

FILED: October 2, 2018
AMENDED: November 27, 2018 *

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-1173 (L)
(LRH-2015-592-GBR)

SIERRA CLUB; WEST VIRGINIA RIVERS COALITION; INDIAN CREEK
WATERSHED ASSOCIATION; APPALACHIAN VOICES; 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; PHILIP M. SECRIST, in his official capacity as District
Commander of the U.S. Army Corps of Engineers, Huntington District; MICHAEL
E. HATTEN, in his official capacity as Chief, Regulatory Branch, U.S. Army Corps
of Engineers, Huntington District

Respondents

MOUNTAIN VALLEY PIPELINE, LLC

Intervenor

* The United States Army Corps of Engineers File Number is changed from LRH-
2015-582-GBR to LRH-2015-592-GBR.

O R D E R

PER CURIAM:

Petitioners ask this Court to set aside Respondent U.S. Army Corps of Engineers’ (the “Corps”) December 22, 2017, verification and July 3, 2018, reinstated verification that construction of the Mountain Valley Pipeline (the “Pipeline”) can proceed under the terms and conditions of Clean Water Act Nationwide Permit 12 (“NWP 12”), rather than an individual permit. Among other arguments, Petitioners assert that, in issuing its verification, the Corps improperly imposed one condition—requiring use of a “dry cut” method for constructing four river crossings—“in lieu of” a special condition imposed by the State of West Virginia, J.A. 232—that “[i]ndividual stream crossings must be completed in a continuous, progressive manner within 72 hours,” J.A. 43—as part of its certification of NWP 12. Construction of each of the four river crossings using the “dry cut” method is expected to take four-to-six weeks to complete.

Exercising jurisdiction pursuant to 15 U.S.C. § 717r(d)(1), we conclude, for reasons to be more fully explained in a forthcoming opinion, that the Corps lacked authority to substitute the “dry cut” requirement “in lieu of” West Virginia’s 72-hour temporal restriction. Accordingly, we VACATE, in its entirety, the Corps’ verification of the Pipeline’s compliance with NWP 12. *See* 5 U.S.C. § 706(2); 33 C.F.R. § 330.6(d) (explaining that if any part of a project requires an individual permit, then “the NWP does not apply and all portions of the project must be evaluated as part of the individual permit

process.”). We reserve judgment on the parties’ remaining arguments until our forthcoming opinion.

FOR THE COURT

/s/ Patricia S. Connor
Clerk