
No. _____

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SIERRA CLUB, WEST VIRGINIA RIVERS COALITION, WEST VIRGINIA
HIGHLANDS CONSERVANCY, APPALACHIAN VOICES, and
CHESAPEAKE CLIMATE ACTION NETWORK
Petitioners

v.

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

PETITION FOR REVIEW

DEREK O. TEANEY
JOSEPH M. LOVETT
APPALACHIAN MOUNTAIN ADVOCATES. INC.
P.O. Box 507
Lewisburg, WV 24901
(304) 793-9007
dteaney@appalmad.org
Counsel for Petitioners

Pursuant to Section 19(d)(1) of the Natural Gas Act, 15 U.S.C. §717r(d)(1), and Rule 15(a) of the Federal Rules of Appellate Procedure, SIERRA CLUB, WEST VIRGINIA RIVERS COALITION, WEST VIRGINIA HIGHLANDS CONSERVANCY, APPALACHIAN VOICES, and CHESAPEAKE CLIMATE ACTION NETWORK hereby petition the United States Court of Appeals for the Fourth Circuit for review of the October 19, 2018 letter order by the United States Army Corps of Engineers reinstating with modification Atlantic Coast Pipeline, LLC's February 7, 2018 verification under Nationwide Permit Number 12 for the discharge of dredged and/or fill material (United States Army Corps of Engineers File Number LRH-2014-00484-GBR) (hereinafter, "Reinstated NWP 12 Verification"). In accordance with Local Rule 15(b), a copy of the Reinstated NWP 12 Verification is attached hereto as Exhibit A.

The agency action subject to this Petition for Review reinstates with modification the agency action that is the subject of *Sierra Club et al. v. U.S. Army Corps of Engineers et al.*, No. 18-1743, pending in this Court. Petitioners intend to file a motion to consolidate this Petition for Review with *Sierra Club et al. v. U.S. Army Corps of Engineers et al.*, No. 18-1743.

In accordance with Rule 15(c) of the Federal Rules of Civil Procedure, parties that may have been admitted to participate in the underlying proceedings have been served with a copy of this Petition. Pursuant to Local Rule 15(b),

attached hereto is a list of Respondents specifically identifying the Respondents' names and addresses.

DATED October 26, 2018 Respectfully submitted,

/s/ Derek O. Teaney

DEREK O. TEANEY

JOSEPH M. LOVETT

APPALACHIAN MOUNTAIN ADVOCATES, INC.

P.O. Box 507

Lewisburg, WV 24901

Telephone: (304) 793-9007

Email: dteaney@appalmad.org

Counsel for Petitioners

CERTIFICATE OF SERVICE

In accordance with Federal Rule of Appellate Procedure 15(c)(1) & (2), the undersigned hereby certifies that, on October 26 2018, a true copy of this Petition for Review was served via first-class mail on each of the following entities that may have been admitted to participate in the agency proceedings:

1. CT Corporation System
Registered Agent for Atlantic Coast Pipeline, LLC
5400 D Big Tyler Road
Charleston, WV 25313
2. Leslie Hartz
Atlantic Coast Pipeline, LLC
707 E Main Street, 19th Floor
Richmond, VA 23219
3. Richard Gangle
Dominion Resources Services, Inc.
5000 Dominion Boulevard
Glenn Allen, VA 23060
4. Spencer Trichell
Dominion Resources Services, Inc.
5000 Dominion Boulevard
Glenn Allen, VA 23060
5. Kevin Bowman
Federal Energy Regulatory Commission
888 First St. NE
Washington, DC 20426

6. Steve Gibson
U.S. Army Corps of Engineers
Norfolk District
803 Front Street
Norfolk, VA 23510
7. Samantha Dailey
U.S. Army Corps of Engineers
Regulatory Division
3331 Heritage Trade Drive, Suite 105
Wake Forest, NC 27587
8. Josh Shaffer
U.S. Army Corps of Engineers
Pittsburgh District
1000 Liberty Avenue
Pittsburgh, PA 15222

DATED: October 26, 2018 /s/ **Derek O. Teaney**
DEREK O. TEANEY
APPALACHIAN MOUNTAIN ADVOCATES, INC.
P.O. Box 507
Lewisburg, WV 24901
Telephone: (304) 793-9007
Email: dteaney@appalmad.org
Counsel for Petitioners

LIST OF RESPONDENTS

Pursuant to Local Rule 15(b), Petitioners hereby provide a list of Respondents specifically identifying the Respondents' names and the addresses where Respondents may be served with copies of the Petition:

United States Army Corps of Engineers
441 G Street NW
Washington, DC 20314

Dr. Mark T. Esper
Secretary, United States Army
101 Army Pentagon
Washington, DC 20310-0101

Lt. General Todd T. Semonite
Commanding General and Chief of Engineers
United States Army Corps of Engineers
441 G Street NW
Washington, DC 20314

Col. Jason A. Evers
District Commander
United States Army Corps of Engineers
Huntington District
502 Eighth Street
Huntington, WV 25701

Michael E. Hatten
Chief, Regulatory Branch
United States Army Corps of Engineers
Huntington District
502 Eighth Street
Huntington, WV 25701

EXHIBIT A



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
HUNTINGTON DISTRICT, CORPS OF ENGINEERS
502 EIGHTH STREET
HUNTINGTON, WEST VIRGINIA 25701-2070

OCT 19 2018

Regulatory Division
Energy Resources Branch
LRH-2014-00484-GBR

NATIONWIDE PERMIT NO. 12 VERIFICATIONS

Leslie Hartz
Atlantic Coast Pipeline, LLC
707 E Main Street, 19th Floor
Richmond, Virginia 23219

Dear Ms. Hartz:

On July 27, 2018, the Huntington District, United States Army Corps of Engineers (Corps) suspended the Nationwide Permit (NWP) 12 verifications dated February 7, 2018 indefinitely for all crossings of water of the United States (U.S.) associated with the construction of the Atlantic Coast Pipeline (ACP) in accordance with the procedures of 33 CFR § 330.5(d)(1). Via a request dated September 7, 2018, you provided new information regarding the dry-cut construction method proposed at the Greenbrier River crossing and requested the Huntington District re-evaluate and re-instate the previously suspended NWP 12 verifications. Via a pre-construction notification (PCN) received in this office on April 4, 2018, you have requested Department of the Army (DA) authorization for additional discharges of dredged and/or fill material into waters of the United States associated with the ACP based on minor revisions to the original delineation and corrections to previously submitted impact calculations. Approximately 37.4-miles of the proposed pipeline and approximately 61-miles of proposed access roads are located within the Huntington District's regulatory boundary in Randolph and Pocahontas Counties, West Virginia.

The Corps' authority to regulate waters of the U.S. is based on the definitions and limits of jurisdiction contained in 33 CFR 328 and 33 CFR 329. Section 404 of the Clean Water Act requires a DA permit be obtained prior to discharging dredged or fill material into waters of the U.S., including wetlands. Section 10 of the Rivers and Harbors Act of 1899 requires a DA permit be obtained for any work in, on, over or under a navigable water.

The ACP involves the construction of 156 single and complete projects. Each proposed project has been reviewed in accordance with Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899. Based on your description of the proposed work, and other information available to us, the discharges of dredged and/or fill material and work in the Greenbrier River are subject to regulation under Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act. The discharge of dredged and/or fill material into all of the remaining 155 single and complete crossings are subject to regulation under Section 404 of the Clean Water Act.

-2-

In the submitted information, including the September 25, 2017 PCN materials and the April 4, 2018 PCN materials, you have requested a DA authorization for the temporary discharge of dredged and/or fill material into 2,312 linear feet (0.21 acre) of ephemeral streams, 4,991 linear feet (0.55 acre) of intermittent streams, 1,544 linear feet (1.26 acres) of perennial streams, 5.61 acres of palustrine emergent (PEM) wetlands, 0.53 acre of palustrine scrub-shrub (PSS) wetland, 0.39 acre of palustrine forested wetland, and 0.01 acre of palustrine open water, and to permanently discharge dredged and/or fill material into 432 linear feet (0.02 acre) of ephemeral streams, 236 linear feet (0.03 acre) of intermittent streams, 176 linear feet (0.07 acre) of perennial streams, 1.08 acres of PEM wetland, and 0.53 acre of PSS wetland at 156 separate and distant locations as shown on the enclosed Table 2.0-1 titled *Single and Complete Crossings of Waters of the U.S. for the Atlantic Coast Pipeline within the U.S. Army Corps of Engineers – Huntington District Revised October 12, 2018*. Temporarily affected wetlands and streams will be restored to pre-construction contours and conditions following construction activities.

Based upon a review of the submitted *Atlantic Coast Pipeline Greenbrier River Pipeline Crossing Plan*, the Greenbrier River crossing will be constructed using the dam-and-pump method. This method involves the installation of a water dam (bladder) across the river, the installation of pump lines, and the attachment of pump hoses to the water dam to fill the bladder. Via a letter dated September 7, 2018, the West Virginia Department of Environmental Protection (WVDEP) stated their view that your crossing plan complies with Section 401 Water Quality Certification Special Condition C of the NWP 12. The Corps concurs with the WVDEP's assessment and has further determined the proposed crossing method is protective of water quality and the aquatic environment and is the least environmentally damaging practicable construction method. Upon installing the pipeline and backfilling the trench, the water dam will be removed and the affected riverbed returned to its pre-construction conditions. Post-construction reports will be submitted to this office upon completion of the river crossing to document the restoration of the river to its pre-construction contours and elevation.

Based on the provided information, it has been determined the proposed discharge of dredged and/or fill material into waters of the U.S. at each of the 156 separate and distant locations and work within navigable waters of the United States meet the criteria for NWP 12 (enclosed) under the January 6, 2017 Federal Register, Issuance and Reissuance of NWPs (82 FR 1860) provided you comply with all terms and conditions of the enclosed material, the enclosed special conditions, and the general Section 401 Water Quality Certification issued by the WVDEP. A copy of this NWP can be found on our website at: <http://www.lrh.usace.army.mil/Missions/Regulatory.aspx>. The NWP 12 verifications for all of the crossings previously authorized and subsequently suspended by the Corps are therefore reinstated with modifications pursuant to 33 CFR § 330.5(d).

-3-

Please be aware these NWP verifications do not obviate the requirement to obtain any state or local assent required by law for the activities. Each verification is valid until the expiration date of the NWPs, unless the NWP authorization is modified, suspended, or revoked. The verification will remain valid if the NWP authorization is reissued without modification or the activity complies with any subsequent modification of the NWP authorization. All of the existing NWPs are scheduled to be modified, reissued, or revoked on March 18, 2022. Prior to this date, it is not necessary to contact this office for re-verification of your project unless the plans for the proposed activity are modified. Furthermore, if you commence or under contract to commence this activity before March 18, 2022, you will have twelve (12) months from the date of the modification or revocation of the NWP to complete the activity under the present terms and conditions of this NWP.

A copy of this NWP and this letter should be supplied to your project engineer responsible for project activities and a copy kept at the site during project work. Upon completion of the work, the enclosed certification must be signed and returned to this office. If you have any questions concerning the above, please contact Adam Fannin of the Energy Resource Branch at (304) 399-6901 or by email at adam.e.fannin@usace.army.mil.

Sincerely,

A handwritten signature in black ink, appearing to read 'J. Evers', with a large, stylized loop at the end.

Jason A. Evers P.E., PMP
Colonel, Corps of Engineers
District Engineer

Enclosures

cc: (next page)

-4-

cc:

Richard Gangle
Dominion Resources Services, Inc.
5000 Dominion Boulevard
Glenn Allen, Virginia 23060

Spencer Trichell
Dominion Resources Services, Inc.
5000 Dominion Boulevard
Glenn Allen, Virginia 23060

Kevin Bowman
Federal Energy Regulatory Commission
888 First St. NE
Washington, DC 20426

Mr. Josh Shaffer
U.S. Army Corps of Engineers
Pittsburgh District
1000 Liberty Avenue
Pittsburgh, Pennsylvania 15222

Nationwide Permit 12 Verification Special Conditions**Atlantic Coast Pipeline, LLC****Atlantic Coast Pipeline****LRH-2014-00484-GBR****1 of 5**

1. These Nationwide Permit 12 verifications for the discharge of dredged and/or fill material into waters of the United States and associated work within the Greenbrier River are contingent upon the permittee's submitted Pre-Construction Notification (PCN) information regarding the scope and/or impacts of the project as described in Figure 1 titled Atlantic Coast Pipeline Overview Map, the aquatic resources identified in the enclosed Table titled Single and Complete Crossings of Waters of the U.S. for the Atlantic Coast Pipeline within the U.S. Army Corps of Engineers – Huntington District, and the environmentally protective construction method (dry open cut with pump and water bladder dam) as described in the enclosed Atlantic Coast Pipeline Greenbrier River Pipeline Crossing Plan. Should new information regarding the scope and/or impacts of the project become available that was not submitted to this office during our review of the proposal, the permittee must submit written information concerning proposed modification(s) to this office for review and evaluation, as soon as practicable.
2. The permittee is required to apply for and secure all necessary permits, certifications or other approvals from Federal, State and/or local regulatory agencies, prior to commencing the construction activity.
3. Enclosed is a copy of Nationwide Permit 12, which will be kept at the site during construction. A copy of the nationwide permit verification, special conditions, and the submitted construction plans must be kept at the site during construction. The permittee will supply a copy of these documents to their project engineer responsible for construction activities.
4. Construction activities will be performed during low flow conditions to the greatest extent practicable. Additionally, appropriate site specific best management practices for sediment and erosion control will be fully implemented during construction activities. The permittee shall ensure stream and riparian upland buffers are adequately flagged and/or staked before construction activities to ensure these areas are not inadvertently impacted pre-, during- or post-construction and follow the *Wetland and Waterbody Construction and Mitigation Procedures* and the *Upland Erosion Control, Revegetation Plan, and Maintenance Plan* established by the Federal Energy Regulatory Commission (FERC) unless otherwise approved by FERC and by this office where necessary.

Nationwide Permit 12 Verification Special Conditions**Atlantic Coast Pipeline, LLC****Atlantic Coast Pipeline****LRH-2014-00484-GBR****2 of 5**

5. Completion of stream and wetland crossings must adhere to the dates established in the Standard Conditions of the State 401 Water Quality Certification applicable to the Nationwide Permits, including the established restrictions during the spawning season for warm water streams and their adjacent tributaries (April to June) and trout waters and their adjacent tributaries (September 15 to March 31) or in accordance with any applicable timing restriction waivers issued by the State of West Virginia. For waiver requests, the permittee must contact the West Virginia Division of Natural Resources Coordination Unit, at (304) 637-0245. For information about specific stream designations, the permittee must contact the West Virginia Department of Environmental Protection, Water Quality Standards Section at (304) 926-0495.
6. Construction of the Greenbrier River crossing will be conducted using the “dry” open-cut methodology described in the *Atlantic Coast Pipeline Greenbrier River Pipeline Crossing Plan* to minimize adverse effects to water quality, the aquatic environment, and overall environmental impacts. Changes to the plan will require notification and prior approval from the Corps.
7. At each stream crossing, substrate in the channel will be removed and stockpiled separately from other excavated material. This native material must be reused in restoration of the stream channel and, upon final stream bed restoration, the stream must have similar substrate pattern, profile, dimension and embeddedness of the original stream channel. Affected riparian areas must be revegetated with native, non-invasive species similar in density to adjacent undisturbed lands. At each wetland crossing, the top 12 inches of soil will be removed and stockpiled separately from other excavated material. This native material must be reused in restoration of the wetlands.
8. The permittee will document pre- and post-construction activities through photographs, both upstream and downstream of each channel and each bank. A minimum of four (4) photographs per stream crossing will be taken. For the major streams, as defined by the Federal Energy Regulatory Commission, additional photographs of the streams’ banks will be taken for a minimum of six photographs. For wetland crossings, the permittee will document prior to construction through photographs of the wetland with the Right-of-Way (ROW), the ROW as it enters the wetland, and the ROW as it exits the wetland will be obtained by the permittee. All photographs must be geo-referenced and identified to correspond with aquatic feature names as described in the Table titled Single and Complete Crossings of Waters of the U.S. for the Atlantic Coast Pipeline within the U.S. Army Corps of Engineers – Huntington District with a date of the photograph taken and corresponding

Nationwide Permit 12 Verification Special Conditions
Atlantic Coast Pipeline, LLC
Atlantic Coast Pipeline
LRH-2014-00484-GBR
3 of 5

GPS coordinates. Upon completion of construction and reclamation of each stream and wetland crossing, associated photographs must be taken in the same manner and locations as pre-impact existing conditions with narrative documentation that the area has been returned to pre-construction contours. The pre- and post-construction photographs associated with each stream and wetland crossing must be submitted to the Huntington District along with the enclosed "Activity Completion Certification." The permittee is responsible for implementing reasonable corrective measures recommended by the Corps.

9. The permittee will submit post-construction reports upon completion of the activities conducted within waters subject to Section 10 of the Rivers and Harbors Act of 1899 (Section 10) to document the restoration of the stream to pre-construction contours. One Section 10 river, the Greenbrier River, falls within the project boundary within Huntington District's area of responsibility. Post-construction reports will include in-stream habitat and bank characteristics. The reports will include obtaining post-construction data consistent with methods used to document pre-construction conditions provided by the permittee for the above Section 10 stream crossing. The permittee will provide post-construction documentation that streams have similar substrate pattern, profile, dimension and embeddedness of the original river channel. The permittee is responsible for implementing reasonable corrective measures recommended by the Corps.
10. The permittee understands and agrees that, if future operations by the United States require the removal, relocation, or other alteration, of the structure or work herein authorized, or if, in the opinion of the Secretary of the Army or his authorized representative, said structure or work shall cause unreasonable obstruction to the free navigation of the navigable waters, the permittee will be required, upon due notice from the United States Army Corps of Engineers, to remove, relocate, or alter the structural work or obstructions caused thereby, without expense to the United States. No claim shall be made against the United States on account of any such removal or alteration. The permittee is solely responsible for insuring all activities are performed in compliance with all permit conditions.
11. The authorized work shall not interfere with the public's right to free navigation on navigable waters of the United States. The permittee will provide a site-specific spill response plan for the Greenbrier River crossing.

Nationwide Permit 12 Verification Special Conditions
Atlantic Coast Pipeline, LLC
Atlantic Coast Pipeline
LRH-2014-00484-GBR
4 of 5

12. The permittee will purchase stream and wetland mitigation credits from multiple federally-approved mitigation bank(s) and the West Virginia In-Lieu Fee Program as indicated on the below Table as excerpted from the applicant's compensatory mitigation plan. The permittee will submit confirmation to the Corps, Huntington District (Permit Number LRH-2014-00484) of the purchase of the mitigation credits prior to the discharge of dredged and/or fill material into waters of the United States.

Table 4: ACP West Virginia Mitigation Summary (Continued)						
MITIGATION						
Resource	Mitigation Credit Needs	Bank Credits		ILF Credits		Total Credits Delivered
Stream	1,009.44	0.00		Tygart Valley	339.46	1,009.44*
				West Fork	95.06	
				Elk	295.91	
				Greenbrier	279.02	
Wetland	3.310	Tygart Valley Bank Beverly #1 Bank	2.000 0.930	Greenbrier	0.380	3.310

**Individual impacts were aggregated and summed, resulting in a rounding discrepancy of 0.01 acres in the total impacts calculated.*

13. In the event any previously unknown historic or archaeological sites or human remains are uncovered while accomplishing the authorized activity, the permittee must cease all work in waters of the United States immediately and contact local, state and county law enforcement offices (only contact law enforcement on findings of human remains), the Corps at (304) 399-5210 and West Virginia State Historic Preservation Office at (304) 558-0220. The FERC will initiate the Federal, state and tribal coordination required to comply with the National Historic Preservation Act and the applicable state and local laws and regulations. Federally recognized tribes are afforded a government-to-government status as sovereign nations and consultations are required under Executive Order 13175 and 36 CFR Part 800.

Nationwide Permit 12 Verification Special Conditions
Atlantic Coast Pipeline, LLC
Atlantic Coast Pipeline
LRH-2014-00484-GBR
5 of 5

14. The revised United States Fish and Wildlife Service (USFWS) Biological Opinion for the Atlantic Coast Pipeline, LLC; Docket Numbers CP15-554-000, CP15-554-001, CP15-555-000; Project #05E2VA00-2016-F-1219, #05E2WV00-2014-F-0832, #05E2PA00-2016-TA-0960, #04EN2000-2017-I-0738 (BO) and dated September 11, 2018 contains mandatory terms and conditions to implement the reasonable and prudent measures that are associated with "incidental take" that is also specified in the BO. The permittee's authorization under this Corps nationwide permit verification is conditional upon their compliance with all of the mandatory terms and conditions associated with the incidental take of the BO, which terms and conditions are incorporated by reference as being special conditions of the Section 404 and Section 10 nationwide permit verifications. The USFWS is the appropriate authority to determine compliance with the terms and conditions of its BO, and with the Endangered Species Act.
- 