



May 28, 2021

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United States Army Corps of Engineers
Huntington District
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ATTN: Adam Fannin and CELRH-RD-E
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Submitted Via Email

Board of Directors:

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Re: Comments in Response to Public Notices LRH 2015-00592-GBR, LRP-2015-798, NAO-2015-0898; Mountain Valley Pipeline, LLC's Application for a Department of the Army Permit Under Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act

Dear Mr. Fannin:

This letter and attachments are submitted on behalf of Wild Virginia and our members. We object to issuance of a Clean Water Act (CWA) section 404 permit for the Mountain Valley Pipeline (MVP) project. The application materials MVP has submitted are grossly inadequate to support the findings your agency is required to make and previous reviews made when coverage was granted for MVP under Nationwide Permit number 12 (NWP 12) were likewise far from sufficient. The evidence that is available prove that MVP will be unable to comply with the CWA requirements, at least in some instances. And since each and every discharge must meet the legal requirements outlined in regulations, the showing that one or more would be legally impermissible must lead to denial of the permit.

We also request that the U.S. Army Corps of Engineers (Corps) hold a public hearing to gather additional information and allow members of the public a fuller and more adequate opportunity to review information and provide facts and analyses without which a proper decision can be made. We appreciate the extended comment period the Corps granted, however

The right for members of the public to effectively represent their interests through the permitting process and the need for agencies to gather the kinds of information that only local residents can provide are both bases for the Clean Water Act's stated approach to public involvement. Congress specified in the CWA that public participation in all actions undertaken by regulators not only be allowed but that it be "encouraged and assisted." 33 U.S.C. § 1251(e). The Corps must be willing to allow the kind of involvement only possible through a hearing, where people better able and prepared to provide verbal testimony can be accommodated and assisted.

Our objection to permit issuance by the Corps is based on a wide range of issues. Many of those concerns are explained in separate comments submitted jointly with other parties. In the submittal we focus on two primary areas of concern.

- The Corps cannot take for granted that plans or assurances by the applicant will be carried out. Unlike many cases, MVP does not begin this portion of the project with a "clean slate." Rather the builder's record of non-compliance with environmental requirements throughout the period of construction since early 2018 justify a finding that MVP is unable and/or unwilling to meet its obligations to protect our water.
- Cumulative impacts analyses that are legally-adequate and technically-credible have not been conducted and the Corps may not issue its permits without these analyses. The facts show that, at least in some cases, cumulative impacts in particular streams and watersheds cannot be deemed insignificant or short term and must compel rejection of the 404 permit application.

Widespread and Repeated Violations and Environmental Damage

In deciding whether to grant a CWA permit, the Corps may not simply assume that any requirements it may impose through a permit will protect our waters, because those requirements are of no value unless they will be met by the permit holder. In this case, MVP's record shows that there are systemic failures in the plans and procedures used in construction and implementation of pollution controls. These are not isolated instances, nor are they ones that occurred early in the construction process and were then stopped.

The record of documented violations, enforcement actions by both Virginia and West Virginia, and fines imposed is available to the Corps and it must examine and account for those occurrences in the record supporting this permitting action. We will not attempt to describe that large body of evidence in this letter. We do wish to highlight certain problems and issues that must inform the Corps decision here.

- Some of the violations cited by the two states are also violations of CWA section 404 and the Corps had an obligation to take note of them and take appropriate enforcement action. At this stage, those violations must be given even more weight in the agency's permitting decision.
 - In its enforcement suit against MVP, the State of Virginia cited seven instances where MVP made unpermitted discharges of fill into streams, in violation of the state's Water Protection Permit Program regulation. These fill discharges also violate section 404, as the requirements of Virginia's permitting system mirror those regulations administered by the Corps.¹ These illegal discharges continued over a period of more than five

¹ Complaint in the Circuit Court of Henrico County, David K. Paylor, Director of the Department of Environmental Quality, and State Water Control Board v. Mountain Valley Pipeline, LLC, Case No. CL18006874-00, Filed December 7, 2018 (See paragraphs 44, 47, 48, 51, 52, 55, 58 and Count I, Unpermitted Discharge).

- months; evidence that MVP was unable or unwilling to take effective measures after the initial violation occurred.
- Notices of Violation issued by the West Virginia Department of Environmental Protection (DEP), among numerous other types of infractions, have included at least four dozen instances where fill discharges deposited significant quantities of sediment on the beds and banks of streams and in wetlands. These illegal discharges have occurred over the course of many months.
 - In many instances, MVP has sought to excuse or justify violations by noting that they occurred during heavy storms. MVP has admitted that "the project's ESC measures can be, and sometimes are, overwhelmed or severely damaged by storm events that exceed the volume, intensity, or duration of stormwater they were designed to control" and that those failures created sediment deposits off-site.² Where such deposits were discharged to waterbodies, they would constitute illegal fill.

MVP asserts, inaccurately, that the pollution control designs that failed met Virginia's standards.³ But even if that assertion was correct, it demonstrates that the company's plans are designed to work only during storms of a magnitude MVP deems manageable. This approach cannot fail to violate water quality standards and degrade waterbodies. The occurrence of heavy rains at or above arbitrary levels of intensity are not rare in the mountains of Virginia and West Virginia, especially in spring and summer months when construction is likely to be most intense.

The approach MVP has taken in controlling, or failing to control, pollution discharges for the so-called "upland" portions of this project, portends the likelihood of severe damage to our waters if allowed for stream crossing work. MVP's application does not demonstrate that designs for crossing structures are or will be designed to handle extreme storms and, thus, the application cannot be approved, because the activities planned would violate water quality standards and result in significant degradation of waters.

- MVP also attempts to justify water quality degradation that persists for months or even years, where one of two conditions exists: 1) pollution has encroached on waterbodies on adjacent landowners' properties and that MVP lacks permission to access to those areas and mitigate the damages, 2) pollution has damaged a waterbody but MVP must apply for and receive a variance from FERC or it does not have Corps authorization for instream work.

Of course, neither of these conditions obviates the fact that water quality standards have been violated or waters degraded, sometimes very severely. And a response wherein MVP simply throws up its hands and laments these difficulties is unacceptable, but there are no

² Letter from Todd L. Normane, Equitrans Midstream Corporation, to David Sligh, Wild Virginia, February 25, 2020, at 6.

³ Id.

provisions in MVP's application that demonstrates that these kinds of problems will be prevented in construction at crossings. On this basis alone, the Corps must deny coverage under a 404 permit.

A "weekly report" MVP submitted to FERC early this year, covering the period January 2 - January 8, 2021, shows an example of the problems described above. A "slip" had been observed to leave the construction area and enter stream S-RS-001 in Spread A, on May 4, 2020. Eight months later, that fill material was still present in the stream because MVP was awaiting a variance from FERC "to remove slip material and repair slip."⁴

Another shocking example of the second scenario described above is included in the same January report. In that instance, the report states that on October 3, 2018 inspectors found a "[s]tream/wetland sinking over where pipe was installed." (The location was listed as station 6789+40, Spread E). However, as of the report date of January 14, 2021, the notation said NWP permit from the Corps were "pending."⁵

Adequate Cumulative Impacts Analysis Not Done

As an attachment to this letter, we are submitting a technical analysis of the degree to which cumulative impacts on waterbodies and stream systems have been assessed. That analysis concludes the following:

- The 404 application does not contain sufficient information to make technically-valid analyses of cumulative impacts.
- Prior analyses by regulatory agencies of cumulative impacts have been grossly deficient.
- Evidence from specific streams and stream systems show that pollution from the proposed waterbody crossings will contribute to serious, long-term impairments of water quality and aquatic system viability.
- Under applicable regulatory standards, the United State Army Corps of Engineers (Corps) cannot issue approvals for MVP water crossings because available information is not sufficient and impairments will result from and be worsened by these activities.

We incorporate that report, *Technical Analysis of the Sufficiency of Information to Assess Cumulative Impacts from MVP Waterbody Crossings*, prepared by David Sligh, May 27, 2021 as part of these comments and are sending it as a separate document.

⁴ Mountain Valley Pipeline, LLC, Docket No. CP16-10-000, Weekly Status Report No. 167, Accession no. 20210114-5143, at pdf p. 10.

⁵ Id.

Adam Fannin, USCOE - Huntingdon District
May 28, 2021

Thank you for accepting these comments and please contact me if we can provide further information.

Sincerely,
/s/ David Sligh
David Sligh
Conservation Director