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Re: Clean Water Act Section 404 Permitting for Mountain Valley Pipeline,
Factors Making Application of NWP 12 Inappropriate

Mr. Miller, Mr. Carson, Mr. Shaffer:

I submit this letter and attachments on behalf of Wild Virginia and our members to provide information that we believe the U.S. Army Corps of Engineers (“Corps”) must consider when making any decisions about Clean Water Act (CWA) section 404 permitting for the Mountain Vally Pipeline (MVP) project. We believe this information must compel the Corps to reject requests to cover the MVP under Nationwide Permit No. 12 (NWP 12), because such coverage would be both inadvisaeable from a regulatory standpoint and legally inappropriate.

Of course, we recognize that any such decisions must reflect the ongoing litigation in *Northern Plains Resource Council v. U.S. Army Corps of Engineers*, CV-19-44-GF-BMM (D. Mont. 2020). However, the concerns we discuss in this letter are pertinent without regard to that case and are made without comment on how that District Court holding and subsequent rulings should affect this situation.

The MVP project cannot proceed with waterbody crossings such as those proposed and previously approved by the Corps without causing serious harm to aquatic resources. Numerous parties submitted evidence and arguments to that effect prior to the Corps' decisions on previous requests for coverage under NWP 12 from each of the District offices. Construction on the pipeline since early 2018 has proven those warnings to be valid, particularly when all sources of water pollution, from waterbody crossing sites and in so-called "upland" construction activities, are considered cumulatively as the Corps is obligated to do.

Based on previous and ongoing damage to waters of the U.S. and predictable further degradation if construction resumes, we believe no valid CWA section 404 permit may be issued for the project as it is designed. Coverage under NWP 12 is particularly inappropriate, because the prerequisites for coverage are not met here and because individual permit reviews and project-specific permit requirements would be necessary to protect our waters. Based on these concerns, the sections below address the following:

- Impacts to waterbodies from MVP have altered conditions, requiring detailed waterbody-specific assessments and cumulative impacts analyses.
- MVP's extensive record of violations requires individual reviews and conditions if any CWA section 404 permits are to be granted.
- A public comment period would inform decisions about coverage under NWP 12.
- The Corps should prepare a supplemental Environmental Impact Statement (EIS).

I. Altered Waterbody Conditions

A. Degradation of Aquatic Environments Since Construction Began Must be Assessed

Through its activities during land clearing and construction, between late 2017 and the present, MVP has caused major impacts to a large number of streams and wetlands across its entire route. Many of these impacts constitute serious degradation of water quality and aquatic habitats. Clearly, these negative impacts were not present during the Corps' initial consideration of NWP 12 coverage for the project and they make those decisions invalid.

We describe only a small number of these instances in the documents submitted here but note that all of these and many more are publicly available. Before the Corps takes action on any requests for section 404 permit coverage, it has an affirmative duty to ensure that all such pertinent information is compiled and considered. In fact, many of the serious impacts cited here and other similar ones should be disclosed in MVP's preconstruction notifications and, if they are not, the Corps must order that this information be provided by MVP.

There have been severe impacts to streams and wetlands from sediment-laden flows of water, often because the pollution control measures that plans called for were not installed, were installed incorrectly, or were found to be inadequate as-designed and were overwhelmed. All of these problems have contributed heavy sediments to streams, however because the sediments are suspended, the ultimate and most dire impacts could be found farther downstream. To our knowledge neither MVP nor any regulator has attempted to trace or assess the impacts of these kinds of excessive sediment discharges.

By contrast, discharges of fill or solids directly into the waterbodies is much easier to trace and the impacts are much more easily assessed. Therefore, we concentrate most on these types of discharges and insist that the Corps has a duty to track these cases and make detailed assessments where these discharges have occurred.

1. There have been numerous instances in which sediments or fill have been directly deposited or discharged into waters, through landslides or slips and through collapsing or eroding stream banks and beds caused by MVP work.

Virginia VWP Violations Documented - In its enforcement complaint against MVP in the Circuit Court of Henrico County (**Attachment A**), the State of Virginia addressed discharges that violate the prohibition against “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, citing Virginia Code § 62.1-44.15.20 and 9 VAC 25-210-50.”

These discharges, which are illegal under state law, are similar to those which are addressed in CWA section 404 permitting. Thus, all or some of these types of discharges listed in the Virginia complaint would also be prohibited without a valid Corps permit. Many of them occurred due to so-called “upland” construction on MVP, not from work at waterbody crossings, and none were covered by MVP’s pre-construction notice or by NWP 12.

Even more importantly, some of these discharges resulted in extremely damaging impacts in waterbodies, some of which are described and depicted in photographs in Virginia Department of Environmental Quality (DEQ) inspection reports, such as those included in **Attachment B**.

We assert that each of the specific instances cited in Virginia’s court complaint must be assessed before the Corps may issue valid approvals under section 404 and that the Corps has a duty to make its own investigations to see if others exist. We note that there is no one consistent and reliable system for identifying waterbodies which we address in this letter, so we have been forced to present the patchwork of names and designations available to us. This makes it difficult at times to determine the exact location of the impacted sites and their proximity to specific waterbody crossings proposed for coverage by the Corps. We believe it is incumbent on the Corps to

require MVP to clearly identify the sites in a consistent manner, so that both the Corps and the public can understand and assess their true implications.

Specific waterbodies where fill discharges were documented by DEQ, include streams designated with the codes SMM15 and MN513 as well as those designated stream 39 and stream 40, as discussed in Attachment A (paragraphs 66 – 75). Other waters affected by direct discharges of fill material are described as being near markers 13476+16 and 13489+10. In addition to these waters which were specifically named, the Virginia complaint states that its contract inspectors “observed 16 additional instances where sediment was deposited off of the construction right of way into an adjacent stream as a result of erosion and sediment control measures being improperly installed or maintained.”

A fuller description of the impacts to stream SMM-15, cited above, is included in the report in Attachment B, for the site identified as Bacchus Road with the coordinates 37°15’ 30.5” N and 80°17’ 46.8” W. The inspection of an unnamed tributary to Flatwood Branch, in Montgomery County, was made in June of 2018. Inspectors described a 3,600 foot segment of the stream in which sediment deposits ranged from 1 inch to 7 inches deep throughout the length of the section.

At a site identified as Catawba Road, at coordinates 37°15’53.6” N, 80°18’30.8” W, stream crossings 39 and 40, inspectors found a total of 2,200 linear feet of channel within two separate streams to be coated in sediment ranging from 1 to 5 inches in depth. These two tributaries to the North Fork Roanoke River are shown to be clearly degraded and only through on-site assessments of physical and biological features can the Corps know the impacts and predict what cumulative impacts would be when these discharges are combined with discharges from water crossing construction.

We note that in reports by DEQ and other parties, there are discussions of actions to remove such fill discharges from the impacted waters. It must be stressed that such operations cannot absolve the Corps of the necessity to assess these waters in detail and to consider both the short- and long-term impacts and cumulative impacts with any discharges that may result from stream crossings under a new 404 permit authorization.

First, the effectiveness of efforts to remove sediment from a stream channel is highly questionable, especially if storm flows have occurred after the original deposition and spread the solids even farther downstream. Second, The removal operation itself is likely to cause significant impacts to the aquatic environments, possibly destroying underlying habitat and removing organisms along with the fill. In fact, though these operations may result in more damage and are of highly questionable value, there seems to be little or no analysis to decide whether they should be allowed nor any physical or biological inspections afterward to assess the true impacts. The Corps is obligated to make these kinds of investigations where heavy direct fill discharges have occurred whether solids removal was attempted or not.

Public Reports of Fill Discharges – There are numerous instances along the length of the MVP route where erosion caused by pipeline construction has eaten away soils and structural features directly adjacent to and within the stream channels. Perhaps one of the most graphic and thoroughly-documented example is presented in the documents in **Attachment C**. At this site, Teels Creek is joined by an unnamed tributary and the MVP construction site encroaches on the riparian zones along both streams.

The photographs in Attachment C show sediment-laden water that has accumulated on the site for many months, at many periods forming a large reservoir that frequently discharged muddy water into Teels Creek and sometimes into the small tributary.

In addition to these discharges of sediment-laden water, MVP construction has caused direct fill through stream bank erosion and collapsing sections of the bank. This bank loss has continually progressed through the past two years.

Importantly, one waterbody crossing the Corps is asked to approve is on the small tributary that lies less than 100 feet from the collapsing banks show in the figures in Attachment C. In addition, Teels Creek would be crossed at other points both upstream and downstream from the site shown. The Corps must assess both short- and long-term impacts on the physical, chemical, and biological features of Teels Creek and must assess how stream crossing fill discharges will add to them.

FERC Reports of Direct Sediment Discharges Due to Slips – FERC compliance reports document many discharges of fill or sediment directly into waterbodies when slopes have slipped or slid downgradient and directly into streams and wetlands. This information is easily accessible to the Corps through the FERC docket and it is incumbent on the agency to review these impact reports. As with all other categories of discharges and waterbody damages discussed herein, those we present are merely a small sample of the whole.

One specific example from FERC reports:

Stream S-A117, Unnamed Tributary to Price Run, Spread A, near milepost 5.7 in West Virginia

Inspectors reported slip materials impacting this stream on February 13 - 14, February 21st, March 4th of 2019. On the first date, the compliance monitor found a slip that “started on the right-of-way near Station No. 310+00 and migrated off of the right-of-way through the woods and into stream S-A117.” On 2/14 crews had begun removing fill from the stream using a vacuum truck.

About one week later, on 2/21/19, the compliance monitor was notified of another slip into stream S-A117, which crews were again attempting to remove on 2/22. Once again, on March 4, a slip was reported to have “overwhelmed” sediment barriers and deposited fill in the stream.

We have been unable to review all of the more recent FERC reports to find whether these kinds of assaults have continued on this small stream. However, these repeated discharges of fill, which were heavy enough to make removal by vacuum truck both possible and deemed necessary, and the fill removal operations themselves have placed a severe impact on this stream. The Corps simply cannot permit the proposed crossing here without ensuring that long-term or even permanent damages will not be exacerbated when discharges from the crossing are considered in combination with those already caused.

2. In addition to the initial discharges of sediments from collapsing or eroding instream structures, as described above, and from streams that may have been damaged by sediment removal operations, these damaged areas will continue to contribute sediments forever unless physical restoration/reconstruction, using approved methods, is completed.

The continuing removal of bank material through many months at the site on Teels Creek, described above and depicted in Attachment D, illustrates this problem. The banks adjacent to the MVP worksite have become denuded of all vegetation, have no remaining slope, and will continue to contribute tons of fill to the stream from this time forward, unless a major channel and bank restoration effort is made.

The Corps cannot ignore these impacts when assessing the related impacts of the water crossings in the same area. One crossing is proposed on the nearby tributary stream and others would cross Teels Creek in close enough proximity that cumulative impacts could be very significant.

B. Cumulative Impacts Analyses Needed for Specific Waterbodies and Small Watersheds

The threshold condition that must be met before the Corps can allow coverage under a nationwide permit is a finding that there will be no more than minimal individual or cumulative impacts. The cumulative impacts analysis that accompanied the adoption of NWP 12 was necessarily broad, addressing only cumulative effects that would be significant on a national basis.

During the preparation of the Environmental Impact Statement, FERC made its cumulative impacts analysis on areas defined by 10-digit hydrologic unit codes (HUCs). According to the U.S. Geological Survey, such areas generally range from 40,000 to 250,000 acres in size.¹ While not as outlandish as the national scale used by the Corps, the HUC 10 scale is completely irrelevant to the kind of localized harms within small drainages that this pipeline can, and already has, caused. Commenters argued to the Corps that use of a so-called HUC 12 watersheds or even smaller

¹ USGS, *Federal Standards and Procedures for the National Watershed Boundary Dataset (WBD)*, Techniques and Methods 11–A3 Fourth edition, 2013.

drainages is absolutely essential to provide any real protection from pipeline-caused impairments.

There is no debate about whether crossings allowed under a section 404 permit will contribute sediments or fill to the waterbodies where work is done. There is also no debate that in many of those same waterbodies that MVP proposes to cross that significant, sometime massive, amounts of sediment or fill have already been discharged. Finally, it is indisputable that these two classes of pollution impacts will have multiplied results, because they are like in kind, close in area and habitat type, and in timeframes. To issue coverage under NWP 12 in light of these obvious facts would be an arbitrary and capricious action and would betray the Corps' duty under the Clean Water Act.

II. Record of Violations

The Corps cannot be unaware of the frequent and widespread body of WQ-related violations that have been documented on MVP. These include those described in section I., as documented by the State of Virginia in its enforcement lawsuit and in reports from FERC inspectors. The West Virginia Department of Environmental Protection (DEP) has also documented a very large body of violations and dozens of stream impairments in violation of state water quality standards. By our latest review of the DEP website, there appear to have been at least forty-six notices of violation (NOV) issued to MVP and in most cases each NOV lists multiple violations. Like those identified for FERC, many of these document direct discharges of sediment or fill into waterbodies. The most recent we found was in December of 2019, at a time when active construction was not allowed to be done under FERC orders.

The Corps must acknowledge this record of systematic and widespread noncompliance and recognize that the only way to prevent its continuance is to build conditions into an individualized permit that anticipate and include safeguards to stop the headlong rush of construction while environmental costs mount. Other agencies have so far documented damage already done fairly effectively but have failed to prevent the damage in many cases. The Corps must not emulate this record.

III. Public Comment

This letter and attachments address a very few specific impacts MVP has already caused to waterbodies, which the Corps must consider when making permitting decisions. However, these are a very small sample of such problems. Other members of the public and government agencies should be invited to provide information and analysis that is vital for the Corps to make fully-informed decisions.

If the Corps determines that individual section 404 permits are required, then those proceedings would include public notice and comment opportunities. However, we believe that such opportunities would be appropriate even if the Corps makes a tentative decision that coverage under NWP 12 may be an acceptable approach. Under

that circumstance, the Corps would be able to explain the bases for its tentative decision and other parties could respond. This kind of process would benefit the Corps, through the additional information received, and would allow it to respond appropriately to new information before approving the broad-brush coverage of NWP 12.

IV. A Supplement EIS is Needed

As a cooperating agency with FERC, the Corps chose to adopt the Final Environmental Impact State (EIS) published by the Commission. Since that document was completed, many of the conditions on which its findings were based have changed. The most significant change that has occurred that has a direct relation to the Corps' duties is the fact that hundreds of water quality-related violations and waterbody impacts have occurred – impacts that were predicted by commenters on the EIS but largely dismissed by FERC and other agencies.

As discussed above, FERC's EIS proposed that a cumulative analysis of water quality impacts could be valid even when the watershed size used was vastly larger than would be necessary to truly understand or prevent combinations of impacts of pipeline work and other local activities. This proof of the many adverse water effects and the showing of a clear need for a more realistic and representative analysis should, among numerous other factors, require a supplemental EIS.

Conclusion

Thank you for considering these comments and the attached materials. We believe that the Corps must find that it is improper to allow the MVP project to proceed with waterbody crossing work under NWP 12. Only through the detailed investigations and analyses of individual permitting decisions can you make sound predictions about potential impacts and ensure that proper protections are in place.

Sincerely,

/s/ David Sligh

David Sligh

Conservation Director

Attachments A – C transmitted in separate documents