

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BLUE RIDGE ENVIRONMENTAL)
 DEFENSE LEAGUE, *et al.*,)
)
 Petitioners,) Case No. 18-1175
) (Consolidated with Cases
 FEDERAL ENERGY REGULATORY) No. 17-1271, 18-1002,
 COMMISSION, and UNITED) 18-1177, and 18-1186)
 STATES OF AMERICA,)
 Respondents.)
 _____)

On Petition for Review of Order of the Federal Energy Regulatory
 Commission, 161 FERC ¶ 61,043 (October 13, 2017)

[ORAL ARGUMENT NOT SCHEDULED]

**PRESERVATION PETITIONERS' REPLY TO THE OPPOSITION OF
 FERC AND MOUNTAIN VALLEY PIPELINE TO EMERGENCY
 MOTION FOR STAY**

Andrea C. Ferster (DC Bar # 384648)
 Attorney at Law
 2121 Ward Court, N.W. 5th Fl.
 Washington, D.C. 20037
 (202) 974-5142
 (202) 223-9257 (Facsimile)
 aferster@railstotrails.org

Counsel for Petitioner Blue Ridge Environmental
 Defense League, Preserve Montgomery County
 VA, Ben Rhodd, Steve Vance and Mike and
 Elizabeth Reynolds

August 27, 2018

INTRODUCTION

Petitioners Blue Ridge Environmental Defense League (“BREDL”), Ben Rhodd and Steve Vance (Tribal Historic Preservation Officers (collectively, the “THPOs”) of the Rosebud Sioux Tribe and the Cheyenne River Sioux Tribe, respectively), Preserve Montgomery County VA (“PMCVA”), and Mike and Elizabeth Reynolds (referred to collectively as “Preservation Petitioners”) hereby reply to the oppositions filed by the Federal Energy Regulatory Commission (“FERC” or “the Commission”) and Intervenors Mountain Valley Pipeline, *et al.* to Preservation Petitioners’ motion for an emergency stay pending review of FERC’s October 13, 2017 Certificate approving the Mountain Valley Pipeline (“MVP”) project (“Certificate”) and FERC’s June 15, 2018 Rehearing Order upholding the Certificate (“Rehearing Order”), which refused to consider the request of the THPOs for consultation under Section 101(d)(6)(B) of the National Historic Preservation Act (“NHPA”). 54 U.S.C. § 302706(b).

DISCUSSION

- I. Preservation Petitioners Have A Substantial Likelihood of Success on the Merits of their Claims Under Section 101(d)(6)(B) of the NHPA and Implementing Regulations.
 - A. This Court Has Jurisdiction Because These Claims Were Timely Raised by the Preservation Petitioners and Addressed By FERC in the June 15 Rehearing Order.

FERC and the Intervenors argue that Preservation Petitioners are barred by the Natural Gas Act (“NGA”), 15 U.S.C. § 717r(b), from challenging FERC’s failure to identify the Sioux Tribes as having a traditional religious and cultural interest in the lands affected by the MVP project because they failed to raise this issue in a petition for rehearing of the original FERC Certificate.¹ As we now discuss, this Court has jurisdiction to review FERC’s refusal to reopen the proceeding to address the material new information regarding the Sioux Tribes’ occupation and historic interest in the project area.

1. The Certificate, which Deferred NHPA Compliance, Was Not A “Final Order” With Respect to The FERC’s Failure to Identify the Sioux Tribes.

In exercising its jurisdiction over this petition to review under the NGA, this Court “must consider whether the Commission’s action is final,” *Public Utilities Comm’n v. State of California*, 894 F.2d 1372, 1377 (D.C. Cir. 1990). To be final, the decision “must generally ‘mark the consummation of the agency’s decisionmaking process’ and either determine ‘rights or obligations’ or result in ‘legal consequences.’” *Hunter v. FERC*, 403 Fed. Appx. 525, 2010 WL 5341883 *1 (D.C. Cir. 2010) (citations omitted) (emphasis in original); *see also Oglala*

¹ FERC and the intervenors also argue that the THPOs cannot raise these issues because they were denied the right to intervene in the proceeding. However, these issues were clearly also raised by the remaining Preservation Petitioners, who were parties to the FERC proceeding, and may therefore be addressed by this Court.

Sioux Tribe v. U.S. Nuclear Regulatory Comm'n, 896 F.3d 520, 572 (D.C. Cir. 2018) (a final decision is “one that disposes of all issues as to all parties”).

Here, FERC’s conditional Certificate did not “consummate” FERC’s decision-making with respect to FERC’s obligations to consult under the NHPA. The Section 106 process is completed upon actual “*compliance* with the procedures established in an approved programmatic agreement.” *Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dept. of Interior*, 755 F. Supp. 2d 1104, 1109 (S.D. Cal. 2010). As FERC’s conditional Certificate specifically acknowledged, at that time, the “process of compliance with section 106 of the National Historic Preservation Act has not been completed for the projects,” including “consultations with [State Historic Preservation Officers].” Certificate, Appendix C, Condition 15.² It was not until several months later that FERC executed the Programmatic Agreement, which itself merely established a set of procedures for future completion of the consultations and studies mandated by Section 106 of the NHPA. *See* MVP Opp., Exhibit B. Those consultations remained ongoing until March 27, 2018, when FERC determined that Condition 15 had been satisfied and issued a Notice to Proceed to MVP. *See* Exhibit 1 (attached hereto).

² *See* Exhibit A to Motion for Stay filed by Appalachian Mountain Voices, *et al.*, (Document #1712005, page 95 of 582).

As their stay motion makes clear, the Preservation Petitioners timely raised the need to consult with the Sioux Tribes while these ongoing Section 106 reviews and studies were underway. *See* Preservation Petitioners' Motion to Stay, Exhibit B. It was not until April 6, 2018, that FERC addressed the ongoing post-Certificate NHPA issues raised by the THPOs and others concerning the need to consult with the Sioux Tribes, at which time FERC determined that it had no obligation to do so. *See* Preservation Petitioners' Emergency Motion for a Stay, Exhibit A. The Preservation Petitioners filed a timely petition for rehearing of this determination, pointing out the blatant error in FERC's reliance on an irrelevant chapter of the *Handbook of North American Indians* in finding no documentation that the Sioux Tribes "ever occupied the project area or had historic interest in West Virginia or Virginia." *Id.* Thus, FERC's Rehearing Order, which refuses to reconsider this issue, is a final order that represents the agency's conclusive determination on the issue. The Preservation Petitioners' petition for review, filed within two weeks of the Rehearing Order, was timely, and plainly confers jurisdiction on this Court over this issue.

2. The NHPA Claims Arising from FERC's Post-Certificate Refusal to Consult with the Sioux Tribes Are Encompassed Within the Scope of BREDL's Original Challenge to the Certificate.

Assuming, *arguendo*, that the conditional Certificate was a final order even for purposes of all NHPA post-Certificate compliance issues, including those

arising after the time for seeking rehearing had passed, this Court still has jurisdiction over the post-Certificate NHPA compliance issues raised by Preservation Petitioners in their May 4, 2018 Rehearing Petition. These compliance issues are a product of, and therefore fall within the scope the argument raised by BREDL and PMCVVA in their original petitions for rehearing of the Certificate, asserting that FERC's issuance of a conditional certificate prior to completing the Section 106 process violated the plain language of Section 106 of the NHPA, 54 U.S.C. § 306108. Otherwise, aggrieved parties are placed in the untenable position of having to anticipatorily challenge FERC's post-certificate refusal to consult with them even before such a refusal is made. The effect would be to completely preclude judicial review of FERC's NHPA compliance, "an extreme position" that should be avoided. *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 680-81 (1986).

3. This Court has Jurisdiction to Review FERC's Refusal to Consider New Information Raised In An "Untimely" Petition for Rehearing.

In the alternative, the post-Certificate evidence concerning the need to consult with the Sioux Tribes constitutes new information that was timely brought to FERC's attention in their May 4, 2018 rehearing petition. FERC's refusal in the Rehearing Order to reopen its NHPA consultations to address this new NHPA compliance issue is itself reviewable by this Court. *See Tennessee Gas Pipeline*

Co. v. FERC, 871 F.2d 1099, 1107 n.12 (D.C. Cir. 1989) (noting that FERC “frequently treats untimely petitions for rehearing as reconsideration motions” and has authority under Section 19 of the NGA to modify orders *sua sponte* up until a petition for judicial review is filed); 18 C.F.R. § 385.716 (allowing FERC to reopen the record if “warranted by any changes in conditions of fact or of law or by the public interest”).

As this Court has acknowledged, the NGA confers jurisdiction on this Court to address new issues raised for the first time in a petition for rehearing before FERC “insofar as the request for rehearing was based upon new evidence or changed circumstances.” *Martin v. FERC*, 199 F.3d 1370, 1371 (D.C. Cir. 2000) (citing *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 278-80 (1987)). This includes petitions challenging FERC’s refusal to re-open or reconsider new evidence that was raised after the time for filing a petition for rehearing of the underlying order has expired. *See Cooley v. FERC*, 843 F.2d 1464, 1472 (D.C. Cir. 1988) (noting that FERC should have treated a petition for rehearing filed before FERC issued its order denying rehearing, but months after the deadline for filing a petition for rehearing, as a petition to reopen the proceeding). Such petitions are subject to review for “abuse of discretion” where it “clearly appear[s] that the new evidence would compel or persuade to a contrary result.” *Id.*

(citations omitted); *Minisink Residents for Envtl Preservation & Safety v. FERC*, 762 F.3d 97 (D.C. Cir. 2014).

The procedural objections raised by FERC are similar to those raised by the Surface Transportation Board (“STB”) in *Friends of Atglen-Susquehanna Trail (“FAST”) v. STB*, 252 F.3d 246 (3rd Cir. 2001), involving enforcement of the NHPA in the context of the Hobbs Act, which, like the NGA, requires that a petition for review of a final agency action be filed within 60 days. 28 U.S.C. § 2344. The STB license in that case, like FERC’s conditional Certificate, was conditioned upon future compliance with Section 106 of the NHPA. The STB refused to consider new information raised after the expiration of the 60-day period for seeking review but prior to the STB’s completion of the Section 106 process, and FAST filed a petition to review the STB’s NHPA compliance within 60 days of the STB’s refusal. The Third Circuit held that the petition for review was timely, holding that, “[w]here a motion to reopen is based on non-pretextual arguments about new evidence or changed circumstances, the refusal to reopen or reconsider a decision itself is reviewable for abuse of discretion.” *Id.* at 260.

Here, as will be discussed next, the issues raised in the Preservation Petitioners’ petition for rehearing demonstrate that FERC failed to make a good faith effort to identify the Sioux Tribes’ occupation of and interest in the project area. They would plainly “persuade to a contrary result.” *Cooley v. FERC*, 843

F.2d at 1472. Accordingly, FERC's refusal in its Rehearing Order to consider this new information is reviewable by this Court.

B. Preservation Petitioners Have A Substantial Likelihood of Success on their Claims That FERC Violated Section 101(d)(6)(B) of the NHPA.

Apart from the jurisdictional issues, FERC and the Intervenors offer only a tepid defense on the merits of their refusal to identify and consult with the Sioux Tribes. First, they note that the FERC undertook outreach to certain tribes (notably, *not* the Sioux) as part of the National Environmental Policy Act ("NEPA") process. *See* MVP Stay Opp., Exhibit A. However, it is well-established that NEPA and the NHPA are separate statutory responsibilities, and FERC's completion of the required NEPA review is insufficient to demonstrate compliance with NHPA. *Preservation Coalition, Inc. v. Pierce*, 667 F.2d 851, 859 (9th Cir. 1982) ("compliance with the NHPA, even when it exists, does not assure compliance with NEPA"). In the case of historic buildings, each statute "mandates separate and distinct procedures, both of which must be complied with" *Adler v. Lewis*, 675 F.2d 1085, 196 (9th Cir. 1982)

In particular, the case law makes clear that federal agencies have a special affirmative responsibility under the NHPA to consult with Native American tribes in light of the fiduciary duty owed by the United States to all Indian tribes. *Pit River Tribe v. U.S. Forest Service*, 469 F.3d 768, 788 (9th Cir. 2006); *see also Attakai v. United States*, 746 F. Supp. 1395, 1408 (D. Ariz. 1990) (emphasizing the

importance of an Indian tribe's concurring “in any agreement regarding undertakings which affect its lands.”) The special consultation responsibilities independently mandated by Section 101(d)(6)(B) of the NHPA cannot be discharged by form letters or pro forma notifications. *See Pueblo of Sandia v. United States*, 50 F.3d 856 (10th Cir. 1995).

Here, of course, no effort was undertaken even by form letter to identify the Sioux Tribes, despite the fact that the Sioux connection to the project area was readily available through objectively verifiable sources, including the very same *Handbook of North American Indians* that FERC cites in its April 6, 2018 letter as the authoritative source for its contrary viewpoint. FERC offers no specific response or rebuttal to the evidence submitted by the Preservation Petitioners in their rehearing petition, which incontrovertibly demonstrates the unreasonableness of FERC’s failure to identify the Sioux Tribes. FERC’s only argument is its entirely conclusory and unsupported assertion that “the fact that language of the Tribes’ ancestors may have been present in the Project area does not establish that the Commission’s outreach was unreasonable.” FERC Stay Opp. at 18.

Both FERC and Intervenors rely on communications from the Advisory Council on Historic Preservation (“ACHP”) asserting that FERC was not obligated to “re-start the Section 106 process” based on the failure to consult with the THPOs, and confirming the reasonableness of FERC’s general efforts to identify

historic properties. *See* Exhibits C and I attached to MVP's Opposition. Notably, these letters do not even purport to address FERC's responsibilities under Section 101(d)(6)(B) of the NHPA to consult with the THPOs, much less assess or affirm the reasonableness of FERC's outreach to Native American tribes. The ACHP's authority is limited exclusively to interpretation of Section 106 and does not extend to other provisions of the NHPA, the interpretation of which is vest in the Secretary of the Interior. 54 U.S.C. §§ 304108(a), 306101(b).

Finally, FERC argues that, by inviting the THPOs to share with FERC the results of the THPOs' independent cultural resource surveys, FERC has somehow satisfied its consultation responsibilities under the NHPA. FERC Opp. at 19-20. However, FERC has no ability to identify traditional and cultural properties of the Sioux peoples in the absence of consultation with the Sioux THPOs, and the Sioux THPOs have no ability to to conduct cultural resource studies or otherwise ensure that adverse effects to these properties are taken into account unless and until FERC provides them with a meaningful opportunity to consult as part of the Section 106 process. In any event, FERC has already determined that all necessary historic reviews and treatment plans have been completed and has issued a notice to proceed with pipeline construction. *See* Exhibit 1. As a result, pipeline construction is proceeding even as the THPOs are endeavoring to study the area. These studies will therefore be meaningless unless a stay is issued.

B. Petitioners Will Suffer Irreparable Harm in the Absence of a Stay.

As Preservation Petitioners' stay motion argued, the stabilization measures authorized by FERC threaten to irreparably harm artifacts associated with traditional Siouan religious practice located on Dale Angle's property. *See* Emergency Motion for A Stay, Exhibit E. FERC acknowledges that the stabilization measures authorized by FERC would affect "areas where the pipeline route has already been trenched and/or pipe has been strung along the route," but states it is unclear "that either circumstance pertains to Mr. Angle's property." FERC Stay Opp. at 11-12.

As the attached declaration of Daniel Angle and associated photographs demonstrate, pipe has also been laid along the pipeline route on Dale Angle's property. *See* Exhibit 2 (attached hereto). As is also clear, the "stabilization measures," for which FERC approval is pending with regard to properties such as Mr. Angle's, are indistinguishable from the construction activities that were underway prior to FERC's Stop Work Order. *See* Appalachian Mountain Advocates' Motion to Expedite Stay, Exhibit B (8/14/18). As MVP's Temporary Stabilization Plan makes clear, MVP considers these actions to be "necessary . . . if the FERC Stop Work Order is not resolved by September 1, 2018." *Id.*, Exhibit D, at p.13. Accordingly, the traditional, cultural and historic sites located on Mr.

Angle's property are threatened with immediate and irreparable harm unless a stay is issued prior to September 1, 2018.

CONCLUSION

For the foregoing reasons, the Preservation Petitioners respectfully request that the Court stay FERC's Certificate pending review.

Respectfully submitted,

/s/ Andrea C. Ferster
Andrea C. Ferster (DC Bar # 384648)
Attorney at Law
2121 Ward Court, N.W. 5th Fl.
Washington, D.C. 20037
(202) 974-5142
(202) 223-9257 (Facsimile)
aferster@railstotrails.org

Counsel for Petitioners BREDL, *et al.*

CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limit of FRAP 32(a) and the word limit of FRAP 27(d) because, excluding the parts of the document exempted by FRAP 32(f), this document contains 2,598 words.

This document complies with the typeface requirements of FRAP 32(a)(5) and the type-style requirements of FRAP 32(a)(6) because this document has been prepared with a proportionally spaced typeface using Microsoft Word 2017 in 14-point font size and Times New Roman type style.

/s/ Andrea C. Ferster
Andrea C. Ferster (DC Bar # 384648)
Attorney at Law
2121 Ward Court, N.W. 5th Fl.
Washington, D.C. 20037
(202) 974-5142
(202) 223-9257 (Facsimile)
aferster@railstotrails.org

CERTIFICATE OF SERVICE

I hereby certify that on August 27, 2018, a copy of the foregoing Reply of Preservation Petitioners to Oppositions to Emergency Stay Motion was served by the CM/ECF system on all ECF-registered counsel via the Court's CM/ECF system.

:

/s/ Andrea C. Ferster
Andrea C. Ferster (DC Bar # 384648)
Attorney at Law
2121 Ward Court, N.W. 5th Fl.
Washington, D.C. 20037
(202) 974-5142
(202) 223-9257 (Facsimile)
aferster@railstotrails.org

Exhibit 1 – FERC Letter to MVP and Notice to Proceed dated March 27, 2018

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

OFFICE OF ENERGY PROJECTS

In Reply Refer To:
OEP/DG2E/Gas 3
Mountain Valley Pipeline LLC
Docket No. CP16-10-000

March 27, 2018

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

**Re: Notice to Proceed with Construction of Various Pipeline Segments and at
Certain Workspaces and Access Roads**

Dear Mr. Eggerding:

I grant your March 20, 2018 request (Request for Notice to Proceed No. 17), for Mountain Valley Pipeline LLC (Mountain Valley) to commence construction of discontinuous portions of its pipeline in Giles, Craig, Montgomery, and Roanoke Counties, Virginia, listed on Attachment A of your request. In addition, you may construct at 3 additional temporary workspaces in Lewis County, West Virginia; and 1 workspace, 1 access road, and 1 anode bed in Giles County, Virginia; 10 workspaces, 5 access roads, and 1 anode bed in Montgomery County; and 14 workspaces, 5 access road, and 1 anode bed in Roanoke County, Virginia, also listed on Attachment A.

In Giles County, you may construct within the boundaries of the Big Stony Creek Historic District (Historic Site No. 35-5127) between about mileposts (MP) 200.2 and 200.5. The Management Summary filed March 14, 2018, indicated that there would be no on-the-ground cultural resources fieldwork within the Historic District as part of the Treatment Plan, and that all treatment measures, including but not limited to vegetation enhancement and Historic American Landscape Survey documentation, would be implemented after installation of the pipeline.

In Montgomery County, you may construct within the boundaries of the North Fork Valley Rural Historic District (Historic Site No. 60-574) between about MPs 226.3 and 228.3. The Management Summary filed March 15, 2018 indicated that there would be no on-the-ground cultural resources fieldwork within the Historic District as part of the Treatment Plan, and that all treatment measures, including but not limited to vegetation enhancement and development of an historic exhibit, would be implemented after installation of the pipeline. However, the Treatment Plan should be revised to address the March 23, 2018 comments of Montgomery County, and our letter of March 13, 2018. Mountain Valley should document an agreement with the Montgomery Museum to host the historic exhibit, or find another non-profit partner for the exhibit, and

This letter does **not** authorize any construction activities anywhere else within the project area, that was not previously authorized in letters from the FERC issued on January 21 and 29, and February 8, 9, 12, 13, 14, 15, 16, 21, and 22, and March 1, 12, 14, 15, and 22, 2018. I remind you that Mountain Valley must comply with all applicable remaining terms and conditions of the Order.

Sincerely,



Paul Friedman
Environmental Project Manager

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

Exhibit 2 – Declaration of Daniel Angle dated August 27, 2018.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BLUE RIDGE ENVIRONMENTAL)
DEFENSE LEAGUE,)
)
Petitioner,) Case No. 18-1175
) (Consolidated with Cases
FEDERAL ENERGY REGULATORY) No. 17-1271 , 18-1002,
COMMISSION, and UNITED) 18-1177, and 18-1186)
STATES OF AMERICA,)
Respondents.)
_____)

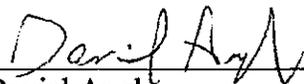
DECLARATION OF DANIEL ANGLE

I, Daniel Angle, am over the age of 18 and am competent to give this declaration:

1. My name is Daniel Angle. I reside at 1116 Iron Ridge Rd., Rocky Mount, VA 24151, at property owned by my father, Dale Angle.
2. As my father explained in his letter dated August 16, 2018, construction of the Mountain Valley Pipeline is underway on my father's property, which contains a historic archaeological site and also artifacts that have been identified by the Tribal Historic Preservation Officers of the Rosebud Sioux Tribe and the Cheyenne River Sioux Tribe as having spiritual significance to those tribes.
3. The attached photos on my father's property were all taken on August 1 or August 3, 2018, prior to the issuance of a stop work by FERC.
4. As depicted by these photos, the pipe is "strung" but no trench has been dug as yet and the pipe has not been welded.

I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct to the best of my knowledge

Executed this 27th day of August, 2018



 Daniel Angle



