

Report on MVP Variances Through FERC

Prepared June 12, 2020 by Protect Our Water, Heritage, Rights (POWHR)

Introduction

From the time Mountain Valley Pipeline began construction in February 2018 to June 12, 2020, the company has requested 138 formal variances and 143 in-field variances to modify their work plan from what was originally approved by FERC. The following sections provide additional context to the spreadsheet of variances compiled by Protect Our Water, Heritage, Rights (POWHR) and most recently updated June 12, 2020.¹ This variance spreadsheet was used in calculations reported by Environmental Hydrologist Dr. Jacob Hileman in a report published in the Virginia Mercury on July 15, 2019, in which he analyzed the details of the variances requested through mid-March 2018.² This report is an updated version of one originally prepared for Virginia Senators Kaine and Warner on November 12, 2019.

Variance Request Name	Date of Request	Original Request Document	Description of Request
H-9	21-Sep-18	MVP Variance Requests H-9 and MVP-006	Shifts the pipeline alignment based on a landowner request to avoid sidehill construction, adds ATWS-1561, and adjusts the alignment of temporary access road MN-278.01. The request impacts approximately 0.24 additional acres in Montgomery County, VA around MP 237.5
MVP-006	21-Sep-18	MVP Variance Requests H-9 and MVP-006	Request to update two project plans: the Vertical Scour and Lateral Channel Erosion Analyses and the Traffic and Transportation Management Plan. Changes to the plans are highlighted in yellow within the request. Specifically, MVP indicates that the Vertical Scour and Lateral Channel Erosion Analyses were only "a theoretical desktop analysis and did not take site specific constructibility issues (elevations, terrain, and workspace) into account." As a result, crews determined that the mitigation measures indicated in the plan could not be implemented as described. MVP also revised the central point of command noted in the Traffic and Transportation Management Plan.
C-10	24-Sep-18	MVP Variance Request C-10	Adds workspace ATWS-SM-013 for slip remediation, impacting approximately 2.88 additional acres in Braxton County, WV around MP 68.5
MVP-007	25-Sep-18	MVP Variance Request MVP-007	Request for extended work hours at 44 stream crossings in West Virginia in order to comply with condition set forth in the State's approval of the Nationwide 12 permit requiring stream crossings be completed in 72 hours or less.

Sample of Variance Spreadsheet prepared by POWHR

Formally Requested Variances

¹ The full spreadsheet of variances, updated approximately weekly, can be found on the POWHR website at <https://powhr.org/2019/05/14/master-list-of-mvp-variance-requests-through-ferc/>. More information on the details included in the spreadsheet, as well as a guide for understanding the content, can be found at the link above.

² Hileman, Jacob. "MVP's violations show 'complete absence of any and all meaningful regulation'," Virginia Mercury, July 15, 2019. <https://www.virginiamercury.com/2019/07/15/mvp-shows-complete-absence-of-any-and-all-meaningful-regulation/>

The primary variances MVP has requested and obtained are formally requested through filings in the FERC docket. To date, MVP has made 138 variance requests through these formal filings, including 14 variances that are considered “route-wide,” which impact a large portion or the entirety of the route. These variances have impacted 455.2 additional acres of land and required almost 47 additional acres of tree clearing beyond what was originally considered in the FERC Certification process and subsequent condemnation of private land. These variances include requests such as the following:

- Route and pipe alignment alterations;
- Additional laydown yards and access roads;
- Access to additional space to stabilize failing slopes due to construction;
- Allowance for 24-hour construction operations in certain areas;
- Modifications to MVP’s General Blasting Plan;
- Modifications to the time-of-year restrictions for tree-clearing in the Jefferson National Forest;
- Changes to seed mixes used to stabilize the right-of-way;
- Demolition of nearby buildings.

Though these variances are presumably filed on the FERC docket as they are requested, then approved through a FERC review process, some of the variance requests have been posted only hours before they are approved by FERC Environmental Project Manager Paul Friedman. Across the 138 formal variances requested to date, it takes an average of approximately six days to approve a variance request, with the median number of days to approve being three. Some variance requests are submitted by the company after the requested change has already been implemented by work crews on the ground. This process of quick approval leaves little to no time for other stakeholders in the project to even become aware of the variance request prior to approval, much less provide meaningful information and objection to the variance as requested.

Stream Crossing Modifications

Falling under the category of “route-wide” variances are requests to modify MVP’s method of crossing streams and wetlands. These requests came after the U.S. Fourth Circuit Court of Appeals vacated authorization granted by the U.S. Army Corps of Engineers for the pipeline to be constructed under a general Nationwide 12 Permit (NWP 12) in the Corps Huntington District on October 2, 2019 and the Corps voluntarily suspended parallel authorizations in the Norfolk and Pittsburgh Districts on October 5 and 19, respectively. Through the process of variances beginning with B-31 in West Virginia on May 16, 2019, and continuing with MVP-014 submitted June 11, 2019 and subsequent requests, MVP has gained permission to alter their method of crossing 60 streams and 13 wetlands in Virginia and West Virginia.

Most recently, MVP filed Variance Requests D-35, G-12, and H-21 to alter the method of crossing the Gauley River in Nicholas County, WV, Stoney Creek in Giles County, VA, and the

Roanoke River in Montgomery County, VA, respectively. These variance requests notably come following the US District Court for the District of Montana, Great Falls Division decision vacating the use of NWP12 for all dredge-and-fill activities related to oil and gas pipelines.³ Variances D-35 and G-12 were requested May 8, amended with supplemental information May 14, and approved conditionally by FERC May 18, 2020. Variance H-21 was requested May 20 and approved May 27, 2020. As noted in the approval of these variances, MVP is making these requests for major changes to construction plans amidst an active, route-wide stop work order due to the US Fourth Circuit Court of Appeals' stay on the US Fish and Wildlife Service Biological Opinion and Incidental Take Statement. It is also critical to note that these requests are being filed and approved during an unprecedented global pandemic for a project slated to bring “**upwards of 4,000 people** right [a]way to start doing all of that upland work” in rural areas when construction is once again permitted by FERC (emphasis added).⁴

In-Field Variances

A secondary form of variance MVP has obtained is in-field variances, approved by FERC's Environmental Compliance Monitors and Managers. Those approvals are included in the Environmental Compliance Monitoring Reports, which each cover weekly reports from the Monitors and are often posted to the FERC docket several weeks after the monitoring period concludes. FERC provides two classifications for the variances requested in this manner:

- Level 1: Reviewed and approved or denied by the Compliance Monitors. These requests must be within the approved workspace or of like use and are for site-specific, minor, performance-based changes to Project specifications or mitigation measures that provide equal or better protection to environmental resources.
- Level 2: Reviewed and approved or denied by the Compliance Manager. These requests involve Project changes that would affect an area outside of the previously approved work area, but within the corridor previously surveyed for cultural resources, sensitive species, sensitive resources, etc.

To date, no in-field variances included in these reports have been denied. In many cases, these variances are requested for activities contractors have already performed but for which they need retroactive permit modifications; in-field variances requested and approved during October 2019 include after-the-fact modifications to grant the company and contractors permission to perform actions that occurred *over a year prior* to the request being made.

³ *Northern Plains Resource Council et al v. US Army Corps of Engineers et al* (D. Mont. 2020).

⁴ Equitrans Midstream Corp (ETRN) Q1 2020 Earnings Call Transcript, posted by The Motley Fool May 14, 2020.

<https://www.fool.com/earnings/call-transcripts/2020/05/14/equitrans-midstream-corp-etrn-q1-2020-earnings-cal.aspx>

Conclusion

Through the process of formal and in-field variances, MVP has been allowed to drastically alter the permitted project from what was originally approved by FERC in 2017. The 281 total variances submitted as of June 12, 2020 allow the company to expand the scope of their construction on a whim and circumvent vacated and suspended permits, and swift FERC approval prevents any other project stakeholders from getting a chance to provide information on the project as it changes. This approval process is further impacted by the practice of issuing “tolling orders,” as the only recourse intervenors on the project have for reconsideration of variances is through the process of rehearing, which FERC can delay indefinitely until the request becomes moot.

Along the MVP, it is apparent that variances are being used to push the project forward at all costs, in a manner that is constantly enabled by the process at FERC. As a result, FERC is unable to provide any meaningful regulation of the project, and it is time for legislators at a federal level to formally request that FERC stop all work and variance approvals associated with the Mountain Valley Pipeline. Additionally, these variances are indicative of a systemic problem within FERC of blocking meaningful public participation and preventing open dissemination of information to stakeholders. It is therefore critical for Congress to conduct formal hearings regarding FERC’s operations and consider changes to legislation that enable public participation when massive pipeline permits are rewritten through project-wide variances to prevent the rubber-stamped changes to projects such as the Mountain Valley Pipeline.