginia or Virginia. *See* Exhibit 6 at 1. As FERC staff explained, Volume 15 (Northeast) of the Handbook of North American Indians indicates that the Project area was occupied by Algonquian and Iroquois peoples. Volume 13 (Plains) of the Handbook indicates that the ancestral, aboriginal, or ceded lands of the Lakota or Sioux Nation extended westward from Wisconsin to Wyoming, and from Iowa north to North Dakota. *Id.* Blue Ridge notes that Volume 14 of the Handbook states that the Project area was also occupied by the Tutelo tribe, which shares a historical linguistic similarity with the ancient Siouan language. Motion at 10. This, according to Blue Ridge, establishes a historic connection between the Project area and forebearers of the Cheyenne River and Rosebud Sioux. *Id.* But the fact that the language of the Tribes' ancestors may have been present in the Project area does not establish that the Commission's outreach was unreasonable – a conclusion with which the Advisory Council agrees.

**2. The Advisory Council has found that the Commission undertook reasonable and good faith efforts to identify and consult with interested tribes**

In a March 30, 2018 letter in response to the Preservation Officers' indication of interest in the Project, the Advisory Council stated that "it was our judgment that FERC, with the assistance of [Mountain Valley], had made [a] . . . reasonable and good faith effort to identify, and consult with, relevant tribes." *See* Mar. 30, 2018 letter from Advisory Council to FERC at 2 (attached as Exhibit 7). With the execution of the December 2017 Programmatic Agreement, "[t]he Section 106 review process was formally completed." *Id.* In the Advisory Council's view, "when new stakeholders or consulting parties come forward as they have in this case, a federal agency is not obligated to restart the Section 106 review or reconsider previously finalized findings or determinations." *Id.* The Advisory Council noted, however, that the Programmatic Agreement has provisions that permit the consideration of information provided by the Preservation Officers regarding historic properties within the Project area. *Id.* As explained below, that is precisely what is occurring here.

**3. The Preservation Officers have been invited to share any pertinent information with FERC staff**

The fact that the Preservation Officers were not consulting parties in the section 106 process does not mean that they cannot convey information to the Commission. In response to the Preservation Officers' indication that there may be

cultural resources located on Mr. Angle's property, FERC staff advised that four archaeological sites had been found and that all were stone scatters determined not to be eligible for nomination to the National Register of Historic Places. *See* Exhibit 6 at 2. Because the Preservation Officers had indicated that they had information about other potential cultural resources, FERC staff asked the Preservation Officers to submit detailed information expeditiously. *Id.* In a July 2018 letter, the Preservation Officers indicated that a cultural resource report was being prepared. *See* Motion, Exhibit D at 4.

### **III. A Stay Will Substantially Injure Other Parties**

Enjoining the Commission-issued certificate and halting the Project while this case proceeds to a court ruling on the merits (and while FERC staff considers how to carry out its August stop work order and stabilization orders) would seriously jeopardize the availability of additional capacity needed to transport natural gas to markets in the Northeast, Mid-Atlantic, and Southeast to meet increasing natural gas demand. *See, e.g.,* Certificate Order, 161 FERC ¶ 61,043 at PP 1, 6, 41, 56. Such an outcome would harm not only the certificate holder, but also the five project shippers (two of which are utilities) that have executed long-term supply agreements with Mountain Valley for 100 percent of the Project's capacity, and the customers of the utility-shippers, who depend on the utilities for reliable electricity service. *See id.* P 10.

#### IV. The Public Interest Does Not Favor A Stay

The public interest is a “crucial” factor in “litigation involving the administration of regulatory statutes designed to promote the public interest.” *Va. Petroleum Jobbers*, 259 F.2d at 925. The Natural Gas Act charges FERC with regulating the interstate transportation and wholesale sale of natural gas in the public interest. *See, e.g., Columbia Gas Transmission Corp. v. FERC*, 750 F.3d 105, 112 (D.C. Cir. 1984). Because the Commission is the “presumptive[] guardian of the public interest,” its views “indicate[] the direction of the public interest” for purposes of deciding a stay request. *N. Atl. Westbound Freight Ass’n v. Fed. Mar. Comm’n*, 397 F.2d 683, 685 (D.C. Cir. 1968); *see also Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1307-08 (D.C. Cir. 2015) (Congress has entrusted FERC with responsibility to determine if a certificate is in the public interest).

Here, a stay of the Project would not serve the public interest. The Commission found a showing of need in issuing the certificate to provide natural gas to meet the region’s growing demand for natural gas. *See, e.g., Certificate Order*, 161 FERC ¶ 61,043 at PP 1, 6, 41, 56.

## CONCLUSION

For the foregoing reasons, Blue Ridge has not established the extraordinary circumstances necessary to justify a stay of pipeline construction and, therefore, the emergency motion for stay should be denied.

Respectfully submitted,

James P. Danly  
General Counsel

Robert H. Solomon  
Solicitor

/s/ Robert M. Kennedy  
Robert M. Kennedy  
Senior Attorney

For Respondent  
Federal Energy Regulatory  
Commission  
Washington, D.C.

August 23, 2018

**CERTIFICATE OF COMPLIANCE**

Pursuant to Fed. R. App. P. 32(g), I certify that this filing complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(C) because it contains 4,862 words, excluding the parts exempted by Fed. R. App. P. 32(f).

I further certify that this filing complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this filing has been prepared in Times New Roman 14-point font using Microsoft Word 2010.

*/s/ Robert M. Kennedy*  
Robert M. Kennedy  
Senior Attorney

Federal Energy Regulatory  
Commission  
Washington, D.C. 20426  
Tel.: (202) 502-8904  
Fax: (202) 273-0901  
Email: [robert.kennedy@ferc.gov](mailto:robert.kennedy@ferc.gov)

August 23, 2018

# EXHIBITS

	<b>Exhibit No.</b>
August 3, 2018 Letter from T. Turpin (FERC) to Mountain Valley .....	1
August 10, 2018 Letter from T. Turpin (FERC) to Mountain Valley .....	2
August 20, 2018 Letter from P. Friedman (FERC) to Mountain Valley .....	3
August 15, 2018 Letter from T. Turpin (FERC) to Mountain Valley .....	4
Excerpt from Final Environmental Impact Statement .....	5
April 6, 2018 Letter from J. Martin (FERC) to Preservation Officers .....	6
March 30, 2018 Letter from Advisory Council to J. Martin (FERC).....	7

# **EXHIBIT 1**



FEDERAL ENERGY REGULATORY COMMISSION  
WASHINGTON, D.C. 20426

OFFICE OF ENERGY PROJECTS

**In Reply Refer To:**OEP/DG2E/Gas Branch 3  
Mountain Valley Pipeline LLC  
CP16-10-000

August 3, 2018

Matthew Eggerding, Counsel  
Mountain Valley Pipeline LLC  
625 Liberty Ave., Suite 1700  
Pittsburgh, PA 15222**Re: Notification of Stop Work Order**

Dear Mr. Eggerding:

On July 27, 2018, the United States Court of Appeals for the Fourth Circuit issued an order vacating decisions by the Department of the Interior's Bureau of Land Management (BLM) and by the Department of Agriculture's Forest Service (Forest Service) authorizing the construction of the Mountain Valley Pipeline Project (Project) across federal lands and remanding to those agencies for further proceedings to address issues identified in that opinion. In light of this development, Mountain Valley Pipeline, LLC (MVP) has not obtained the rights-of-way and temporary use permits from the federal government needed for the Project to cross federally owned lands.

There is no reason to believe that the Forest Service or the Army Corps of Engineers, as the land managing agencies, or the BLM, as the federal rights-of-way grantor, will not be able to comply with the Court's instructions and to ultimately issue new right-of-way grants that satisfy the Court's requirements. However, Commission staff cannot predict when these agencies may act or whether these agencies will ultimately approve the same route. Should the agencies authorize alternative routes, MVP may need to revise substantial portions of the Project route across non-federal lands, possibly requiring further authorizations and environmental review. Accordingly, allowing continued construction poses the risk of expending substantial resources and substantially disturbing the environment by constructing facilities that ultimately might have to be relocated or abandoned.

**MVP is hereby notified that construction activity along all portions of the Project and in all work areas must cease immediately, with the exception of any measures deemed necessary by those land managing agencies or FERC staff to ensure the stabilization of the right of way and work areas.** Commission staff intends to review the need for this stop work notification in light of further actions that the Forest

Service, the Army Corps of Engineers, and the BLM will take with respect to the issues raised in the Court's opinion and stand ready to assist to achieve a prompt resolution.

In addition, within 5 days, MVP must provide an interim right-of-way and work area stabilization plan for review and written approval by the Director of the Office of Energy Projects.

Sincerely,

A handwritten signature in blue ink that reads "Terry L. Turpin". The signature is written in a cursive style with a large initial "T".

Terry L. Turpin  
Director  
Office of Energy Projects

## **EXHIBIT 2**

FEDERAL ENERGY REGULATORY COMMISSION  
WASHINGTON, D.C. 20426

OFFICE OF ENERGY PROJECTS

**In Reply Refer To:**  
OEP/DG2E/Gas Branch 3  
Mountain Valley Pipeline LLC  
CP16-10-000

August 10, 2018

Matthew Eggerding, Counsel  
Mountain Valley Pipeline LLC  
625 Liberty Ave., Suite 1700  
Pittsburgh, PA 15222**Re: Partial Approval of the Temporary Stabilization Plan**

Dear Mr. Eggerding:

Staff has reviewed Mountain Valley Pipeline LLC's (Mountain Valley) August 8, 2018 *Temporary Stabilization Plan*, filed in response to the August 3, 2018 Notification of Stop Work Order. As indicated in your plan, the shutdown presents challenges for stabilization and restoration, and we agree that there are some clear advantages to allowing some limited construction activities to proceed to prevent potential safety and environmental impacts.

Mountain Valley is approved to implement the stabilization measures as indicated in Attachment 1. Any measures discussed within the Temporary Stabilization Plan that are not identified in the attachment as "approved" cannot be implemented at this time. Commission staff will continue to evaluate unapproved measures and will be requesting additional information from Mountain Valley during that review. Mountain Valley must also seek concurrence from appropriate agencies, such as the Bureau of Land Management, the Forest Service, or the Army Corps of Engineers, for any measures that Mountain Valley proposes on federal lands.

Sincerely,

Terry L. Turpin  
Director  
Office of Energy Projects

Enclosure

**Attachment 1**

Plan Section	Stage of Construction	Action	Approval Status
Short Term Stabilization Plan: Tree Felled, Cleared and Graded Only	Not Felled	Continue to monitor and inspect per WVDEP and VADEQ requirements.	Yes
Short Term Stabilization Plan: Tree Felled, Cleared and Graded Only	Tree Felled Only	Continue to monitor and inspect per WVDEP and VADEQ requirements.	Yes
Short Term Stabilization Plan: Tree Felled, Cleared and Graded Only	Trees Felled/ROW Cleared and/or Graded No Pipe Strung/Not Trenched	Temporary stabilization in accordance with the approved WVDEP and VADEP Erosion and Sediment Control Plans.	Yes
Inspection/Maintenance Activities	N/A	N/A	Yes
Stabilization Activities	N/A	N/A	Yes
Short Term Stabilization Plan: Pipe Strung, Welded and Trenched	Trench Open Only	Stabilize the trench by installing / maintaining trench breakers or trench plugs. Monitor daily, continue to dewater open excavations / trenches to avoid saturation and potential for cave-in / slip. Backfill any open trench that poses a safety concern. Secure all remaining open trench with orange safety fencing.	Yes
Short Term Stabilization Plan: Pipe Strung, Welded and Trenched	Pipe Strung / Welded, Trench Open	Lower in, backfill, restore to final grade, if appropriate, and permanently stabilize per approved WVDEP or VADEQ plans.	Yes

Short Term Stabilization Plan: Pipe Strung, Welded and Trenched	Pipe Strung / Welded, Not Trenched	In non-steep slope areas Mountain Valley will stabilize the pipe as appropriate. Mountain Valley will use seed and mulch to temporarily stabilize the ROW per the WVDEP and VADEQ requirements.	Pending
Short Term Stabilization Plan: Pipe Strung, Welded and Trenched	Pipe Strung / Welded, Not Trenched	In steep slope areas, trenching, lowering in, backfilling, restoring to final grade, if appropriate, and permanently stabilizing ROW.	Pending
Short Term Stabilization Plan: Pipe Strung, Welded and Trenched	Pipe Strung / Not Welded, Trench Open	Weld, lower in, backfill, restore to final grade, if appropriate, and permanently seed per approved WVDEP or VADEQ plans.	Yes
Short Term Stabilization Plan: Pipe Strung, Welded and Trenched	Pipe Strung / Not Welded, Not Trenched	In non-steep slope areas Mountain Valley will stabilize the pipe as appropriate. Mountain Valley will use seed and mulch to temporarily stabilize the ROW per the WVDEP and VADEQ requirements.	Yes
Short Term Stabilization Plan: Pipe Strung, Welded and Trenched	Pipe Strung / Not Welded, Not Trenched	In steep slope areas, trenching, lowering in, backfilling, restoring to final grade, if appropriate, and permanently stabilizing the ROW.	Pending
Short Term Stabilization Plan: Pipe Strung, Welded and Trenched	Pipe Installed / Backfilled	Restore to final grade, if appropriate, and permanently seed per approved WVDEP or VADEQ plans.	Yes
Short Term Stabilization Plan: Pipe Strung, Welded and Trenched	Pigg River HDD	Fully complete the HDD by finishing reaming and pull back operations. Temporarily seed and mulch adjacent temporary workspace areas.	Yes

<p>Short Term Stabilization Plan: Pipe Strung, Welded and Trenched</p>	<p>Blue Ridge Parkway</p>	<p>In consultation with National Park Service, install grouting around the bored pipe under the Blue Ridge Parkway, back fill the open trench, rough grade, temporarily seed and mulch, monitor and maintain the temporary ECDs, assure that the cattle have access to the existing spring and the work area is fenced off, repair and stabilize the private road on the south side of the Blue Ridge Parkway, and remove all equipment and pipe that is stacked from National Park Service property.</p>	<p>Pending</p>
<p><b>Short Term Stabilization Plan: Pipe Strung, Welded and Trenched</b></p>	<p><b>Jefferson National Forest</b></p>	<p><b>All work stopped</b></p>	<p><b>Pending</b></p>
<p>Immediate actions are necessary to temporarily stabilize the facilities and their associated work areas -</p>			<p>Yes</p>
<p>Longer Term Stabilization Plan: Pipeline ROW and Facilities</p>	<p>Pipe Strung/Welded, Not Trenched</p>	<p>In non-steep slope areas, trenching, lowering in, backfilling, restoring to final grade and permanently stabilizing the ROW.</p>	<p>Pending</p>
<p>Longer Term Stabilization Plan: Pipeline ROW and Facilities</p>	<p>Pipe Strung/Not Welded, Not Trenched</p>	<p>In non-steep slope areas, trenching, welding, lowering in, backfilling, restoring to final grade and permanently stabilizing the ROW.</p>	<p>Pending</p>

<p>Longer Term Stabilization Plan: Compressor Station and Interconnects</p>	<p>N/A</p>	<p>Install security fencing at the Compressor Station and Interconnect sites.</p> <ul style="list-style-type: none"> <li>-Complete any work in open excavations, including welding, coating, x-ray of pipe, finishing concrete pours already prepared and backfilling as appropriate (already in ditch).</li> <li>-Protect any installed anchor bolts from the elements.</li> <li>-Preserve, protect and maintain all equipment per best practices / manufacturer's recommendations at all Compressor Station and Interconnect Facilities.</li> </ul>	<p>Yes</p>
<p>Specific Areas of Sensitive Environmental Concern</p>	<p>N/A</p>	<p>N/A</p>	<p>Yes</p>



<p>Longer Term Stabilization Plan: Compressor Station and Interconnects</p>	<p>N/A</p>	<ul style="list-style-type: none"> <li>- Complete MLV-9 installation at Harris – this is currently ready for final coating test and backfill. It would be beneficial to complete to protect the pipe and leave one less open excavation to monitor and dewater.</li> <li>-Complete MLV-19 installation at Stallworth – this work is currently in progress. It would be beneficial to complete to protect the pipe and leave one less open excavation to monitor and dewater.</li> <li>-Complete compressor foundation #4 at Bradshaw - Currently an open excavation that can't be backfilled due to forms, exposed rebar, bolts, etc.</li> <li>-Compressor building walls at Harris - Currently an open excavation that can't be backfilled due to forms, exposed rebar, bolts, etc.</li> <li>-Complete 42" header piping that is already in the ditch at all facilities - Currently exposed pipe, open excavations.</li> </ul>	<p>Yes</p>
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## **EXHIBIT 3**

FEDERAL ENERGY REGULATORY COMMISSION  
WASHINGTON, D.C. 20426

OFFICE OF ENERGY PROJECTS

In Reply Refer To:  
OEP/DG2E/G3  
Mountain Valley Pipeline LLC  
CP16-10-000

August 20, 2018

Matthew Eggerding, Counsel  
Mountain Valley Pipeline LLC  
625 Liberty Ave., Suite 1700  
Pittsburgh, PA 15222

**Re: Limited Construction Approval**

Dear Mr. Eggerding:

I grant your August 17, 2018 request for Mountain Valley Pipeline LLC (Mountain Valley) to resume limited construction activities at six locations. Allowing these limited construction activities to proceed is justified for the reasons outlined in your request, and the completion and restoration of the right-of way at these specific locations would reduce the risk of potential safety and environmental impacts.

This authorization is in accordance with our August 10, 2018 partial approval of Mountain Valley's Stabilization Plan. Mountain Valley must follow the measures outlined in its Plan, in order to stabilize and restore the right-of-way, as appropriate, during the period covered by the Commission's temporary stop work order. I remind you that Mountain Valley must comply with all applicable terms and conditions of the Commission's October 13, 2017 *Order Issuing Certificates and Granting Abandonment Authority* (Order) in the above-referenced docket, as well as any conservation measures identified by the federal land managing agencies.

If you have any questions regarding this approval, please call me at 202-502-8059 (or email to paul.friedman@ferc.gov).

Sincerely,



Paul Friedman  
Environmental Project Manager

## **EXHIBIT 4**

FEDERAL ENERGY REGULATORY COMMISSION  
WASHINGTON, D.C. 20426

OFFICE OF ENERGY PROJECTS

**In Reply Refer To:**  
OEP/DG2E/Gas Branch 3  
Mountain Valley Pipeline, LLC  
CP16-10-000

August 15, 2018

Matthew Eggerding, Senior Counsel  
Mountain Valley Pipeline, LLC  
625 Liberty Ave., Suite 1700  
Pittsburgh, PA 15222**Re: Stop Work Order Modification**

Dear Mr. Eggerding:

Staff, having further reviewed the status of construction activities along the route of the Mountain Valley Pipeline Project, has determined that the protection of the environment along the project right-of-way is best served by modifying the Stop Work Order issued on August 3, 2018, as described below.

In the Stop Work Order, Mountain Valley Pipeline, LLC (Mountain Valley) was "...notified that construction activity along all portions of the Project and in all work areas must cease immediately, with the exception of any measures deemed necessary by those land managing agencies or FERC staff to ensure the stabilization of the right-of-way and work areas." On August 10, 2018, the Director of the Office of Energy Projects issued a letter authorizing Mountain Valley to implement certain of the measures proposed in Mountain Valley's August 8, 2018 *Temporary Stabilization Plan*, recognizing that "the shutdown presents challenges for stabilization and restoration, and we agree that there are some clear advantages to allowing some limited construction activities to proceed to prevent potential safety and environmental impacts."

Upon additional review, staff has determined that approximately eighty percent of the right-of-way from Milepost 0 up to Milepost 77 has been cleared. Not only have trees been felled in this area, but much of the right-of-way has been disturbed and graded. At some points, pipeline has been brought to the right-of-way; some has been bent to fit the contours of the right-of-way and some has been welded together. In addition, some of the right-of-way has been trenched and some pipe is already put in the ground.

After careful consideration, and with the goal of protecting the environment to the maximum extent possible while the relevant agencies determine how best to comply with the orders of the U.S. Court of Appeals for the Fourth Circuit, staff concludes that allowing completion of construction, including full restoration along the right-of-way, in

this limited area is the best option. Maintaining the status quo would result in significant areas being subject to erosion and soil movement for an indeterminate period, possibly negatively affecting plant and wildlife habitat and adjacent water bodies. At the same time, requiring restoration of the right-of-way immediately to pre-construction conditions would require significant construction activity, including earth moving, with concomitant environmental impacts, and might result in the same areas having to be disturbed twice, if construction is later reauthorized. Long-term restoration along the right-of-way could be difficult with such repeated disturbance, potentially leading to other negative environmental impacts.

In its August 14 filing, Mountain Valley proposes the Stop Work Order be modified to allow construction to continue between Milepost 0 and the interconnection with Columbia Gas Transmission near Milepost 77, a section of the certificated project that can provide natural gas transportation once the BLM addresses the right-of-way grant across the Corps of Engineers' Weston and Gauley Bridge Turnpike Trail.<sup>1</sup> Consistent with the findings of the Commission's October 13, 2017 Order<sup>2</sup> that the Mountain Valley Pipeline Project is in the public interest and the discussion above, Mountain Valley may continue construction of the project from Milepost 0 up to, and including, the WB interconnect with Columbia Gas Transmission near Milepost 77, excluding the right-of-way between Mileposts 64 and 71. The scope of this exclusion, which encompasses the certificated crossing of the Weston and Gauley Bridge Turnpike Trail, is intended to accommodate the BLM's assessment of any necessary alternative co-location routes across this Federal property should that agency undertake such analysis. However, Mountain Valley must take whatever measures determined to be necessary and appropriate by Federal land managing agencies and/or FERC staff to ensure the stabilization of the right-of-way and work areas within the Federal lands and the exclusion area.

In addition, as construction of access areas and ground disturbance at compressor station sites was completed prior to issuance of the Stop Work Order, Mountain Valley may also proceed with mechanical installation of compressor station equipment at the Bradshaw, Harris, and Stallworth Compressor Stations. Mountain Valley's request for construction of additional interconnects outside of these areas remains under review. We emphasize that construction activity along all other portions of the project from Milepost 77 to Milepost 303 and in all other work areas remains subject to the August 3, 2018 stop work order.

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<sup>1</sup> Staff recognizes that the BLM right-of-way grant across the Weston and Gauley Bridge Turnpike Trail was included in the vacatur issued by the Fourth Circuit. However, neither the installed location nor the alternatives analysis on which that location was based appear to have been a material issue in the proceedings before the Court.

<sup>2</sup> *Mountain Valley Pipeline, LLC*, 161 FERC ¶61,043 (2017), *order on reh'g*, 163 FERC ¶61,197 (2018).

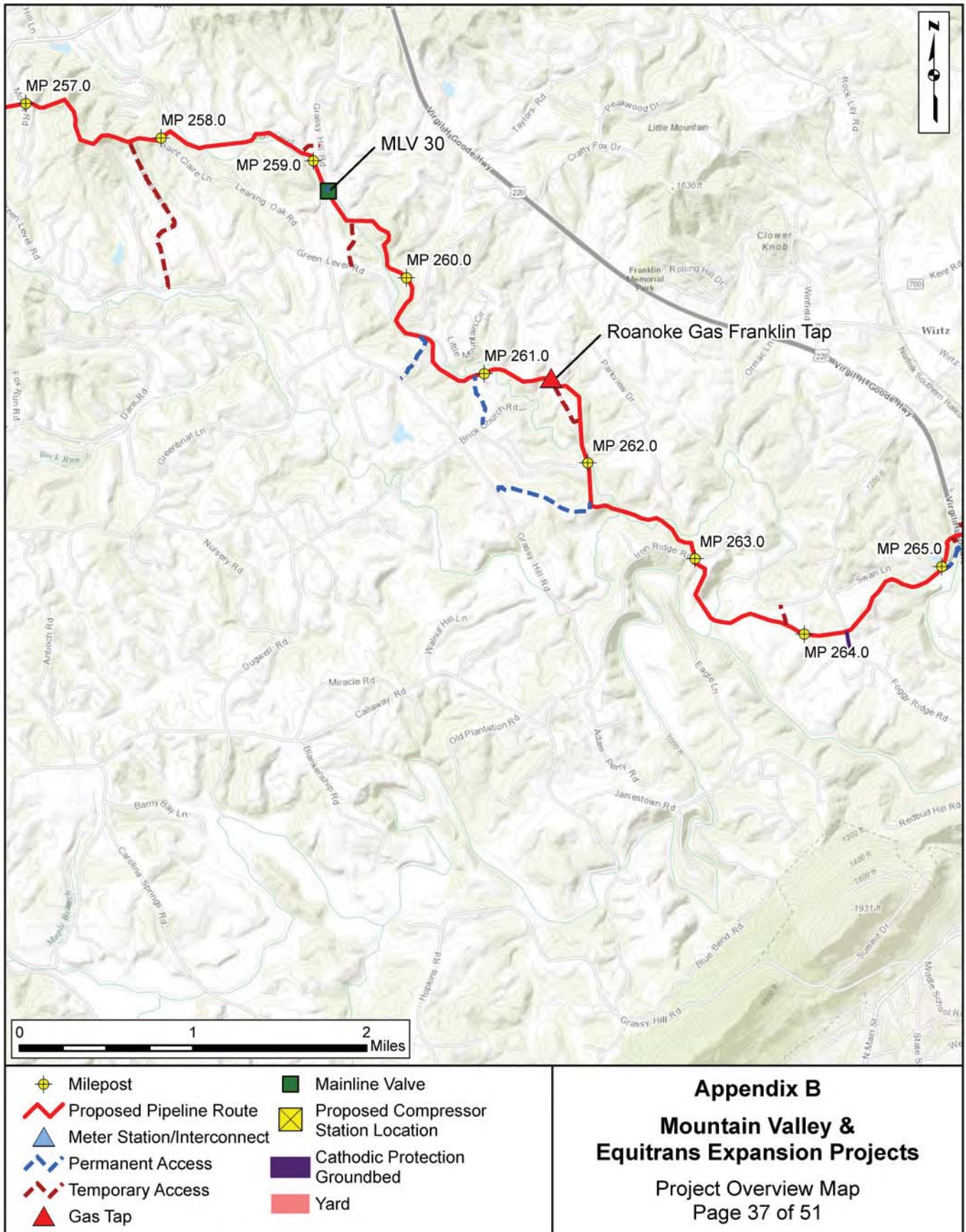
Finally, as we are allowing construction to continue in the above areas because we deem that to be the best way to mitigate further impacts on the environment, Mountain Valley must take all steps necessary to promptly complete post-construction restoration activity in the areas on which we are allowing construction, as soon as construction is complete.

Sincerely,

Terry L. Turpin  
Director  
Office of Energy Projects

## **EXHIBIT 5**





## **EXHIBIT 6**

FEDERAL ENERGY REGULATORY COMMISSION  
WASHINGTON, D.C. 20426

OFFICE OF ENERGY PROJECTS

In Reply Refer To:

OEP/DG2E/G3

Mountain Valley Pipeline LLP

CP16-10-000

April 6, 2018

Steven Vance  
Tribal Historic Preservation Officer  
Cheyenne River Sioux Tribe  
P.O. Box 590  
Eagle Butte, SD 57625

**Re: Compliance with Section 106 of the National Historic Preservation Act**

Dear Mr. Vance:

Thank you for your March 18, 2018 letter to the Federal Energy Regulatory Commission (FERC or Commission), commenting on the Mountain Valley Project (MVP) in West Virginia and Virginia, proposed by Mountain Valley Pipeline LLP (Mountain Valley) in the above-referenced docket. You provided a number of comments regarding FERC lack of effort to consult with your tribe, inadequate survey and reporting, and that FERC should restart Section 106 consultation because of the inadequate consultation and anticipatory demolition of historic properties. We have included some of the comments from the Advisory Council on Historic Preservation (ACHP) March 30, 2018 letter to you, in our response.

First, the Cheyenne River Sioux was not contacted by our agency for MVP because FERC staff found no documentation that your tribe ever occupied the project area or that your tribe had historical interest in West Virginia or Virginia. For instance, Volume 15 (Northeast) of the "Handbook of North American Indians" shows that West Virginia and Virginia were occupied by Algonquian and Iroquois peoples (not Siouan). Additionally, Volume 13 (Plains) of the "Handbook of North American Indians" illustrates that the ancestral, aboriginal, or ceded lands of the Lakota or Sioux Nation extended from Wisconsin westward to Wyoming, and from Iowa north to North Dakota.

The regulations for implementing Section 106 of the National Historic Preservation Act, at 36 Code of Federal Regulations Part 800.2(c)(2)(ii), indicate that an agency should make a "reasonable and good faith effort to identify Indian tribes" that should be consulted. Agencies should recognize that historic properties of religious or cultural importance to tribes may be "located on ancestral, aboriginal, or ceded lands." In a March 30, 2018 letter to you, responding to your comments to the ACHP about the

MVP, the ACHP wrote that it “concluded that FERC made a reasonable and good faith effort to identify and consult with relevant tribes.”

Second, a number of cultural resources reports have been and still are being produced for the project. The work conducted and reports produced by Mountain Valley and its consultants were considered adequate by FERC staff and accepted by the Virginia State Historic Preservation Officer. From information filed with FERC, no cultural resources were identified by Mountain Valley or its contractors on the Martin or Chandler tracts. Four archaeological sites (44FR398, 44FR399, 44FR400, and 44FR404) were found on the Angle tract; all lithic scatters determined to be not eligible for nomination to the National Register of Historic Places (NRHP). Two archaeological sites (44RN400 and 44RN401) were identified on the Reynolds tract that are pre-contact camps eligible for the NRHP and require data recovery excavations as mitigation, which are being conducted under the Programmatic Agreement (PA) for the project. For a point of clarity, Mountain Valley has a court order conveying an easement to allow for investigations on the Reynold’s property. No other cultural resources were identified by Mountain Valley or its consultants during surveys of these tracts. Furthermore, the results of surveys in Roanoke and Franklin Counties, Virginia were summarized in our June 2017 FEIS (pages 4-462 to 4-465).

Four landowners (Angle, Chandler, Martin, and Reynolds) filed letters with FERC indicating that you and members from other tribes conducted cultural resources investigations on their property. Your March 18, 2018 letter to FERC indicated that you have information about occupation sites, encampments, villages, and ceremonial sites. However, a report of your investigations along the MVP pipeline route has not yet been filed with FERC; so there is no data for FERC staff to analyze. If your findings are germane to the analysis by FERC staff, then your cultural resources report should be provided expeditiously.

Last, with the execution of the PA as described by ACHP, FERC is not obligated to restart section 106 consultation. In its March 30, 2018 letter to FERC regarding your March 18 letter, the ACHP said that: “The Section 106 review process was formally completed by the execution of the PA.” Further, “...It is the ACHP’s opinion that when new stakeholders or consulting parties come forward, as they have in this case, a federal agency is not obligated to restart the Section 106 review or reconsider previously finalized findings or determinations.” Additionally, the ACHP stated: “that implementation of treatment plans for data recovery at archaeological sites under the terms of the PA as well as archaeological work for inventory survey and evaluation of eligibility do not constitute anticipatory demolition.”

If you have additional questions, feel free to contact Paul Friedman by telephone (202-502-8059) or email ([paul.friedman@ferc.gov](mailto:paul.friedman@ferc.gov)).

Again, we appreciate your interest in the MVP.

Sincerely,

James Martin, Chief  
Gas Branch 3  
Division of Gas – Environment and  
Engineering

cc: Public File, Docket No. CP16-10-000

John Eddins  
Advisory Council on Historic Preservation  
401 F St. NW, Suite 308  
Washington DC 20001

Ben Rhodd  
Rosebud Sioux Tribe  
P.O. Box 809  
Rosebud, SD 57570

Dale Angle  
1116 Iron Ridge Rd.  
Rocky Mount, VA 24151

James Chandler  
P.O. Box 20638  
Roanoke, VA 24018

Andrea Ferster  
2121 Ward Ct NW, 5<sup>th</sup> Floor  
Washington DC 20037

Lois Martin  
10808 Bottom Creek Rd.  
Bent Mountain, VA 24059

## **EXHIBIT 7**



*Preserving America's Heritage*

March 30, 2018

Mr. James Martin, Chief  
Gas Branch 3  
OEP/DG2E/Gas 3  
Federal Energy Regulatory Commission  
Washington, D.C. 20426

Ref: Cheyenne River Sioux Tribe & Rosebud Sioux Tribe regarding Mountain Valley Pipeline  
Docket No. CP16-10-000  
West Virginia and Virginia

Dear Mr. Martin:

The Advisory Council on Historic Preservation (ACHP) has received communications from Mr. Steve Vance, the Tribal Historic Preservation Officer (THPO) of the Cheyenne River Sioux Tribe (CRST), and Mr. Ben Rhodd, the THPO of the Rosebud Sioux Tribe (RST), regarding the Mountain Valley Pipeline (MVP) and potential effects on properties of religious and cultural significance to their tribes. We have also been copied on correspondence with the Federal Energy Regulatory Commission (FERC) from two landowners whose property is crossed by MVP, expressing support for the concerns presented by Mr. Rhodd and Mr. Vance. As we understand, the THPOs also visited Virginia from March 3 to 6, 2018, and state they have identified five features or properties that should be considered eligible for inclusion on the NRHP, two of which they have identified as being within the Right-of-Way (ROW) for MVP. The THPOs request that ACHP intercede with FERC to halt tree clearing and construction for 30 days while the issues are considered. The ACHP is providing its comments here on the concerns and issues raised by the tribes along with recommendations for FERC to consider in addressing them.

In sum, the THPOs have indicated that the CRST and the RST have cultural ties to the region where the MVP will be constructed and informed FERC that they ascribe religious and cultural significance to properties in the Area of Potential Effects (APE) for the undertaking that may be eligible for listing on the National Register of Historic Properties (NRHP) and that may be affected by the clearing of the ROW and construction of the MVP. The THPOs also assert that FERC's compliance with Section 106 of the National Historic Preservation Act (NHPA) (54 U.S.C. § 300101 et seq.) and its implementing regulations, "Protection of Historic Properties" (36 C.F.R. Part 800), was inadequate because FERC did not previously invite them into the consultation and has declined to provide them copies of survey reports as requested in a letter from Mr. Vance dated January 16, 2018.

The Section 106 regulations require that federal agencies make a reasonable and good faith effort to identify and consult with Indian tribes or Native Hawaiian organizations that attach religious and cultural significance to historic properties that may be affected by an undertaking. The Section 106 regulations also require a reasonable and good faith effort to identify historic properties that may be affected by an undertaking. The ACHP was a consulting party in the Section 106 consultation for the MVP and on

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December 15, 2017, signed the Programmatic Agreement (PA) developed to resolve the Adverse Effects of the undertaking on historic properties. We did so because it was our judgment that FERC, with the assistance of the proponent, had made the mentioned reasonable and good faith effort to identify, and consult with, relevant tribes. Such efforts, as in this case, typically include the identification of tribes that have previously demonstrated interest in historic properties in the APE and are known to ascribe religious and cultural significance to properties in the region. It was also our assessment, based on coordination with the State Historic Preservation Officers (SHPOs) in Virginia and West Virginia that, as directed by FERC, the project proponent had carried out a reasonable and good faith effort to identify historic properties that may be affected by the undertaking, and would continue to do so through the terms of the PA.

The Section 106 review process was formally completed by the execution of the PA, which sets forth the resolution of the adverse effects on historic properties of the undertaking. The PA includes protocols for dealing with post-review discoveries and developing or finalizing treatment plans to resolve adverse effects. It also has protocols for completing surveys along a small percentage of the ROW that could not be completed prior to issuance of the certificate. In our letter dating December 15, 2017, transmitting the ACHP's signature on the PA, we specified that by carrying out the terms of the PA, FERC will have fulfilled its Section 106 compliance responsibilities for this undertaking. If during the implementation of the undertaking, historic properties are newly discovered or new effects recognized for previously known historic properties, FERC is required to follow the post-review discovery protocols set forth under the terms of the PA.

Now that FERC and the consulting parties are aware of the interest of the CRST and RST in the region and the potential for effects to properties to which the two tribes ascribe religious and cultural significance, FERC, as the lead federal agency, should ensure it considers and communicates to all consulting parties how it intends to respond to their expressions of concern, consistent with the terms of the PA. For instance, the PA at Stipulation III.B.3., indicates that before approving final treatment plans, it will consider comments from, among others, "interested Indian Tribes." The identification of new tribes that state they ascribe religious and cultural significance to properties in the APE of this undertaking is important, as it could make them such "interested Indian Tribes" for the cited and other provisions of the PA going forward as appropriate. More generally, beyond the particular terms of the PA, such tribes may be able to provide information on the significance of properties that may be identified during implementation of the undertaking and also supplement the evaluation of historic properties previously identified. Thus, it is beneficial for a federal agency to engage with them to the extent reasonable.

Further, it is ACHP's recommendation that FERC consider sharing the inventory and evaluation reports for the entire ROW with the two tribe(s) as they have requested. However, we also reaffirm that the identification effort required by Section 106 has been completed for the portions of the ROW already surveyed and the resolution of adverse effects on historic properties has been memorialized for the undertaking under the terms of the executed PA. It is the ACHP's opinion that when new stakeholders or consulting parties come forward as they have in this case, a federal agency is not obligated to restart the Section 106 review or reconsider previously finalized findings or determinations. It should continue to follow and fulfill the terms of the executed PA, and in particular its provisions about post-review discoveries which, in this case, will allow for the consideration of the information provided by the tribes about historic properties within the APE. We also want to clarify that implementation of treatment plans for data recovery at archaeological sites under the terms of the PA as well as archaeological work for inventory survey and evaluation of eligibility do not constitute anticipatory demolition as suggested by Mr. Rhodd in his letter to ACHP of March 14, 2018, but are activities required by the executed PA.

We note that consulting parties and stakeholders, including federally recognized tribes, who indicate that there are previously unidentified properties that may be eligible for inclusion on the NRHP and affected by the undertaking or previously unrecognized effects on known historic properties should supply the federal agency with sufficient information to justify the federal agency to consider the proposed property or effect under the terms of the executed PA. Mr. Rhodd indicated in his letter of March 9, 2018, that he would, in



the week of March 12, 2018, submit to FERC and to MVP a report of the five properties he and Mr. Vance had identified during their visit to Virginia in early March 2018. However, in his follow-up letter of March 14, 2018, Mr. Rhodd suggested that the Rosebud Sioux have photos, maps, and documentation regarding the properties identified and indicated that he would submit a full report of that documentation to FERC and MVP "when it is deemed appropriate." The ACHP will encourage the THPOs of the CRST and the RST to submit any information they have regarding the status of the five properties they have identified, their significance to the tribes, and the effects of the undertaking on those properties sufficient to enable FERC to make findings and determinations in the post-review discovery process set forth in the PA. We urge the CRST and RST to share that information with FERC in a timely way so that it can be considered prior to further ground disturbing activities and urge FERC to respond to the CRST and RST expeditiously so that it can fulfill the terms of the executed PA.

Lastly, we are aware of a letter, dated March 23, 2018, from the legal representative of Elizabeth Reynolds to FERC, alleging trespassing issues associated with archaeological work required by the PA prior to coordination with landowners and FERC's notification to proceed, as stipulated by FERC. We have received a similar expression of concern from another affected landowner. We urge FERC to respond to that letter at its earliest convenience and copy the ACHP on its response. Such activity may be disrupting community participation in the resolution of adverse effects to historic properties and run counter to the overall goals of their participation in the Section 106 review process.

Should you have any questions or wish to discuss this matter further, please contact John T. Eddins, PhD at 202-517-0211, or by e-mail at [jeddins@achp.gov](mailto:jeddins@achp.gov).

Sincerely,



Reid J. Nelson  
Director  
Office of Federal Agency Programs

Enclosures

**CERTIFICATE OF SERVICE**

I hereby certify that, on August 23, 2018, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Robert M. Kennedy

Robert M. Kennedy  
Senior Attorney