No. 19-1866

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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WILD VIRGINIA, et al.,
*Petitioners*,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,
*Respondents*,

and

MOUNTAIN VALLEY PIPELINE, LLC,
*Intervenor-Respondent*.

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On Petition for Review of Action of the U.S. Fish and Wildlife Service

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**FEDERAL RESPONDENTS' COMBINED OPPOSITION TO PETITIONERS' MOTION TO STAY AGENCY ACTION AND MOTION TO HOLD LITIGATION IN ABEYANCE**

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## INTRODUCTION

Petitioners move for a stay pending review of the U.S. Fish and Wildlife Service's Biological Opinion (BiOp) and Incidental Take Statement (ITS) for the Mountain Valley Pipeline. The motion should be denied.

The Service issued the BiOp and ITS in November 2017. Petitioners cannot show that they will suffer irreparable harm to their interests now, 21 months after the BiOp and ITS were issued, because Mountain Valley Pipeline LLC (Mountain Valley) has suspended all new construction activities that pose a risk to threatened or endangered species. The suspension is binding and may not be lifted without approval of the Federal Energy Regulatory Commission (FERC). And even if Petitioners did face imminent harm despite the suspension (which they do not), such harm would be a product of Petitioners' own delay in seeking judicial review. Because equity ministers to the vigilant, not to those who sleep on their rights, and because Petitioners have not made a clear showing of imminent irreparable harm absent a stay, Petitioners' motion should be denied.

FERC has requested reinitiation of Endangered Species Act (ESA) consultation with the Service to address new information relating to the same issues raised in Petitioners' motion. Consequently, the present action should be held in abeyance until January 11, 2020, pending the completion of that parallel administrative process. Petitioners will not be prejudiced given the suspension of

activities, and because Section 7(d) of the ESA will prohibit FERC and Mountain Valley from making any irreversible or irretrievable commitment of resources during re-consultation. The abeyance will avoid the harm to the Service and the consumption of judicial resources that would result from litigating issues that may be altered or mooted by the Service's new BiOp or other analysis issued after re-consultation. The Court should therefore temporarily hold this case in abeyance.

The Service has informed counsel for the other parties of its intent to move for an abeyance. Mountain Valley does not oppose the Service's motion. Petitioners intend to file an opposition to the motion.

## BACKGROUND

### A. The Endangered Species Act

Section 7(a)(2) of the ESA directs each federal agency to insure that "any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of" any species that has been listed as threatened or endangered. 16 U.S.C. § 1536(a)(2). The agency proposing to act (action agency) fulfills that obligation through consultation with the Service. *Id.* At the conclusion of formal consultation, the Service issues a BiOp addressing whether the proposed action is likely to cause jeopardy. 50 C.F.R. § 402.14(g)-(h).

Section 9(a)(1) of the ESA prohibits the unauthorized "take" of members of a listed species. 16 U.S.C. § 1538(a)(1)(B). If, after formal consultation, the

Service concludes that the proposed action is not likely to cause jeopardy but will take members of a listed species, the Service provides an ITS with the BiOp. *Id.* § 1536(b)(4). The ITS must specify the impact (amount or extent) of anticipated take, measures to minimize such impact, and terms and conditions to implement those measures. 50 C.F.R. § 402.14(i)(1). Any taking in compliance with those terms and conditions "shall not be considered to be a prohibited taking of the species concerned." 16 U.S.C. § 1536(o)(2).

After the Service issues a BiOp, the action agency (here, FERC) must reinitiate consultation in certain circumstances, including when "new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered." 50 C.F.R. § 402.16(b). "It is ultimately the responsibility of the Federal action agency to reinitiate consultation with the . . . Service when warranted." 84 Fed. Reg. 44,976, 44,980 (Aug. 27, 2019). During re-consultation, the action agency and any applicant (here, Mountain Valley) may not make any "irreversible or irretrievable commitment of resources" that would foreclose the implementation of reasonable and prudent measures that may be necessary to avoid jeopardy. 16 U.S.C. § 1536(d).

**B. Status of the project**

In October 2017, FERC issued a Certificate of Public Convenience and Necessity (Certificate) under the Natural Gas Act authorizing construction of the

Mountain Valley Pipeline, a 304-mile pipeline to transport natural gas from West Virginia to Virginia. *See Mountain Valley Pipeline, LLC*, 161 F.E.R.C. ¶ 61,043, 2017 WL 4925425 (Oct. 13, 2017); Petitioners' Exhibit A at 2-5. FERC's certificate was challenged in court and upheld. *Appalachian Voices v. FERC*, No. 17-1271, 2019 WL 847199 (D.C. Cir. Feb. 19, 2019).

FERC's issuance of the Certificate was an action triggering formal consultation under ESA Section 7(a)(2). On November 21, 2017, the Service issued its BiOp, concluding that the Mountain Valley Pipeline is not likely to jeopardize the continued existence of any listed species, including the endangered Roanoke logperch and the endangered bat species referenced in Petitioners' motion. Petitioners' Exhibit A at 1, 38-39. Because the Service determined that certain project activities are likely to take members of those species, the Service provided an ITS with the BiOp. *Id*. at 39-44.

Mountain Valley reports that during the 22 months since FERC issued its Certificate, the following activities have been completed:

> Mountain Valley has cleared, graded, and trenched a large majority of the 303-mile Project right-of-way (ROW). Tree felling is complete, except for an approximate 500-foot section of the Project. About 281 miles of the ROW have been mechanically processed, and roughly 272 miles of the ROW have been graded. Mountain Valley has completed pipe welding across 256 miles and has trenched about 249 miles of ROW. About 238 miles of pipe have been laid. Final restoration is complete on approximately 74 miles of the Project area.

Petitioners' Exhibit E at 1. All of those activities are within the scope of the consultation previously conducted by FERC and the Service.

**C. Reinitiation of consultation**

For the past several months, FERC and the Service have been evaluating whether consultation on the Mountain Valley Pipeline must be reinitiated in light of new information, including information relating to the same issues that Petitioners now seek to adjudicate. *See* Petitioners' Exhibits C, E, F.

On April 12, 2019, the Service requested detailed information from FERC to assist the agencies in determining how to proceed. Petitioners' Exhibit C. The Service requested an analysis of the efficacy of Mountain Valley's erosion and sediment control plan, which would serve as the foundation for any reassessment of project-induced sedimentation. *Id*. at 1. Petitioners challenge the 2017 BiOp's analysis of sedimentation. *See* Motion 3, 10-16. The Service requested the additional sedimentation analysis recommended by an independent scientist in an October 2018 letter to the Service. *Id*. Petitioners rely on the same letter (at 3). The Service requested that FERC use the analyses to assess the project's effects on the logperch, including the potential effects of upland sedimentation. Petitioners' Exhibit C at 2. Petitioners assert that the 2017 BiOp did not adequately analyze upland sedimentation. *See* Motion 10-16.

Mountain Valley responded to the Service's request on July 2, 2019, providing more than 2,000 pages of materials. Petitioners' Exhibit F at 1. The Service has been assessing that complex information as expeditiously as possible while ensuring its careful consideration. *Id*. To that end, the Service has requested that the U.S. Geological Survey conduct an independent and objective review of the model used in Mountain Valley's new sedimentation analysis. *Id*. The Service is also evaluating the potential impact of this Court's recent decision involving the Atlantic Coast Pipeline. *Id*.; *see also Defenders of Wildlife v. U.S. Department of Interior*, 931 F.3d 339 (4th Cir. 2019). Petitioners rely on that decision (at 8-10) in challenging the 2017 BiOp's analysis of effects on endangered bats.

On August 28, 2019, FERC requested reinitiation of consultation to address the new information provided by Mountain Valley and other recent developments. Service Exhibit 2. Re-consultation will proceed immediately after the Service confirms that it has the required information, mindful of this Court's guidance in the Atlantic Coast Pipeline decision. Service Exhibit 1, ¶ 5.

**D. The suspension of new construction activities**

On August 12, 2019, Petitioners requested that the Service administratively stay the BiOp and ITS for the Mountain Valley Pipeline. Petitioners' Exhibit D. On August 15, 2019, building on prior discussions with the Service, Mountain Valley suspended new project activities that pose a risk to listed species.

Petitioners' Exhibit E. Mountain Valley committed to continue the suspension pending reinitiation of consultation, at which point FERC and Mountain Valley's activities are governed by ESA Section 7(d). *Id*. at 4. Mountain Valley explained that the submission of its suspension letter to FERC makes the suspension binding and enforceable under the terms of FERC's Certificate. *Id*. By letter dated August 16, 2019, FERC agreed and stated that the suspended activities "may not be resumed without prior approval of the Director of the Office of Energy Projects." Service Exhibit 5.

The suspension applies to all remaining project activities that the Service has determined (in Appendix B to the BiOp) risk harm to listed species. Petitioners' Exhibit E at 1, 2-3; Service Exhibit 3. The suspension applies as well to activities in areas that the Service is evaluating for potential effects, including activities with the potential to cause the upland sedimentation that is the focus of Petitioners' stay motion. Petitioners' Exhibit E at 1, 2-3. The suspension thus applies to all new ground-disturbing activities or instream disturbances within any watershed draining to a stream or river known or assumed to contain Roanoke logperch. *Id*. at 2-3. This approach ensures that no new upland or instream ground-disturbing activities will occur that could result in direct or indirect take of the logperch. *Id*.

Under the terms of the suspension, Mountain Valley has committed to complete the work necessary to stabilize and restore previously disturbed areas,

employing measures previously approved by FERC. *Id*. at 3. For areas that already have been cleared, graded, and trenched within watersheds of listed aquatic species, this work includes completing pipeline installation, stabilizing the areas, and then restoring those areas—all consistent with FERC's recommendations. Petitioners' Exhibit E at 3-4; Service Exhibit 4 at 2.

On August 15, 2019, the Service denied Petitioners' request for an administrative stay of the BiOp and ITS. Petitioners' Exhibit F. The Service explained that in light of the suspension, which FERC has recognized operates as a mandatory requirement, an administrative stay is not necessary to avoid adverse effects to listed species. *Id*.

Petitioners requested that Mountain Valley clarify whether the suspension applies to the entire length of the project right-of-way between milepost 218.6 and 293.3, an area of concern for Roanoke logperch. Service Exhibit 6. On August 19, 2019, Mountain Valley confirmed that the suspension applies to all identified activities occurring within that area. *Id*. Petitioners raised no other concerns with the Service or Mountain Valley regarding the terms of the suspension.

On August 21, 2019, Petitioners moved this Court for a stay of the November 2017 BiOp and ITS pending judicial review.

## ARGUMENT

### I. Petitioners' motion should be denied because Petitioners are not likely to suffer irreparable harm absent a stay.

A stay of agency action pending judicial review "is not a matter of right," but is "an exercise of judicial discretion." *Nken v. Holder*, 556 U.S. 418, 434 (2009) (internal quotation marks omitted). In deciding whether to grant a stay, the Court considers four factors that substantially overlap with the factors governing preliminary injunctions: (1) whether the petitioner has made a "strong showing that he is likely to succeed on the merits"; (2) whether the petitioner will be "irreparably harmed" in the absence of a stay; (3) whether a stay would substantially injure the other parties interested in the agency's proceeding; and (4) "where the public interest lies." *Id*. (same). The party requesting a stay bears the burden of demonstrating that a stay is warranted. *Id*. at 433-34.

The Service does not intend to address the first factor (likelihood of success on the merits) in this filing because the Service intends to issue a new BiOp or other analysis at the conclusion of re-consultation that likely will supersede the 2017 BiOp and ITS in whole or in part. *See infra* pp. 17-22. More importantly, addressing the first factor is unnecessary because Petitioners have not shown that their interests in listed species will be irreparably harmed absent a stay.

In the analogous preliminary injunction context, the Supreme Court has "made clear that *each* of [the] four factors must be satisfied," such that it is

"unnecessary to address all four factors when one or more [have] not been satisfied." *Henderson v. Bluefield Hospital Co., LLC*, 902 F.3d 432, 438-39 (4th Cir. 2018) (citing *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008)). The Supreme Court also has made clear that, "regardless of the other factors, 'the equitable remedy of an injunction is unavailable absent a showing of irreparable injury.'" *SAS Institute, Inc. v. World Programming Ltd.*, 874 F.3d 370, 386 (4th Cir. 2017) (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983)). It is therefore appropriate to "begin the analysis with that issue because the basis of injunctive relief in the federal courts has always been irreparable harm and the inadequacy of legal remedies." *Direx Israel, Ltd. v. Breakthrough Medical Corp.*, 952 F.2d 802, 812 (4th Cir. 1991). The *possibility* of irreparable harm is insufficient. *See Winter*, 555 U.S. at 20. The movant must make a clear showing that it is *likely* to suffer irreparable harm absent provisional equitable relief. *Id.*; *Nken*, 556 U.S. at 434. As elaborated below, Petitioners have not made the requisite showing.

Petitioners claim (at 16) that their interests in observing the Roanoke logperch and endangered bats will be irreparably harmed absent a stay because the BiOp and ITS enable FERC and Mountain Valley to engage in harmful construction activities. This argument has no merit. Because of the suspension of activities that pose a risk to those species, and because ESA Section 7(d) will apply

during re-consultation, the Service's BiOp and ITS will not cause Petitioners *any* harm. On that basis alone, Petitioners' motion should be denied.

The suspension is binding under FERC's Certificate, and suspended activities may not resume without FERC's approval. Petitioners' Exhibit D at 4; Service Exhibit 5. The suspension applies to all remaining activities that the Service has determined (in Appendix B to the BiOp) risk harm to listed species. Petitioners' Exhibit E at 1, 2-3. Mountain Valley has suspended all remaining activities in *additional* areas that the Service is evaluating for potential effects on listed species. *Id*. Thus, the suspension does not rely solely on the BiOp to identify activities that should be avoided, as Petitioners incorrectly assert (at 21).

The suspension covers both (1) all tree-clearing activities that pose a risk to endangered bats and (2) all new ground disturbing activities or instream disturbances within any watershed draining to a stream or river that is known or assumed to contain Roanoke logperch, *including* in the upland areas of concern to Petitioners. *Id*. at 2-3; Motion 10-16. The suspension accordingly ensures that the species of concern to Petitioners will not be harmed during the suspension. Prior to resuming any the suspended activities during re-consultation, FERC and Mountain Valley must ensure that those activities comply with ESA Section 7(d), which prohibits FERC and Mountain Valley from making any irreversible or irretrievable commitment of resources. *See* 16 U.S.C. § 1536(d).

Petitioners contend (at 17-18) that any activities conducted by Mountain Valley violate ESA Section 7(d). This Court's jurisdiction, however, is limited to reviewing the Service's BiOp and ITS. *See* 15 U.S.C. § 717r(d)(1). Section 7(d) imposes obligations on FERC and on Mountain Valley, not on the Service. As the Court previously explained, to the extent Petitioners believe that Mountain Valley is violating Section 7(d), "district courts remain the courts of original jurisdiction." *Sierra Club v. United States Department of Interior*, No. 18-1082 (Doc. 97), at 4 (4th Cir. Aug. 15, 2018) (citing 16 U.S.C. § 1540(c), (g) and 28 U.S.C. § 1331).[1] To the extent that Petitioners believe that FERC has authorized activities in violation of Section 7(d), "Petitioners must proceed through the specific review process provided by the Natural Gas Act." *Id*. (citing 15 U.S.C. § 717r(a)-(b)). FERC's and Mountain Valley's compliance with Section 7(d) is a matter beyond this Court's limited jurisdiction, and it has no bearing on whether Petitioners are being irreparably harmed *by the Service's 2017 BiOp and ITS*.

Petitioners next take issue with Mountain Valley's continuation of work necessary to stabilize and restore previously disturbed areas. *See* Motion 18-20. Petitioners acknowledge (at 19) that disturbed areas must be stabilized to avoid

[1] The cited order is a precedential order marked for publication, but it does not appear to have been reported on Westlaw. A copy is attached as Exhibit 7.

environmental harm, but they assert that Mountain Valley's activities go too far and will cause additional harm. This argument fails for two independent reasons.

*First*, Petitioners identify no alternative stabilization measures that allegedly would be more protective than the measures Mountain Valley has committed to implement. Under the terms of the suspension, Mountain Valley must stabilize and restore previously disturbed areas consistent with FERC's order of August 29, 2018. Petitioners' Exhibit E at 3-4. In that order, FERC determined that maintaining the status quo in previously disturbed areas "would likely pose threats to plant and wildlife habitat and adjacent waterbodies as long-term employment of temporary erosion control measures would subject significant portions of the route to erosion and soil movement." Service Exhibit 4 at 1. FERC further determined that for cleared, graded, and trenched portions of the right-of-way where temporary control measures have been installed, protection of the environment "is best served by completing construction and restoration activities as quickly as possible." *Id*. at 2. Petitioners, who bear the burden of proof under *Nken*, 556 U.S. 418, present no evidence contravening FERC's assessment.

*Second*, an order staying the Service's BiOp and ITS would not resolve Petitioners' dispute with FERC and Mountain Valley over proper stabilization measures. The Court's jurisdiction is limited to reviewing the BiOp and ITS; it does not extend to directing FERC how to stabilize worksites. *See* 15 U.S.C.

§ 717r(d); *see also Sierra Club*, No. 18-1082 (Doc. 97), at 3-4. Petitioners appear to agree (at 19) that if a stay is granted, FERC and Mountain Valley still would need to stabilize disturbed areas. But a stay would not prevent FERC and Mountain Valley from implementing those measures that they have determined are most protective and (during re-consultation) consistent with Section 7(d). Consequently, to the extent that Petitioners are harmed by Mountain Valley's stabilization activities (which they have not established), that harm is not attributable to the Service's BiOp and ITS, and there is no basis for concluding that the alleged harm would be avoided by a stay of the BiOp and ITS.

Petitioners accuse Mountain Valley (at 19-20) of engaging in "extensive construction activity" under the "guise" of stabilization. Mountain Valley is in the best position to address that accusation. But to the extent that Petitioners contend that Mountain Valley is violating the terms of the suspension, which is now enforceable under FERC's Certificate, they are in the wrong court. "To the extent that Petitioners seek to *enforce* the terms or conditions of an existing and valid FERC order, such claims must originate in an appropriate district court." *Sierra Club*, No. 18-1082 (Doc. 97), at 4 (citing 15 U.S.C. § 717u).

Petitioners assert (at 20) that the suspension of tree felling is insufficient to protect Indiana bats. This assertion also lacks merit. Petitioners rely on statements in Mountain Valley's biological assessment indicating that bats could be harmed

by noise, dust, and lighting associated with construction. *See* Petitioners' Exhibits D and H. At the conclusion of consultation, however, the Service determined that the only project activities that risk harming Indiana bats are those involving tree removal. Petitioners' Exhibit A at 25. The Service found that other project activities are not likely to harm the species, particularly in light of the required avoidance and minimization measures. *See* Service Exhibit 3 (BiOp Appendix B, Table 4). In their merits arguments, Motion 6-10, Petitioners do not challenge the Service's expert judgment on that point, which is entitled to substantial deference, *see AES Sparrows Point LNG v. Wilson*, 589 F.3d 721, 733 (4th Cir. 2009). Nor do Petitioners present evidence that the required avoidance and minimization measures are inadequate to avoid harm to the species.

Petitioners contend (at 21) that the duration of the suspension is insufficient to avoid irreparable harm. This contention also lacks merit. Mountain Valley may not resume any of the suspended activities without FERC's prior approval, Service Exhibit 5; and during re-consultation, FERC may not authorize Mountain Valley to resume any suspended activities without first ensuring that the activities comply with Section 7(d), *see* 16 U.S.C. § 1536(d); Petitioners' Exhibit E at 4. To the extent that Petitioners believe that FERC authorizes activities in violation of Section 7(d), Petitioners may pursue relief in the appropriate forum. *See Sierra Club*, No. 18-1082 (Doc. 97), at 4. Therefore, Petitioners have not shown that the

binding and enforceable terms of Section 7(d) and of the FERC-supervised suspension will be inadequate to prevent irreparable harm to listed species.

Finally, even if Petitioners could show a risk of imminent harm (which they have not shown), that risk would be a product of Petitioners' own extraordinary delay in seeking judicial review. The BiOp and ITS were issued on November 21, 2017, more than 21 months ago. Petitioners could have promptly challenged the Service's decisions, 15 U.S.C. § 717r(d)(1), but they did not. Nor have Petitioners provided any valid justification for their delay. Petitions do not claim that any non-suspended project activities differ materially from those that Mountain Valley has already completed. And while Petitioners' motion relies on new information, that information has no bearing on the validity of the November 2017 BiOp, which must be judged based on the Service's administrative record at that time. *QinetiQ US Holdings, Inc. v. Commissioner of Internal Revenue*, 845 F.3d 555, 560 (4th Cir. 2017). Although FERC might have a duty to reinitiate consultation in light of significant new information, 50 C.F.R. § 402.16; 84 Fed. Reg. at 44,980, Petitioners have not pursued a reinitiation claim against FERC in the appropriate forum. *See Sierra Club*, No. 18-1082 (Doc. 97), at 4.

The only agency action at issue in *this* case is the Service's November 2017 BiOp and ITS, which must be reviewed based on the information before the Service at that time. Had Petitioners promptly challenged the BiOp and ITS, the

challenge likely would have been resolved by now, avoiding any alleged urgent need for equitable relief. Such relief is therefore unwarranted. "For equity ministers to the vigilant, not to those who sleep upon their rights." *Perry v. Judd*, 471 Fed. Appx. 219, 224 (4th Cir. 2012) (internal quotation marks omitted). "Equity demands that those who would challenge the legal sufficiency of administrative decisions concerning time sensitive public construction projects do so with haste and dispatch. To require any less could well result in costly disruptions of ongoing public planning and construction." *Quince Orchard Valley Citizens Ass'n, Inc. v. Hodel*, 872 F.2d 75, 80 (4th Cir. 1989).

A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter*, 555 U.S. at 22. Petitioners have not made a clear showing that they are likely to suffer irreparable harm absent a stay of the November 2017 BiOp and ITS and, in any event, any alleged harm that Petitioners now face is a product of their own delay in seeking judicial review. On that basis alone, Petitioners' motion should be denied. *See Henderson*, 902 F.3d at 438-39.

## II. This litigation should be held in abeyance pending completion of re-consultation.

The Service requests that the Court hold this litigation in abeyance until January 11, 2020, to allow FERC and the Service to engage in re-consultation and

for the Service to issue a new BiOp or other appropriate analysis.[2] Petitioners' interests in listed species will be protected by the suspension of activities and by the requirements of ESA Section 7(d). The abeyance will avoid the harm to the Service and the consumption of judicial resources that would result from attempting to adjudicate issues that are likely to be altered or mooted by the completion of re-consultation. All relevant factors therefore weigh in favor of temporarily holding this litigation in abeyance.

"[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. North American Co.*, 299 U.S. 248, 254 (1936). "How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." *Id.* at 254-55. A court may enter a stay "pending resolution of independent proceedings which bear upon the case . . . whether the separate proceedings are judicial, administrative, or arbitral in character," and granting the stay "does not require that the issues in such proceedings are necessarily controlling of the action

[2] Although the Service anticipates issuing a new BiOp and ITS, it is possible that the Service and FERC could conclude consultation informally for at least some of the species at issue if the agencies concur that the project is not likely to adversely affect those species. *See* 50 C.F.R. § 402.13(a).

before the court." *Leyva v. Certified Grocers of California, Ltd.*, 593 F.2d 857, 863-64 (9th Cir. 1979).

"In determining whether to grant a stay of proceedings, the Court considers the length of the requested stay, the hardship that the movant would face if the motion were denied, the burden a stay would impose on the nonmovant, and whether the stay would promote judicial economy." *Donnelly v. Branch Banking & Trust Co.*, 971 F. Supp. 2d 495, 501-02 (D. Md. 2013) (citation and internal quotation marks omitted). Applying those factors, courts have recognized the propriety of holding ESA litigation in abeyance pending re-consultation. *See, e.g.*, *WildEarth Guardians v. U.S. Army Corps of Engineers*, Civil No. 15-159, 2016 WL 9777189, at *2-6 (D.N.M June 17, 2016); *Natural Resources Defense Council v. Kempthorne*, No. 1:05-cv-1207 LJO-GSA, 2015 WL 3750305, at *8 (E.D. Cal. June 15, 2015); *Public Employees for Environmental Responsibility v. U.S. Department of Navy*, No. 08-cv-5552-BHS, 2009 WL 2163215, at *10-12 (W.D. Wash. July 17, 2009); *Center for Biological Diversity v. Henson*, No. CIV. 08-946-TC, 2009 WL 1882827, at *3 (D. Or. June 30, 2009). The same considerations weigh in favor of holding this litigation in abeyance pending re-consultation.

The proposed 135-day abeyance period is of modest length and corresponds to the statutory time period for consultation (absent extension by the agencies) and for delivery of a BiOp. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14(e). The re-

consultation will address new information relating to the same issues that Petitioners have raised in this litigation. *See supra* pp. 5-6.

Although the Natural Gas Act requires that this matter be set for expedited consideration, 15 U.S.C. § 717r(d)(5), the statute does not alter the Court's discretion to hold litigation in abeyance in appropriate cases. *See, e.g.*, *Sierra Club v. U.S. Army Corps of Engineers*, No. 18-1713 (Doc. 59) (4th Cir. Jan. 9, 2019) (ordering an abeyance that remains in effect in an action brought under 15 U.S.C. § 717r(d)(1)), *reproduced in* Service Exhibit 8. The purpose of the statutory requirement is to ensure that approvals needed for interstate natural gas pipelines are obtained in a timely manner, not to *require* a court to rush to review an approval that is likely to be changed during ongoing administrative proceedings. *See* 15 U.S.C. § 717r(d)(2)-(3), (5); *Islander East Pipeline Co., LLC v. Connecticut Department of Environmental Protection*, 482 F.3d 79, 85 (2nd Cir. 2006).

Petitioners will not be prejudiced by the abeyance because the enforceable requirements of the suspension of activities and ESA Section 7(d) will prevent harm to listed species. *See supra* pp. 10-16. Petitioners also advocate for re-consultation (at 17), which the abeyance will facilitate.

Although Petitioners would not be prejudiced, the Service would suffer significant hardship absent an abeyance. *See* Service Exhibit 1, ¶¶ 7-10. Moving forward with the litigation would require the Service to litigate the same issues that

will be addressed during re-consultation, resulting in unnecessary duplication of effort. *See id*. Any BiOp or other analysis issued at the conclusion of re-consultation likely will alter and potentially moot Petitioners' current claims. *See Grand Canyon Trust v. U.S. Bureau of Reclamation*, 691 F.3d 1008, 1017 (9th Cir. 2012) (holding that "the issuance of a superseding BiOp moots issues on appeal relating to the preceding BiOp"). Forcing the Service to devote scarce resources to assembling the administrative record for the 2017 BiOp and ITS and to defending those decisions in litigation "when it is already clear that the outcome of the administrative proceedings will impact the final resolution of this case, would be prejudicial." *Natural Resources Defense Council*, 2015 WL 3750305, at *8 (granting abeyance during re-consultation). Diverting resources from the consultation to litigation also could delay completion of re-consultation. Service Exhibit 1, ¶¶ 7-10. An abeyance is warranted when litigation "will bear a high cost in terms of the time and resources needed to complete the consultation in a timely manner." *WildEarth Guardians*, 2016 WL 9777189 at *4; *accord Center for Biological Diversity*, 2009 WL 1882827, at *2-4.

An abeyance will conserve judicial resources. As discussed, the re-consultation will address new information relating to the same issues raised in this case. *See supra* pp. 5-6. A temporary abeyance "is a small price to pay to avoid expenditure of time by the Court resolving ESA claims that may become altered or

rendered moot when the consultation process is completed." *WildEarth Guardians*, 2016 WL 9777189, at *5. Judicial efficiency is better served by having the parties reevaluate the need for litigation after completion of re-consultation and to present a proposed course of action to the Court at that time. "Depending on the outcome of the reconsultation, the Court's intervention may not be needed at all." *Natural Resources Defense Council*, 2015 WL 3750305, at *8.

The Court should therefore hold this litigation in abeyance until January 11, 2020, without prejudice to Petitioners' right to seek further relief if circumstances change materially during the abeyance period. Absent an extension of the abeyance, the Service proposes that the parties file a proposal for further proceedings, if necessary, on or before January 18, 2020.

## CONCLUSION

For the foregoing reasons, Petitioners' motion for a stay pending review of the November 2017 BiOp and ITS should be denied, and the Service's motion to hold the litigation in abeyance until January 11, 2020, should be granted.

Respectfully submitted,

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August 29, 2019
90-13-8-15823

## CERTIFICATES

I certify that on August 29, 2019, a copy of the foregoing was served on all counsel of record in the above-captioned case by electronic service under the Court's CM/ECF system.

I certify that the foregoing complies with the type-volume limits because, excluding the parts of the document exempted by Fed. R. App. R. 32(f), it contains 5140 words, which is within the Court's limit of 5,200 words for a motion or response thereto. I certify that the foregoing complies with the typeface and type style requirements because it has been prepared in a proportionally spaced typeface, Times New Roman 14 point, using Microsoft Word.

*/s/ Kevin W. McArdle*
Kevin W. McArdle

Counsel for Federal Respondents

## LIST OF EXHIBITS

1. Declaration of Spencer Simon, Deputy Assistant Regional Director, Ecological Services, for Region 5 of the U.S. Fish and Wildlife Service

2. Letter from the Federal Energy Regulatory Commission to the U.S. Fish and Wildlife Service dated August 28, 2019

3. Biological Opinion on the Mountain Valley Pipeline dated November 21, 2017 (excerpts, including Appendix B, Table 4)

4. Letter from the Federal Energy Regulatory Commission to Mountain Valley Pipeline LLC dated August 29, 2018

5. Letter from the Federal Energy Regulation Commission to Mountain Valley Pipeline LLC dated August 16, 2019

6. Email exchange between Petitioners and Mountain Valley Pipeline LLC dated August 19, 2019

7. Published Order dated August 16, 2018 (Doc. 97), in *Sierra Club v. U.S. Department of the Interior*, Fourth Circuit No. 18-1082

8. Order dated January 9, 2019 (Doc. 59), in *Sierra Club v. U.S. Army Corps of Engineers*, Fourth Circuit No. 18-1713