



July 18, 2019

WV Department of Environmental Protection
Division of Water and Waste Management
601 57th Street SE
Charleston, WV 25304

Attn: Kathy Emery, Acting Director

Re: Administrative Consent Order No. 8951

Director Emery:

West Virginia Rivers Coalition, on behalf of our members, and the 22 co-signing organizations respectfully submit the following comments on the Administrative Consent Order No. 8951 (Order) with Mountain Valley Pipeline, LLC (MVP). We strongly urge DEP to increase the penalty imposed on MVP for their persistent and egregious infractions during construction.

Pipeline-related construction activities in our state have created a culture of non-compliance that must be reversed. Over the past 5 years, the WV Department of Environmental Protection (DEP) has issued 6 consent orders for pipeline construction, including the Dominion G-150, Stonewall Gas Gathering, Rover Pipeline, Mountaineer Xpress Pipeline, WB Xpress Pipeline and most recently, the MarkWest Sherwood to Mobley Pipeline. In each case, numerous violations were issued, a consent order and penalty was agreed upon, and a corrective action plan was approved. While we appreciate DEP's steps in ensuring the companies comply with environmental regulations, it is blatantly apparent that the threat of fines do not deter non-compliance with environmental laws and regulations. It is easier for the company to pay a nominal fine than to do the job right in the first place. This culture of non-compliance is wreaking havoc on our streams by subjecting them to increased sediment loads. Therefore, we implore DEP to increase the penalties associated with impacts to water quality to end the culture of non-compliance on future pipeline construction projects.

Account for all violations incurred by MVP up to the date of the Order: MVP was issued an Oil and Gas Construction General Stormwater permit (WVR310667) in 2017. Since construction began, the project has received 35 Notices of Violations (NOVs) by DEP Inspectors. Administrative Consent Order 8951 was dated March 28, 2019;

however, the Order does not reference the NOV's issued past November 30, 2018. MVP accrued 9 additional NOV's in 2019, including 2 NOV's that were issued in February 2019 prior to drafting the Order in March. *We request that DEP include all of the NOV's that MVP incurred up to date of the Order and calculate the penalty accordingly.*

Include all Finding of Facts in penalty calculation: The Order contains Finding of Facts (FOF), referencing the sections of the Stormwater Permit that MVP violated at a particular location. FOF #2a. references Section G.4.e.2.A.ii.j – failing to prevent sediment-laden water from leaving the site at the Bradshaw Compressor Station. FOF #2b references G.4.e.2 – failing to properly implement controls at the Mobley Compressor Station. These are two separate sections of the Stormwater Permit that were violated at two distinct sites. FOF 2a and 2b are not duplicative penalties and both must be included in the penalty calculation. The penalty calculation does not include FOF 2a, 3b, 4d, 5c, 6b, 7b, 8a, 9d, 10b, 11d, 12e, 13f, 16b, 17b, 18a, 19a, 20a, and 24b. There is no justification for excluding any FOF relevant to the penalty calculation. *DEP must include all non-duplicative FOFs within the penalty calculation.*

Sensitivity of Environment Potentially Affected: The Base Penalty Calculation includes the Potential for Harm Factor 1c, Sensitivity of the Environment. The factor rating ranges from 1-minor to 3-major. The Sensitivity of the Environment was rated 1-minor for all FOF #s. MVP's negligent construction practices impacted approximately 33 streams and wetlands. These streams and their un-named tributaries were impacted with sediment and sediment-laden water, causing irreparable harm to aquatic life and their habitat. *All streams and wetlands must be considered a sensitive environment and the potential harm factor should be rated as major where FOFs impacted water quality.*

Actual Exposure and Effects thereon: The Base Penalty Calculation includes the Potential for Harm Factor 1e Actual Exposure and Effects thereon. MVP created conditions not allowable in approximately 33 streams and wetlands. These are significant impacts to a subset of streams that were exposed to and affected by the sedimentation. The FOFs were all rated 1-minor, but several streams such as an unnamed tributary of Meathouse Fork, unnamed tributary of Dry Fork unnamed tributary of Knowls Creek, unnamed tributary of Little Kanawha, and Grass Run were impacted with sediment more than once. Some were impacted 3 times! *Because of the cumulative impacts to these streams, the potential harm factor, actual exposure and*

effects thereon, should be rated as major for all FOF numbers where impacts to water quality occurred multiple times.

Maximum Fines Allowable: When calculating the base penalty, the potential for harm rating is coupled with the extent of deviation rating to determine the numerical value of the fine for each FOF. There is a range of the monetary fine allowable. We applaud DEP in rating the extent of deviation as major in all categories, but we are disheartened to see DEP give such leniency in the monetary value chosen for the fine when the Potential Harm was rated as moderate. Instead of assessing the maximum fine of \$5,000, DEP chose instead to cut a break and only assess a \$4,200-\$4,400. MVP's egregious acts do not warrant any leniency! *We implore DEP to issue the maximum fine allowable in each category.*

Multiple Factor: We applaud DEP for providing multiple factors for the most egregious instances of non-compliance where water quality impacts occurred. We implore DEP to provide additional multiple factors.

Base Penalty Adjustments

Willfulness and/or negligence: Not only was MVP careless in their construction practices, but they were repeatedly cited for the same deficiencies and failed to correct those deficiencies forcing the agency to issue over 35 NOVs. Nine of those NOVs were issued after the consent order was signed. This degree of negligence shows a blatant disregard for their permit conditions and the regulatory requirements. Repeatedly failing to comply with their permit conditions even after receiving multiple violations and a fine is inexcusable. The consent order has done nothing to deter MVP's non-compliance. The culture of non-compliance is inexcusable and must be stopped. Penalty adjustment factor 6.2.b.1 allows for a 30% increase, but DEP only increased it 10%. *DEP should increase the degree of negligence from 10% to 30% to account for MVP's repeated negligence.*

The Order fails to make any adjustments to the penalty for:

- Previous compliance/noncompliance history
- Economic benefits
- Public interest
- Loss of enjoyment of the environment

Compliance/noncompliance history: MVP has a long history of noncompliance, accruing 35 NOVs since construction commenced. Penalty adjustment factor 6.2.b.4 specifies a base penalty increase of 10% for each NOV. With MVP accruing a total of 28 NOVs on the project up to the date of the Order, the base penalty can be increased by 280%. The repeated nature of these violations is inexcusable. It signals that this company harbors disregard for the law and the people who stand to be adversely impacted by that disregard. *DEP should increase the base penalty by 280% for MVP's history of noncompliance.*

Economic benefits: MVP stands to profit substantially as a result of this project. These profits will be reaped at the expense of WV's water resources. Taking short cuts on compliance was a deliberate strategy by MVP that put completing construction ahead of concerns for the environment. MVP will not get the message of the importance of complying with environmental laws unless the economic benefit from taking short cuts is exceeded by the penalties for noncompliance. The approximately \$266,000 fine is less than one ten-thousandth of the cost to construct the 4.6-billion-dollar project. MVP is expected to earn a 14% return on investment, so at \$4.6 billion, that amounts to \$644 million dollars. Even if that return is spread over 20 years, a week's delay for each of the 35 violations would account for a penalty in excess of \$21 million. By comparison, the \$265,972 represents only 3 days of profits. A flat monetary increase is allowed for economic benefits derived by the responsible party. *DEP must use their authority and exercise their right to increase the penalty based on the fact that MVP will reap economic benefits at the expense of state waters.*

Public interest: By ignoring a penalty adjustment related to the public interest factor, it sends a message that the public has no interest or stake in the problems MVP caused for their water, and that is simply incorrect. MVP's damages impacted individual lives, businesses, and entire communities. Local residents' right to clean water was compromised when MVP continuously allowed sediment to be released into adjacent streams. The stream's designated uses were not achievable during the construction period and both the human and aquatic communities that relied on those waters suffered as a result.

The public's interest in MVP being held accountable is strong, and they share concerns that the penalty does not provide any incentive to assure future compliance on other pipeline projects also of public interest. We want WVDEP's enforcement role to be

taken seriously by this company to help ensure that all industry will adhere to their permit requirements. *The public has an interest in seeing that the penalty is severe enough to prevent non-compliance in future construction projects.*

Loss of enjoyment of the environment: Failure to consider this factor suggests that no person experienced a loss of enjoyment due to MVP's damages to the stream. We know firsthand from impacted landowners and residents that they experienced a loss of enjoyment of the environment as a result of MVP's negligent construction practices. The penalty should be revised to reflect the loss of enjoyment of the impacted streams for the people who rely on and wish to use those waters. *DEP must factor the citizens' loss of enjoyment of the environment into the penalty calculation.*

Staff investigative costs: We applaud DEP on including staff investigative costs in the penalty calculation. MVP placed a burden on DEP staff by requiring countless hours for repeated site visits, increased inspection reports, violation notices, and the presumed negotiations that went into crafting this Order. We are acutely aware that DEP's enforcement staff is stretched very thin with the oversight required for major pipeline development and other oil and gas construction activities currently happening across the state. We are also aware that the permit fees associated with the stormwater construction permits are scaled so low that they may help cover some permit writing staff, but they are not at all enough to extend into the permit oversight and enforcement costs. This is one reason that accounting for extra time required of staff to deal with repeat violators must be factored into penalties – otherwise, the taxpayers stand to cover the bill for corporate wrongdoing. *We expressly commend DEP in assessing this fee to pay for DEP's vigilant and persistent oversight of this project and acknowledge the value of the intense work that went into responding to MVP's repeat violations.*

In conclusion, this Order is of great significance for restitution for damages caused by MVP's negligence and serves as a deterrent to future violations; however, MVP has already received several violations following this Order. Therefore, the \$265,972 penalty does not get the message across that MVP must follow the law or pay the consequences. In previous responses to WV Rivers consent order comments, DEP states that increasing the penalty would not be consistent with similar enforcement actions throughout the state. DEP's enforcement actions are consistently allowing pipeline companies to get away with damaging the state's water resources for a nominal fine. It has become blatantly apparent that DEP's consistent enforcement actions do not deter non-

compliance. With this being the 7th consent order for pipeline construction since 2014, DEP cannot continue the status quo and must increase the penalties to stop the culture of non-compliance. Relying on the excuse of consistency for practices that continue to produce noncompliance means that DEP is de facto "complicit" in that noncompliance, and that is not a position you should present to the people of West Virginia. We appreciate your thorough consideration of these comments and look forward to your response.

Signed,

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West Virginia Rivers Coalition

April Keating
Mountain Lakes Preservation Alliance

Jim Kotcon
West Virginia Chapter of Sierra Club

Chris Chanlett
Summers County Residents Against the Pipeline

Duane Nichols
Upper Monongahela Area Watersheds Compact

Jorge Aguilar
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Mara Robbins
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