

**Wild Virginia
Alleghany-Blue Ridge Alliance
Appalachian Voices
Mothers Out Front - Roanoke and New River Valley
Sierra Club Virginia Chapter**

November 27, 2019

Virginia Department of Environmental Quality
1111 E Main Street
Richmond, VA 23219
mountainvalleypipeline@deq.virginia.gov

Re: Comments on Proposed Consent Decree to Resolve *David K. Paylor, Director of the Department of Environmental Quality and State Water Control Board v. Mountain Valley Pipeline, LLC*, Circuit Court of Henrico County, Case Number CL18006874-00

Dear DEQ Representative:

The Circuit Court of Henrico County is being asked to find, through approval of the proposed Consent Decree ("Decree"), that this agreement is "fair, reasonable, and in the public interest." Decree at 1. The undersigned organizations assert that, while the Decree includes important provisions, it fails to ensure that the public interest will be served. Primary concerns include:

1) The Decree does not account for the fact that, in numerous instances, pollution control measures have failed to provide adequate protection, even when installed and maintained in accordance with approved plans. Therefore, provisions to meet those plans cannot ensure that water quality will be protected in accordance with the State Water Control Law and the Clean Water Act.

2) The penalties and conditions in the Decree are not commensurate with the severity and magnitude of noncompliance and are inadequate to deter Mountain Valley Pipeline, LLC ("Mountain Valley") from continuing a pattern of frequent and widespread violations caused by its failure or refusal to install and maintain pollution control measures in accordance with approved plans.

3) The Decree does not acknowledge that alteration and damages have been caused to riparian and aquatic habitats and does not include requirements to repair these conditions. These impacts will cause ongoing and possibly permanent pollution effects and habitat alterations, if not addressed.

The Public Interest

To be "in the public interest," provisions of the Decree must ensure that the policy goals expressed in the Virginia State Water Control Law will be met in relation to the Mountain Valley Pipeline project ("MVP"). The goals are described as follows:

It is the policy of the Commonwealth of Virginia and the purpose of this law to: (1) protect existing high quality state waters and restore all other state waters to such condition of quality that any such waters will permit all reasonable public uses and will support the propagation and growth of all aquatic life, including game fish, which might reasonably be expected to inhabit them; (2) safeguard the clean waters of the Commonwealth from pollution; (3) prevent any increase in pollution; (4) reduce existing pollution; (5) promote and encourage the reclamation and reuse of wastewater in a manner protective of the environment and public health; and (6) promote water resource conservation, management and distribution, and encourage water consumption reduction in order to provide for the health, safety, and welfare of the present and future citizens of the Commonwealth.

Virginia Code § 62.1-44.2. If the provisions of the Decree cannot ensure that these goals will be upheld, as the evidence explained below indicates, then the public interest will not be served. Goals (1) through (3) listed in the statute have not been upheld in relation to MVP and all available information shows that continued violations are likely to occur under the proposed Decree.

Revised Analyses and Plans Are Required to Protect Water Quality

Evidence of Problems

In many cases throughout the construction of MVP there have been releases of sediment off the right-of-way ("ROW") and deposition onto adjacent lands and into state waters. It appears that in many of those cases the releases occurred even though erosion and sediment control ("ESC") measures had been installed and maintained in accordance with the plans that were approved by the Virginia Department of Environmental Quality ("DEQ"). Experts had warned of this likelihood before construction plans were approved, because the circumstances

that exist along much of the pipeline's path are different from those where the standard ESC measures are normally used. Steep slopes, shallow and highly erodible soils, areas highly prone to landslides and slips, and other factors require enhanced measures that have not been required for MVP.

As explained in the complaint filed by the State of Virginia, which the parties seek to resolve with this Decree, "the Virginia Water Resources and Wetlands Protection Program and Virginia Water Protection Permit Program Regulations prohibit the dredging, filling, or discharging of any pollutant into, or adjacent to wetlands or other surface waters without a Virginia Water Protection Permit issued by the Board."¹ Count I of the complaint cites numerous instances where this this requirement was violated, without reference to any technical deficiencies in the installation or maintenance of ESC measures.²

The evidence that sediment discharges off the MVP ROW and into state waters have occurred on dozens, if not hundreds, of occasions, is provided by DEQ inspection reports, weekly status reports filed by Mountain Valley with the Federal Energy Regulatory Commission ("FERC"), and compliance inspection reports prepared by FERC. In many cases ESC measures are said to have "failed" or silt fences and filter socks are said to have been "undermined," often resulting in sediment deposition off-site. In many of these instances, there is no assertion by inspectors nor any evidence presented to indicate that ESC measures were not properly installed or maintained.

One among a number of constantly-occurring examples of the kind of problems described here relates to "end treatments," where stormwater flowing down slopes on the ROW is directed to the edge of the ROW and is to be slowed, filtered, and cleaned before being discharged off-site. The evidence shows that even when the diversion structures are built in accordance with plans and general guidelines and compost filter socks ("CFS") or silt fences are shown to be in place, the force of water flowing diagonally down and across the ROW has sufficient force to undermine the COS or silt fences and carry sediment and sediment-laden water to be deposited on other properties and into streams and wetlands.

One of Mountain Valley's most recent status reports to FERC includes two such occurrences. The company reported the following for two sites in Spread I on

¹ Complaint filed on December 7, 2018 in *David K. Paylor, Director of the Department of Environmental Quality and State Water Control Board v. Mountain Valley Pipeline, LLC*, Circuit Court of Henrico County, Case Number CL18006874-00, at paragraph 9, citing Code § 62.1-44.15 :20 and 9 VAC 25-210-50.

² Id. at paragraphs 66 - 75.

October 28, 2019, "[d]uring a 2.4" rain event, ECDs were compromised resulting in sediment off ROW."³ A report by a DEQ inspector of visits on October 30, 2019, also in Spread I, states that end treatments or compost filter socks were "undermined" at eight separate locations.⁴ We could provide hundreds of like examples but this information is in DEQ's possession or easily obtainable.

That this problem has occurred so frequently demonstrates that the plans that are being followed simply do not work to control pollution as they should. The only way to solve this problem and prevent damages from this source in the future is to analyze the reasons for the failures and revise plans to eliminate the causes.

Because the erosion, sedimentation, and stormwater control program for pipeline construction designed and implemented by MVP has proven inadequate in certain circumstances encountered, especially in areas of steep, erosion-prone terrain and in areas with especially vulnerable groundwater aquifers, a systemic review must be undertaken to determine the causes of these failures and new or enhanced measures must be designed to prevent future failures.

Proposed Solutions

We believe that a process like the one described below is necessary to ensure that work done in the future in accordance with approved plans can protect resources adequately. Importantly, given that there are systemic problems with Mountain Valley's ESC plans and methods, which are evident even during a time when active construction is not underway, construction should not be allowed to resume unless and until the kind of analysis and revision of plans described below is completed.

Within a prescribed period after entry of this order, Mountain Valley should submit a report to DEQ, prepared by a qualified professional engineer, that includes:

- A detailed description of the specific landscape characteristics for each area where pollution controls structures and practices detailed in approved plans have failed, including percent slope, slope length, soil erosion characteristics, slope stability characteristics, and proximity to waterbodies;

³ Mountain Valley Pipeline, LLC, Weekly Status Report No. 108, FERC Docket CP16-10, Accession No. 20191127-5124.

⁴ DEQ Field Inspection Report, STA 14845 +68 – 14928+ 52, Inspector Marshall Willis.

- Identification of segments of the entire MVP route in Virginia (using appropriate mapping technology) with the same or similar landscape characteristics as the identified areas (the “Vulnerable Segments”).
- A detailed description of erosion control failures for each area, including the nature and extent of failures, frequency of failures, and the likely causes of failures; and
- A detailed description of the effects of erosion control failures for each area, including the frequency and amount of sediment affecting off-site properties or delivered to waterbodies; damage to waterbodies; and the amount and severity of gulying, slips, and landslides.

The report must identify enhanced or additional erosion and sediment control and stormwater management measures and practices for the Vulnerable Segments. These measures and practices must be designed to prevent the repeated failures identified in the submission and include updated erosion and sediment control and stormwater management plans, specific requirements concerning the timing of implementation, and field-based (not lab-based) information demonstrating the effectiveness in the steep terrain of western Virginia.

- After it receives the report, DEQ will review the submission and make an initial determination concerning:
 - The adequacy of the information;
 - Whether or not the proposed measures and practices are adequate to prevent sediment from leaving the MVP construction corridor and entering waterbodies;
 - Whether or not the proposed measures and practices are adequate to ensure that sediment contributions to waterbodies within, and downstream of, the MVP construction corridor will not cause or contribute to violations of any Virginia water quality standards, including narrative standards.

For any part of the submission determined by DEQ to be inadequate, DEQ will require that MVP submit revised information and revised enhanced or additional erosion and sediment control and stormwater management measures and practices.

Once DEQ makes its initial determination that the submission contains adequate information and proposed measures and practices, DEQ will offer that information and the proposed measures and practices for public comment and submit the same to the State Water Control Board for approval.

Once approved by the State Water Control Board, MVP will implement the approved erosion and sediment control and stormwater management measures and practices for each Vulnerable Segment.

Penalties Assessed Are Not Commensurate with Damages and Are Not an Effective Deterrent

Evidence of Problems

The scope and severity of Mountain Valley's violations and the damages caused to state waters is without precedent. These violations have occurred along a hundred-mile path through four counties and affected dozens of streams, many of them especially sensitive to pollution impacts. These waters include those that provide habitat for endangered, threatened, and rare species of fish and mussels.

Headwater streams in some of these areas are the clearest, coldest, and least polluted waters in Virginia.

Mountain Valley's conduct shows that it has been unwilling to reform its practices, over the nineteen-month period before this Decree was negotiated. The same types of violations have continued unabated in the period after September 18, 2019, the end date for coverage of the Decree.

Failures by Mountain Valley, like those described herein, that have occurred in recent months are especially egregious, given that at most of the sites where violations have occurred the status of work is termed "dormant" on DEQ reports and active construction is not underway. This fact demonstrates that, even during a period when Mountain Valley can and should place all of its attention and resources on pollution control, the company is refusing to do so.

The urgency of requiring strong, systemic changes before MVP construction continues is clear. Many of the areas where grading, trenching, and installation of pipe has yet to occur have some of the most valuable and sensitive aquatic resources in the state. Now is the time to insist on preventive measures to avoid the kinds of violations documented in the state's lawsuit and in other sources. Chronicling and attempting to fix problems after violations occur, as has been the pattern by the DEQ to this point is inadequate and inexcusable. The commands of the State Water Control Law, that we "protect existing high quality state waters," "safeguard the clean waters of the Commonwealth from pollution" and "prevent any increase in pollution" cannot be upheld unless Virginia insists on fundamental changes in the way Mountain Valley proceeds.

In the last ten weeks, covering the period not addressed in the Decree, DEQ inspectors have answered "no" to the following question on sixteen separate

inspection reports: "Are all control measures properly maintained in effective operating condition in accordance with good engineering practices and, where applicable, manufacturer specifications?"

On a report covering observations on October 30, 2019, the DEQ inspector noted separate issues of concern at twenty-six (26) separate locations along a stretch of the pipeline route in Franklin County. The inspector noted four sites where sediments had been carried off the ROW, erosion occurring adjacent to at least two streams, and at least twelve locations where ESC measures required maintenance.

Earlier in the summer of 2019 some particularly blatant examples where Mountain Valley failed to perform in accordance with requirements. On July 31, 2019, at three sites in Spread H, ESC measures had not been installed properly or at all and sediment was carried long distances off the ROW. At station 12519+41, Mountain Valley reported that "[d]uring an afternoon storm event, temporary slope breakers and ECDs had not been installed at stream S-EF19. Stormwater carried sediment onto and over the bridge side rails and deposited sediment approximately 2,070' off ROW." At station 12656+89, temporary slope breakers had not been installed and sediment was washed into another stream.

Several important points must be repeated in relation to these kinds of reports. First, even with all of the experience Mountain Valley has had, since early 2018, it is still allowing the same kinds of violations to occur, day after day and in hundreds of locations. Second, it is known that state inspectors have limited abilities to cover the entire area covered by pipeline activities. Consequently, when these inspectors can so readily find these types of violations in areas they are able to visit, how many more such violations occur that are never identified by regulators? Third, waterbodies continue to be damaged by sediment discharges and deposition and the promises of the State Water Control Law are being betrayed.

Proposed Solutions

A requirement that Mountain Valley not resume construction before providing assurance that problems that have been and are continuing to occur will stop is the most important and possibly the only reliable deterrent to violations. It seems apparent that the company's wish to push this project forward quickly has taken precedence over its commitments to obey environmental laws and respect the properties and resources they impact.

As described in the previous section of these comments, construction should not resume on MVP unless and until Mountain Valley shows that its ESC plans can protect water quality. Just as importantly, Mountain Valley must show that it is prepared, through revised policies and provision of additional resources, to fully comply with all legal requirements and follow approved plans.

The Decree requires that

The Environmental Auditor described in this paragraph shall further determine whether additional resources are necessary to ensure that temporary erosion and sediment control measures are properly installed, inspected, and maintained and that all Ineffective Temporary Erosion and Sediment Control Measures are repaired and ESC Measures in Need of Routine Maintenance are maintained within the timeframes required by MVP's Annual Standards and Specifications or as otherwise required by this Consent Decree.

Decree at 8. In fact, we already know the answer to question presented - additional commitment of resources by Mountain Valley is clearly necessary. The deficiencies shown by DEQ inspection reports, MVP weekly reports, and other sources proves as much.

There should be no delay while an auditor addresses this question. Rather, Mountain Valley should be required to provide

- an explanation of the personnel and system failures that have allowed violations to continue for many months,
- a detailed accounting of the resources the company will devote to the tasks necessary to protect waters and property, and
- an enhanced system of internal reporting and response to problems, that ensures deficiencies are fixed and reported to regulators quickly.

Monetary sanctions, such as the civil and stipulated penalties included in the Decree are appropriate. However, we have grave doubts that the amounts agreed upon can or will have any deterrent effect on Mountain Valley. While a detailed analysis of the economic costs of Mountain Valley's noncompliance and the benefits the company has gained through its rushed construction schedule and the consequent violations is not undertaken here, it is clear that the penalties in the Decree are inconsequential to the company.

For monetary penalties to have a rational basis, the amount should have some reasonable relation to an actual assessment of the damages caused to resources and property and to the violator's avoidance of costs that should have accrued, had the company properly designed, implemented, and maintained pollution control measures, rather than proceed in the lawless manner it has followed. Given that the estimated cost of the project has been raised from a figure of \$4.6 billion in September 2018 to \$5.3 - \$5.5 billion in October of 2019, even the partial delays that have been mandated have had an enormous cost. The costs avoided by Mountain Valley's rushed construction schedule, during a period when it failed to adequately respond to the problems it has caused, must also be enormous.

The civil penalty in the Decree, \$2,150,000, is admittedly large in relation to other fines assessed by Virginia for water quality violations. However, as discussed above, this project and the damages it has caused dwarf any other polluting projects in the state. This penalty comprises just 0.04 percent of the estimated cost of \$5.3 billion - hardly a noticeable cost to Mountain Valley. Compared to the amount of money the pipeline's sponsors expect to make from the project, this amount is even more miniscule.

The Decree Does Not Require Restoration for Hydrological and Ecological Damage Caused by the Project

Evidence of Problems

There are numerous examples where stream banks have been damaged and aquatic habitats have been altered in ways that may have long-lasting impacts on water quality. We include as separate attachments to this letter two documents describing these types of damages caused by MVP construction.

In these cases, focusing on the Bernard and Werner properties (Attachments A and B submitted in separate documents with this letter), and in numerous other areas Mountain Valley has destroyed stream banks, caused direct fill of dirt into the streams, and thereby altered stream flow patterns and habitat. If not properly repaired and maintained, the damaged stream banks will continue to contribute sediment to the affected waters for years to come. If physical changes and flow patterns are not addressed, the damages can be permanent and have a cascading impact on biological, physical, and chemical characteristics at the sites of direct impact and throughout the streams.

Proposed Solutions

To ensure that all intermittent and perennial streams impacted by MVP's construction-related activities are restored to pre-construction hydrological and ecological conditions in a manner that is sustainable on a long-term basis, MVP must submit a plan for long-term restoration, management and stewardship of affected streams and streambanks to be reviewed and approved by DEQ. The Stewardship Plan must:

- Supplement, but not replace or contravene, the conditions and requirements related to restoration and/or mitigation of impacts to streams imposed on the MVP project by the Federal Energy Regulatory Commission (FERC) and/or the United State Army Corps of Engineers (USACE);
- Identify all streams and stream sites (by latitude and longitude at the center of the site) that have been impacted by MVP construction-related activities and describe the restoration activities to be conducted on such streams or sites pursuant to FERC and/or USACE requirements.
- Include detailed plans for all impacted sites with adequate measures, in addition to those required by FERC or USACE, to ensure:
 - the restoration and stabilization of stream banks that have eroded or collapsed due to MVP activity;
 - removal of sediment deposits and related restoration of stream beds affected by MVP activity; and
 - return of the ecological functions of all streams to pre-construction levels;
- Describe the basic management measures that will be implemented to ensure the sustainability of all stream restoration activities for a period of at least ten years following the final stabilization and restoration of every stream and site (Maintenance Period). These measures shall include periodic and post-storm event inspections, water quality monitoring (e.g., parameters to be measured including nutrients, sediments, and benthic communities, monitoring methods and schedule, requirements for reporting to DEQ), and maintenance and replacement of structures and features as necessary to protect the integrity of the restoration project;
- Provide estimates of the costs for implementing the management measures during the Maintenance Period and identifies the financial assurance mechanism acceptable to DEQ that will be used to meet these needs;
- Describe the reports regarding the progress of the restoration and maintenance activities that shall be prepared and submitted to DEQ every six months during the Maintenance Period; and
- Designate a responsible long-term steward acceptable to DEQ that shall be responsible during the Maintenance Period for implementing the management measures, administering the financial assurance mechanism, and submitting the progress reports to DEQ.

- Throughout the Maintenance Period, MVP shall remain the default steward ultimately responsible for implementing all requirements of the Stewardship Plan.

Conclusion

We believe that provisions in the proposed Decree are valuable and we appreciate the efforts made to address the problems Mountain Valley has caused. However, we believe the Decree fails to provide the kind of assurances that are necessary to protect the public interest.

Thank you for considering our comments.

Sincerely,

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