



AppalachianVoices

Protecting the Central and Southern Appalachian Mountain Region

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Re: Comments on Draft Clean Water Act Section 401 Water Quality Certification No. 17-002 for the Atlantic Coast Pipeline

Dear Chairman Dunn and Director Paylor:

Appalachian Voices, a 501(c)(3) nonprofit organization working to protect and preserve the natural resources of the central and southern Appalachian mountain region respectfully submits the comments below regarding state certification under Clean Water Act § 401 for the proposed Atlantic Coast Pipeline project. Appalachian Voices has approximately 150 dues-paying members in the Commonwealth of Virginia. Many of our members benefit from uses of Virginia waters that would be impacted by construction and operation of the pipeline, whether recreational, ecological, economic, agricultural, or simply human consumption.

SUMMARY OF THE PROJECT AND RELEVANT LAW

The Atlantic Coast Pipeline

The Atlantic Coast Pipeline, if built, would constitute a 42-inch diameter buried pipeline used to transport at high-pressure up to 1.5 billion cubic feet per day of natural gas approximately 600 miles from West Virginia, through Virginia, and into North Carolina. The pipeline would cross roughly 307 miles in Virginia. This includes 234.8 miles of 42-inch pipe, 71.1 miles of 20-inch pipe, and an additional 1.4 miles of 16-inch pipe. *See* Federal Energy Regulatory Commission, Atlantic Coast Pipeline and Supply Header Project Final Environmental Impact Statement, Table 2.1.1-1, 2-4 (July 21, 2017) (“FEIS”).

Construction and operation of the Atlantic Coast Pipeline threatens to degrade water quality across Virginia. In order to construct the pipeline, developers would have to cross waterbodies in Virginia 708 times. *See* FEIS Appendix K. The pipeline would also cross 311.9 acres of

wetlands in Virginia. FEIS at 4-135. Proposed methods of crossing waterbodies and wetlands include the dry open-cut method (creating a water diversion and trenching instream) and the horizontal directional drilling (HDD) method. FEIS at ES-16, 4-104, Appendix K. Blasting with explosives would likely be required, due to the presence of hard bedrock along the pipeline's proposed route. FEIS at 4-4. According to the FEIS, "blasting may be required in *most* waterbodies crossed by ACP and SHP." FEIS at 4-236 (emphasis added).

Federal Law

The project applicants are asking for all necessary state and federal permits to begin construction. While the Federal Energy Regulatory Commission is the lead agency for permitting interstate natural gas pipelines under the Natural Gas Act, 15 U.S.C. § 717f(e), the law also requires "any permits, special use authorizations, certifications, opinions, or other approvals as may be required under Federal law." *Id.* §§ 717n(a)(1), (2). This includes a certification of compliance with the federal Clean Water Act.

Under the federal Clean Water Act, states have primary responsibility to protect the waters within their borders. 33 U.S.C. § 1370. In fact, this law requires

[a]ny applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate ... that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title.

33 U.S.C. § 1341(a)(1). Commonly known as Clean Water Act § 401 certification, this process confers full authority on the states to approve or deny certifications for projects that are otherwise federally licensed. *Id.* ("No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.")

A necessary part of § 401 certification is assurance that the activity will comply with water quality standards established by each state under Section 303 of the Clean Water Act. 33 U.S.C. § 1313. The Clean Water Act requires that water quality standards consist of designated uses, narrative and numeric criteria, and an antidegradation policy. 33 U.S.C. § 1313. State water quality standards "shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses ... Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation." 33 U.S.C. § 1313(c)(2)(A). Finally, federal regulations require that state § 401 certifications include a "statement that there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards." 40 C.F.R. § 121.2(a)(3).

Virginia Law

Virginia water quality standards are set forth in Title 9 of the Virginia Administrative Code. Using its authority under § 62.1-44.15 of the Code of Virginia, the federal Clean Water Act, and

federal regulations, the Board has established that “[a]ll state waters, including wetlands, are designated for the following uses: recreational uses, e.g., swimming and boating; the propagation and growth of a balanced, indigenous population of aquatic life, including game fish, which might reasonably be expected to inhabit them; wildlife; and the production of edible and marketable natural resources, e.g., fish and shellfish.” 9VAC25-260-10(A) (emphasis added).

Moreover, the Board has also determined in setting general criteria for Virginia waters that “State waters, including wetlands, shall be free from substances attributable to sewage, industrial waste, or other waste in concentrations, amounts, or combinations which contravene established standards or interfere directly or indirectly with designated uses of such water or which are inimical or harmful to human, animal, plant, or aquatic life.” 9VAC25-260-20(A).

Sections 62.1-44.15:20 through 62.1-44.15:23.1 set forth the Virginia Water Protection Program. According to Virginia law “[i]ssuance of a Virginia Water Protection Permit shall constitute the certification required under § 401 of the Clean Water Act.” VA Code § 62.1-44.15:20(D). Therefore, the Board must adhere to the requirements of the Virginia Water Protection Program in considering § 401 certification for the Atlantic Coast Pipeline project.

Moreover, a Virginia Water Protection “permit shall be issued *only if* the Board finds that the effect of the impact, together with other existing or proposed impacts to wetlands, will not cause or contribute to a significant impairment of state waters or fish and wildlife resources.” VA Code § 62.1-44.15:21(A) (emphasis added). Further, the “[p]ermits shall contain requirements for compensating impacts on wetlands. Such compensation requirements shall be sufficient to achieve no net loss of existing wetland acreage...” VA Code § 62.1-44.15:21(B).

Federal law requires that project applicants receive a § 401 certification from Virginia in order to begin construction. Virginia has chosen to administer § 401 certifications through the Virginia Water Protection Program. VA Code § 62.1-44.15:20(D). Therefore, the Board must decide whether the Atlantic Coast Pipeline can be constructed and operated while ensuring that *all waters* of Virginia affected by the project maintain designated uses such as swimming, the propagation of aquatic life, and the production of marketable fish and shellfish. The Board may only provide § 401 certification if it reasonably finds that the project can be constructed without significantly impairing state waters (including wetlands) or fish and wildlife resources.

THE BOARD HAS AUTHORITY TO DENY AN APPLICATION FOR A VIRGINIA WATER PROTECTION PERMIT

There can be no question that the Board has the authority to deny § 401 certifications. Under the State Water Control Law, the Board has the duty and the authority “[t]o issue, revoke or amend certificates” for activities that discharge “wastes into or adjacent to state waters,” alter the “physical, chemical or biological properties of state waters,” excavate in wetlands, fill or dump in wetlands, or “cause significant alteration or degradation of existing wetland acreage or functions.” VA Code § 62.1-44.15(5).

Specific to the Virginia Water Protection Program, the “Board shall, after providing an opportunity for public comment, issue a Virginia Water Protection Permit *if* it has determined that the proposed activity is consistent with the provisions of the Clean Water Act and the State

Water Control Law and will protect instream beneficial uses.” VA Code § 62.1-44.15:20(B) (emphasis added).

“Beneficial uses” are defined in the State Water Control Law as “both instream and offstream uses. Instream beneficial uses include, but are not limited to, the protection of fish and wildlife resources and habitat, maintenance of waste assimilation, recreation, navigation, and cultural and aesthetic values.” VA Code § 62.1-44.3. “Offstream beneficial uses include, but are not limited to, domestic (including public water supply), agricultural uses, electric power generation, commercial, and industrial uses.” *Id.*

The Code also expressly outlines the steps the Board may take to deny a Virginia Water Protection permit. VA Code § 62.1-44.15:21(E), (F). Virginia regulations make clear that “[n]o VWP permit shall be issued...[w]here the proposed activity or the terms or conditions of the VWP permit do not comply with state law or regulations including, but not limited to, § 10.1-1408.5 of the Code of Virginia...” 9VAC25-210-50(B)(1).

Virginia regulations further delineate the possible bases for permit denial, along with other steps the Board must take when denying a Virginia Water Protection permit. The Board must deny a VWP permit if, among other reasons, “[t]he project will result in violations of water quality standards or will impair the beneficial uses of state waters,” or “[t]he project that the applicant proposed fails to adequately avoid and minimize impacts to state waters to the maximum extent practicable.” 9VAC25-210-230.

Finally, it must be emphasized that no other officer or agency of the Commonwealth, whether political or not, may interfere with the Board’s independent authority to carry out its statutory duties. By law the Board “shall have” the power “[t]o act ... independently ... in order to carry out the Board’s powers and duties.” VA Code § 62.1-44.43(d).

PROCEDURAL CONCERNS AND SCOPE OF PUBLIC COMMENTS

DEQ Proposes a Two-Part Section 401 Certification for the Atlantic Coast Pipeline

The DEQ’s Draft Certification No. 17-002 (“Draft Certification”), which is the subject of this public comment period, states that DEQ’s “401 Water Quality Certification for the Corp’s Nationwide Permit 12 issued April 7, 2017 and this additional Certification issued pursuant to Guidance Memo No. GM17-2003 ... together constitute the Commonwealth of Virginia’s 401 Certification for the Project.” Department of Environmental Quality, Certification No. 17-002 3 (2017) (Draft Cert). Therefore, DEQ presents a two-part Section 401 certification for the Atlantic Coast Pipeline project: (1) the Draft Certification now before the Board, and (2) the general Nationwide Permit 12 that the DEQ approved in April, 2017.

On April 7, 2017 DEQ approved the U.S. Army Corps of Engineers’ Nationwide Permits, including Nationwide Permit 12, dealing with utility line activities. *See* Department of Environmental Quality, Commonwealth of Virginia Final § 401 Certifications of the 2017 Nationwide Permits (April 7, 2017), *available at* <http://www.deq.virginia.gov/Portals/0/DEQ/Water/WetlandsStreams/Final%20401%20Certificat>

[ion%202017%20NWP%20with%20typos%20corrected.pdf?ver=2017-05-01-135819-313](#)

(approving with conditions the U.S. Army Corps of Engineers' 2017 Nationwide Permits under 40 CFR 121.2(a)(2) and (3) and 9VAC25-210-130(H)).

This Draft Certification purports to cover “all relevant upland Project activities within the route” and “[p]roject activities that are outside the jurisdictional scope of the Virginia Water Protection Permit Program Regulation.” Draft Cert at 3. In other words, the Draft Certification now before the Board lays out requirements for construction and operation activities that are not conducted in-stream or within wetlands and therefore not part of the Virginia Water Protection Permit Program, presumably leaving regulation of those activities to the Nationwide Permit 12. This is a curious approach, given that the Virginia Water Protection permit is the § 401 certification under the Code.

The Draft Certification purports to constitute “the Commonwealth’s final decision on the Project under the requirement of Clean Water Act § 401.” Draft Cert at 7. Presented this way, the Board would be certifying both that (1) the Draft Certification’s conditions for upland activities and (2) the DEQ’s April 2017 approval of the general Nationwide Permit 12, dealing with utility line activities in streams and wetlands, are together sufficient to provide reasonable assurance that water quality standards will not be violated.

This is problematic for several reasons, two of which are discussed in this section. First, it is unclear whether the Board has received a complete application from Atlantic Coast Pipeline, LLC to include the project in Nationwide Permit 12 coverage under the VWP Program. There appears only to be an *assumption* that Nationwide Permit 12 applies to the Atlantic Coast Pipeline and is sufficient to regulate its construction and operation of across streams and wetlands. Second, the public and the Board are both being denied opportunity to review information and comment on the sufficiency of Nationwide Permit 12 to protect state waters from violations specifically by the Atlantic Coast Pipeline project.

It is Unclear Whether The Board Has Received a Complete General or Individual Virginia Water Protection Permit Application from Atlantic Coast Pipeline, LLC

While the U.S. Army Corps’ 2017 Nationwide Permits were certified by DEQ in general (including NWP12 – utility line activities), it is not clear the owners of the Atlantic Coast Pipeline Project have submitted a complete application for coverage under this general permit in compliance with VA Code § 62.1-44.15:21. As noted above, the VWP permit is the § 401 certification in Virginia. VA Code § 62.1-44.15:20(D).

FERC has not issued a Certificate of Public Convenience and Necessity at this time, nor has the U.S. Army Corps of Engineers issued a permit for the Atlantic Coast Pipeline under Clean Water Act § 404. The DEQ’s certification in April of the Army Corp’s Nationwide Permits in no way implies certification of this particular project.

There is a record showing that Atlantic Coast Pipeline, LLC submitted a Joint Permit Application to the U.S. Army Corps of Engineers Norfolk District on September 16, 2015. Dominion Resources Services, Inc., Dominion Transmission, Inc. Atlantic Coast Pipeline Joint

Permit Application Serving as Pre-construction Notification for Authorization Under Section 10 and Section 408 of the Rivers and Harbors Act, Section 404 of the Clean Water Act for Nationwide Permit 12 (Utility Line Activities), Virginia Water Quality Certificate under Section 401 of the Clean Water Act, Virginia Water Protection Permit, Stream Crossing Permit, and the Tidal Wetland Permit, *available at* <https://webapps.mrc.virginia.gov/public/habitat/getPDF.php?id=20151353>.

This raises procedural questions governed by the Virginia Water Protection Program. Under the Code, if the Board received this application, it had 15 days to determine whether or not it was a “complete” application. VA Code § 62.1-44.15:21(E), (F). A determination that the application was complete would have set in motion a timeline for other procedural requirements. *See id.* Given that this submission occurred in 2015, it begs the question whether the Board received this application at all, or made any determinations on its completeness.

Even if the September 2015 Joint Permit Application was received by the Board, that application no longer contains accurate information upon which the Board can make permitting decisions. Atlantic Coast Pipeline, LLC continued to make route changes and submittals of missing information requested by FERC throughout the federal public comment period in the spring of 2017, rendering the September 2015 application incomplete at best.

If, in fact, the Board now possesses a complete individual application, the public would like to know when it was received, whether it is for a general or individual Virginia Water Protection permit, and whether a public meeting or hearing will be held under VA Code § 62.1-44.15:21(E).

The Draft Certification Attempts to Prevent Both Public Participation and Board Participation in Certifying the Atlantic Coast Pipeline Under the Nationwide Permit 12

Whether or not the Board is in receipt of a complete Virginia Water Protection permit application, it is being asked by DEQ to consider § 401 certification for the entire Atlantic Coast Pipeline project *without* sufficient information regarding stream and wetland crossings particular to this project. This process is indefensible, as the § 401 certification under Virginia law is a VWP permit, and the VWP program regulates activities affecting streams, wetlands, and flows. *See* VA Code §§ 62.1-44.15:20 through 62.1-44.15:23.1.

Moreover, the DEQ has expressly denied the public the ability to comment on whether it is appropriate to cover Atlantic Coast Pipeline Project activities under the general Nationwide Permit 12. Department of Environmental Quality, Frequently Asked Questions about the Mountain Valley and Atlantic Coast Pipelines 1 (2017) available at <http://www.deq.virginia.gov/Portals/0/DEQ/Water/Pipelines/PipelineFAQ.pdf?ver=2017-08-16-160239-303>. (“Comments on erosion and sediment control plans, stormwater plans, the Corps Nationwide 12 permit, or the environmental impact statements will not be considered as part of this action’s record...Such topics that will not be considered include the Corps Nationwide 12 permit, which addresses temporary impacts to wetlands and streams; erosion and sediment control and stormwater management, which are Virginia programs covered by separate regulations.”). This action is contrary to the DEQ’s statutory requirement to “enhance public participation in the regulatory and permitting processes.” VA Code § 10.1-1183.

The result of this arbitrary action is that DEQ now asks the Board to approve Draft Certification No. 17-002 as the § 401 certification for the entire project while only providing information related to indirect impacts on water quality from upland activities. The Draft Certification merely provides four pages of conditions on upland activities relating to riparian buffers, karst terrain surveys and dye assessments, release of hydrostatic test water in upland areas, and compliance with other existing monitoring and mitigation plans. *See* Draft Cert at 4-7. DEQ's admonishment that this process will not consider Erosion & Sediment Control or Stormwater Management plans precludes the Board from receiving information highly relevant to Virginia's water quality standards and impacts on beneficial uses, such as an evaluation of total sediment loads expected to be added to state waters.

The Board can cure these procedural and information deficiencies by denying Draft Certification No. 17-002, as other state environmental and conservation agencies have done when faced with incomplete applications for 401 certification. *See Constitution Pipeline, LLC v. New York State Dept. of Env'tl. Conservation*, Case 16-1568, Document 240-1 (2d. Cir., decided Aug. 18, 2017) (upholding the NYSDEC's decision to deny 401 certification based on the applicant's refusal to provide requested stream crossing information); New Jersey Department of Environmental Protection Letter to PennEast Pipeline Company, LLC (June 28, 2017), *available at* <https://www.sierraclub.org/sites/www.sierraclub.org/files/blog/PENNEAST%20DENIAL%20.pdf> (administratively closing PennEast's application due to lack of response to repeated requests for information).

THE DRAFT CERTIFICATION AND NATIONWIDE PERMIT 12 CANNOT ASSURE THAT THE ATLANTIC COAST PIPELINE PROJECT WILL NOT VIOLATE VIRGINIA WATER QUALITY STANDARDS

As described above, the extant record implies that there is an assumption among some parties that a project the size and magnitude of the Atlantic Coast Pipeline qualifies for coverage under the Nationwide Permit 12. This assumption is false.

By Its Own Admission DEQ Finds the NWP12 Alone to be Insufficient

On May 19, 2017 the DEQ published Guidance Memo No. GM17-2003, Interstate natural Gas Infrastructure Projects – Procedures for Evaluating and Developing Additional Conditions for Section 401 Water Quality Certifications Pursuant to 33 USC § 1341 (“401” Certification) (“Guidance Memo”). In this memo, the DEQ describes a process for evaluating “whether additional Section 401 conditions may be appropriate to supplement those associated with either a US Army Corps of Engineers (Corps) Permit and/or a Virginia Water Protection (VWP) Permit. This review is intended to supplement, but not replace, the Corps and/or VWP permit processes for such projects.” Guidance Memo at 1.

The Guidance Memo states that while general VWP permits and “coverage associated with a Corps’ Nationwide Permit certified by Virginia” have “proven to be sufficient...for most federally permitted projects,” they may not be sufficient for “large FERC-regulated natural gas pipeline projects” due to upland impacts falling outside their scope. *See* Guidance Memo at 2-3

(emphasis added). Draft Certification No. 17-002 reveals that DEQ indeed finds coverage under Nationwide Permit 12 alone to be insufficient to satisfy Clean Water Act § 401 requirements because it pairs together “the Corp’s Nationwide Permit 12 issued April 7, 2017 and this additional Certification issued pursuant to Guidance Memo No. GM17-2003.” Draft Cert at 3.

While the justification DEQ provides for adding additional Section 401 conditions is to cover indirect impacts on water quality from upland activities, a lack of jurisdiction over upland activities is not the only reason the Nationwide Permit 12 is insufficient to assure that the Atlantic Coast Pipeline will not violate Virginia water quality standards.

Nationwide Permits are Inherently Speculative and Generalized

The primary reason Nationwide Permit 12 is insufficient to assure the Atlantic Coast Pipeline’s compliance with Virginia water quality standards is that it is a general permit that was not conceived with projects like the Atlantic Coast Pipeline in mind.

Upon releasing the renewed Nationwide Permits in early 2017, the U.S. Army Corps of Engineers also published Decision Document Nationwide Permit 12, which discusses the factors the agency considered in releasing the Nationwide Permit. U.S. Army Corps of Engineers, Decision Document Nationwide Permit 12 (2017) *available at* http://www.usace.army.mil/Portals/2/docs/civilworks/nwp/2017/NWP_12_2017_final_Dec2016.pdf?ver=2017-01-06-125514-797.

The Decision Document explains that “NWP’s are a type of general permit designed to authorize certain activities that have no more than minimal individual and cumulative adverse environmental effects and generally comply with the related laws cited in 33 CFR 320.3. *Activities that result in more than minimal individual and cumulative adverse environmental effects cannot be authorized by NWP’s.*” Decision Document at 4 (emphasis added). This statement alone should preclude the Atlantic Coast Pipeline from authorization under Nationwide Permit 12. A 42-inch diameter high-pressure gas pipeline has never before been built over the steep, porous, and unstable terrain found in the Appalachian region of Virginia, which the Atlantic Coast Pipeline would cross.

In addition the “issuance of an NWP is based on a general assessment of the effects on public interest and environmental factors that are likely to occur as a result of using this NWP to authorize activities in waters of the United States. *As such, this assessment must be speculative or predictive in general terms.* Since NWP’s authorize activities across the nation, projects eligible for NWP authorization may be constructed in a wide variety of environmental settings. Therefore, it is difficult to predict all of the indirect impacts that may be associated with each activity authorized by an NWP.” Decision Document at 42 (emphasis added).

A “one-size-fits-all” approach may be appropriate for activities that will actually have minimal adverse environmental effects, but the Atlantic Coast Pipeline does not fall into that category. A project of this size requires project-specific data and analysis.

Finally, the Decision Document notes that in “some cases, activities authorized by an NWP may

require other federal, state, or local authorizations. Examples of such cases include... activities that result in discharges of dredged or fill material into waters of the United States and require Clean Water Act Section 401 water quality certification... In such cases ... an NWP does not obviate the need to obtain other authorizations required by law. [33 CFR 330.4(b)(2)]” Decision Document at 5.

In this instance, the Corps explains that the Nationwide Permit 12 is not a substitute for Clean Water Act Section 401 certification. Yet, incredibly, Draft Certification No. 17-002 offers as an attempt to satisfy Section 401 requirements (1) a document that does not purport to satisfy Section 401 [the NWP12] and (2) a list of conditions that expressly do not deal with direct impacts to water quality.

The Draft Certification should be denied because the Atlantic Coast Pipeline cannot be covered under Nationwide Permit 12—construction and operation would result in “more than minimal individual and cumulative adverse environmental effects.” Nationwide Permit 12 does not—in the Corp’s own words—satisfy the requirements of Clean Water Act § 401 by itself, and the upland conditions of the Draft Certification do not close those gaps.

Draft Certification 17-002 Does Not Fill the Gaps

The additional conditions proposed in the Draft Certification do not cure the deficiencies associated with certifying the Atlantic Coast Pipeline under Nationwide Permit 12. Far from it, the Draft Certification “applies to Project activities in upland areas outside of the Corps jurisdictional areas under 33 U.S.C. § 1344 which may result in an indirect discharge to waters of the United States or water withdrawal activities that are exempt from coverage under the Virginia Water Protection Permit Program Regulation.” Draft Certification at 1. Adding conditions for activities in upland areas does nothing to protect Virginia water quality from in-stream blasting and trenching, or any other direct additions of contaminants or fill to streams and wetlands. Combining two insufficient permits here does not result in one complete certification that satisfies Clean Water Act § 401.

Similar Projects Have Violated Water Quality Standards in Other States

It is clear from the information in the Final Environmental Impact Statement and from instances of water quality violations by similar projects that the Atlantic Coast Pipeline is likely to have “more than minimal individual and cumulative adverse environmental effects,” and therefore does not qualify for Nationwide Permit 12 coverage.

For example, in July, Pennsylvania regulators stopped construction of the Mariner East 2 pipeline project, which consists of a 20-inch pipeline and a parallel 16-inch pipeline carrying natural gas across the state, due to a series of spills contaminating state waters. Mike Lee, “Work on Energy Transfer’s Mariner lines halted after spills,” EnergyWire (July 26, 2017), available at <https://www.eenews.net/energywire/stories/1060057894/>. The Pennsylvania Department of Environmental Protection has already issued four notices of violations and executed a consent order. *Id.* The stop work order affected 55 horizontal directional drilling sites. *Id.* This is the same method of water crossing Atlantic Coast Pipeline proposes for a large

portion of its own crossings. *See* FEIS at 4-104. The Mariner East lines are far smaller than those proposed for the Atlantic Coast Pipeline project.

Construction of Dominion’s G-150 and TL-589 gas pipelines in West Virginia resulted in slope failures for which the West Virginia Department of Environmental Protection cited Dominion for violations of permit conditions in thirteen locations. West Virginia Department of Environmental Protection, Consent Order No. 8078 (October 1, 2014) *available at* <http://www.dep.wv.gov/pio/Documents/Settlements%20and%20Orders/DOMINION%20TRANSMISSION%20INC.pdf>. Construction activities resulted in large deposits of sediment in waters of the state, despite the use of standard erosion and sediment controls. *See id.*

Finally, the Rover Pipeline project, which like the Atlantic Coast Pipeline would use 42-inch diameter pipe along with smaller 36-, 30-, and 24-inch segments, would deliver gas 710 miles from the Marcellus shale across Ohio and Michigan. Rover Pipeline LLC, Energy Transfer, http://www.energytransfer.com/ops_etровер.aspx. Despite “best in class” erosion controls, construction has so far resulted in sedimentation so severe that the West Virginia Department of Environmental Protection issued a cease and desist order on July 17, 2017. West Virginia Department of Environmental Protection, Order No. 8749 (July 17, 2017), *available at* https://www.eenews.net/assets/2017/07/24/document_gw_07.pdf. FERC had already ordered a moratorium on construction of the Rover in Ohio in May after 2 million gallons of horizontal directional drilling mud spilled, covering 6.5 acres of a pristine wetland. Steve Mufson, “U.S. blocks major pipeline after 18 leaks and 2 million gallon spill of drilling mud,” *The Washington Post* (May 10, 2017) *available at* https://www.washingtonpost.com/news/energy-environment/wp/2017/05/10/pipeline-shut-down-after-18-leaks-and-a-2-million-gallon-spill-of-drilling-materials/?utm_term=.db294642aea4.

This is by no means a comprehensive list of gas pipeline construction projects that have violated permit conditions and degraded state waters. It is, however, representative of a growing list of gas pipeline problems highlighting the great difficulty of constructing these projects while only creating “minimal” adverse environmental effects. The Atlantic Coast Pipeline would be the first 42-inch pipeline ever to be constructed across the rugged terrain in Virginia’s George Washington National Forest, and without additional study by the DEQ providing evidence to the contrary, there can be no reasonable assurance that the project will not violate Virginia water quality standards.

CONCLUSION: THE BOARD MUST DENY § 401 CERTIFICATION FOR THE ATLANTIC COAST PIPELINE

As noted above, the Atlantic Coast Pipeline project must receive a Clean Water Act § 401 certification from the state where project activities will occur. Federal law requires that § 401 certifications include a “statement that there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards.” 40 C.F.R. § 121.2(a)(3). Under the Virginia Code, the Virginia Water Protection permit “shall constitute the certification required under § 401 of the Clean Water Act.” VA Code § 62.1-44.15:20(D).

Virginia has established its own water quality standards pursuant to the Clean Water Act, and

these include designated uses such as “swimming and boating; the propagation and growth of a balanced, indigenous population of aquatic life... wildlife; and the production of edible and marketable natural resources, e.g., fish and shellfish.” 9VAC25-260-10(A). These water quality standards apply to *all* state waters, including wetlands. *Id.*

In addition, the State Water Control Law establishes instream beneficial uses, including “the protection of fish and wildlife resources and habitat ... recreation, navigation, and cultural and aesthetic values.” VA Code § 62.1-44.3. If the Board determines that a proposed activity will not protect instream beneficial uses, it must deny the requested permit. *See* VA Code § 62.1-44.15:20(B); 9VAC25-210-50 (B)(1).

DEQ asks the Board to certify that Virginia water quality standards will not be violated by construction of a project the size and scope of which has never been attempted in the Commonwealth, without providing the information necessary for the Board to make that decision. Relevant information about erosion and sediment controls and stormwater management plans have been forbidden in this comment period. While the karst dye trace study plans required in the Draft Certification could provide relevant data, *see* Draft Certification at 4-5, DEQ asks the Board to certify the project before those studies are conducted. If DEQ, its contractors, or the applicants have conducted studies quantifying expected impacts from instream blasting, horizontal directional drilling, building in karst, or building on steep slopes, they do not appear in the public record. *See* DEQ, Water Protection for Pipelines, <http://www.deq.virginia.gov/Programs/Water/ProtectionRequirementsforPipelines.aspx>.

The DEQ presents here a two-part § 401 certification outside the scope of the Virginia Water Protection program, in direct contradiction to VA Code § 62.1-44.15:20(D). Draft Certification at 2-3. One part is the DEQ’s April certification of the U.S. Army Corps of Engineers’ Nationwide Permit 12. The second part is Draft Certification No. 17-002, which only places conditions on indirect, upland impacts. The Atlantic Coast Pipeline cannot be certified under Nationwide Permit 12 because it is very likely to have “more than minimal individual and cumulative adverse environmental effects,” similar to many other gas pipelines currently being constructed that are currently violating state water quality standards. The Corps itself states that the Nationwide Permit 12 does not satisfy requirements under Clean Water Act § 401, and the additional upland conditions of Draft Certification No. 17-002 cannot cure these deficiencies.

For the foregoing reasons, the Board must find that Draft Certification No. 17-002 does not provide reasonable assurance that the Atlantic Coast Pipeline project will not violate Virginia water quality standards, and it must deny certification under Clean Water Act § 401.

In the alternative, the Board can declare that a Virginia Water Protection permit application for the Atlantic Coast Pipeline project is incomplete and begin other procedures for review outlined in VA Code § 62.1-44.15:21.

Thank you for the opportunity to provide comments on this important matter.

Sincerely,

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