

INSIGHTS

U.S. Court of Appeals for the Fourth Circuit's Decision to Vacate Mountain Valley Pipeline Nationwide Permit

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On November 27, 2018, the U.S. Court of Appeals for the Fourth Circuit issued the most recent in a series of decisions from various courts affecting the federal permitting and construction of interstate pipelines. *Sierra Club v. U.S. Army Corps of Engineers*, No. 18-1173 (4th Cir. Nov. 27, 2018). In this instance, the Circuit held that the U.S. Army Corps of Engineers violated the Clean Water Act when it verified that construction of the Mountain Valley Pipeline project could proceed pursuant to Nationwide Permit 12 in the State of West Virginia.^[1] This decision will have an impact on the flexibility of federal and state agencies when it comes to permitting projects under the Clean Water Act Nationwide Permit program.

The Mountain Valley Pipeline project is a 304-mile natural gas pipeline proposed to run through West Virginia and Virginia. Earlier this year, the Corps had reinstated its verification that the project met the requirements of Nationwide Permit 12 – a general permit that provides authorization for certain discharges associated with the construction of linear energy infrastructure. The Circuit vacated the Corps' verification in its entirety, leaving the project with no authorization under the Clean Water Act.

Unlike many decisions where the issue is the Corps' own process in promulgating the Nationwide Permit in the first instance or the Corps' assessment of whether a specific project falls within the federal parameters of the Nationwide Permit, this matter turned on whether the Corps properly incorporated the State's conditions into its verification and whether the State itself followed the required Clean Water Act process.

In order to use a Nationwide Permit promulgated by the Corps, a project proponent must provide the Federal permitting agency a Section 401 water quality certification from the State (or other permitting agency with jurisdiction over the water) in which the regulated discharge originates, unless the Federal permitting agency determines that the certification requirement has been waived. The State certification and its conditions then become part of the federal Nationwide Permit. With respect to Nationwide Permit 12, the State of West Virginia had issued a general certification that imposed, after public notice and comment, certain special conditions on projects seeking authorization under Nationwide Permit 12 beyond what the Corps required. Two of these special conditions were at issue in this case:

- Special Condition A, which requires an individual state water quality certification for certain projects including those involving construction of pipelines equal to or greater than 36 inches in diameter or if crossing waters regulated under Section 10 of the Rivers and Harbors Act; and
- Special Condition C, which requires that individual stream crossings be completed in a continuous manner within 72 hours in certain conditions.

Pursuant to these Special Conditions, in order to seek authorization under Nationwide Permit 12, Mountain Valley Pipeline was expected to obtain an individual water quality certification and to complete stream crossings within 72 hours. However, West Virginia purported to “waive” its requirement that the pipeline obtain an individual water quality certification following a series of challenges to West Virginia’s individual water quality certification, and the Corps replaced Special Condition C with an alternate condition that the Corps found to be more protective of water quality with the apparent concurrence of the State.

The Fourth Circuit held: (1) the Corps’ verification violated Section 401 of the Clean Water Act because Section 401 unambiguously requires the Corps to incorporate the State’s certification with its special conditions in the federal verification without modification; and (2) Section 401 does not allow a state to waive its special conditions without public notice and comment, meaning that the project proponent remained subject to the condition requiring that it apply for an individual state water quality certification and, therefore, the Corps’ own verification was invalid.

In reaching these conclusions, the Circuit noted that “the Corps’ interpretation would radically empower it to unilaterally set aside state certification conditions as well as undermine the system of cooperative federalism upon which the Clean Water Act is premised.” *Sierra Club*, No. 18-1173 at *22. With respect to the State’s action purporting to waive its special condition, the Circuit explained that “[a]llowing West Virginia to revoke, on a case-specific basis, conditions imposed in its certification of a nationwide permit would impermissibly allow the state to circumvent [the CWA’s] explicit requirement that state permit certifications satisfy notice requirements.” *Id.* at *31.

Assuming this decision stands, the upshot is that both the Corps and the States (at least within the Fourth Circuit) will have less flexibility in how projects are permitted when a State has issued a general water quality certification with specific conditions. The Corps will need to require that the terms of such certifications are strictly followed in order to make decisions that comply with the Clean Water Act.

[1] The Circuit’s November 27, 2018 decision supports and expands upon the Circuit’s October 2, 2018 decision to vacate the Corps’ verification on more limited grounds. *Sierra Club v. U.S. Army Corps of Engineers*, No. 18-1173 (4th Cir. Oct. 2, 2018).