



Appalachian  
Mountain  
Advocates

CHESAPEAKE BAY  
FOUNDATION

*Saving a National Treasure*

May 8, 2018

*Via email and First Class U.S. Mail to:*

Members of the Virginia State Water Control Board  
c/o Office of Regulatory Affairs  
Department of Environmental Quality  
P.O. Box 1105  
Richmond, Virginia 23218  
citizenboards@deq.virginia.gov

David Paylor, Director  
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Virginia Department of Environmental Quality  
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**Re: 401 Water Quality Certification No. 17-002, Atlantic Coast Pipeline, LLC**

Dear Members of the Virginia State Water Control Board, Director Paylor, and Ms. Davenport:

We are writing on behalf of our clients, listed below, to request that the State Water Control Board and the Department of Environmental Quality stay the effective date of Section 401 Water Quality Certification No. 17-002 issued to Atlantic Coast Pipeline, LLC. Construction and operation of this pipeline poses serious risks to water quality in some of Virginia's most sensitive and important waterways, like the Cowpasture and Jackson Rivers in Bath County, 69 wild trout streams or their tributaries, and the James River. The Certification is not yet effective because DEQ has not approved erosion and sediment control plans and other important plans, but those approvals may

occur soon. According to its terms, “[t]he Board may consider further actions on the Certification” once DEQ completes its review of those plans.<sup>1</sup>

The justification for our request is three-fold: (1) the Board and DEQ recently opened a public comment period to assess the adequacy of Nationwide Permit 12 as it applies to the Atlantic Coast Pipeline’s river, stream, and wetland crossings; (2) there are significant deficiencies in the Certification, described in detail in Petitioners’ Opening Brief in cases 18-1077 and 18-1079, now pending before the U.S. Fourth Circuit Court of Appeals; (3) the U.S. Fish and Wildlife Service listed the yellow lance, a mussel species known to occur in Virginia rivers that will be crossed by the pipeline, as a threatened species under the federal Endangered Species Act on April 3, 2018.

First, on April 12, 2018, the Board voted to open a 30-day comment period on the adequacy of Nationwide Permit 12 to protect Virginia waterways from harm caused by construction of the Atlantic Coast Pipeline. DEQ formally opened the comment period on April 30, 2018. Our clients strongly support this decision and welcome the opportunity to address this important issue.

We disagree with the position taken by the Attorney General’s office on behalf of the Board and DEQ that the new comment period is unrelated to the earlier Certification for the pipeline and disagree with the suggestion that the Board would not take “further action” based on the comments its receives.<sup>2</sup> The Board’s action raises significant uncertainty for the prior certification determination that there was “reasonable assurance” that the pipeline will comply with Virginia water quality standards. The Certification specifies that:

The additional conditions contained in Section V of this Certification along with the requirements imposed by the VWP regulations, the *Corps Section 404 permitting requirements*, and prior regulatory actions associated with the approval and requirements of the July 2017 Annual Standards and Specifications, and the *April 7, 2017 Section 401 Water Quality Certification of the Corps Nationwide Permit 12*

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<sup>1</sup> 401 Water Quality Certification No. 17-002 at 3 (Dec. 20, 2017).

<sup>2</sup> Letter from the Office of the Attorney General, *Sierra Club v. State Water Control Bd.*, Case No. 17-2406 (May 7, 2018), ECF No. 107-1 (copy attached).

provide reasonable assurance that water quality standards will not be violated.<sup>3</sup>

The Board’s April 12 decision makes clear that two of the five bases of the Certification—the “Corps Section 404 permitting requirements” and the Board’s and DEQ’s certification of the “Corps Nationwide Permit 12”—no longer justify a “reasonable assurance” finding.

Second, as the Petitioners described in their opening brief at the Fourth Circuit Court of Appeals, the Board’s concern over whether Nationwide Permit 12 will protect water quality is well-founded for the Atlantic Coast Pipeline. For example, the pipeline will cross individual, smaller-scale watersheds many times, yet the Corps’ Nationwide Permit does not provide for an assessment of the combined effect of those crossings on water quality. The examples are striking. Townsend Draft, a wild trout stream in Highland County, has nine pipeline and access road crossings in its watershed along just one-half mile of the route. The Calfpasture River has 71 pipeline and access road crossings in its watershed. And Back Creek, a waterway in Augusta County where aquatic life is already impaired as a result of excessive sediment, has 49 crossings in its watershed.<sup>4</sup> Many of these watersheds are the headwaters of major tributaries to the Chesapeake Bay, which is already heavily affected by many decades of sediment pollution. The concentration of pipeline crossings and other pipeline activities along these streams and rivers presents a significant risk to water quality that was not assessed as part of the Corps’ Nationwide Permit 12. The Board should take that risk seriously.<sup>5</sup>

New information also justifies a stay of the Certification. In April 2018, the U.S. Fish and Wildlife Service listed the yellow lance as a threatened species under the federal Endangered Species Act.<sup>6</sup> This newly protected mussel species is known to occur in the Cowpasture River, the Nottoway River, the Meherrin River, Sturgeon Creek, and the James River, all of which will be crossed by the Atlantic Coast Pipeline. Because the effects of pipeline construction and operation on the yellow lance are unknown pending

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<sup>3</sup> 401 Water Quality Certification No. 17-002 (emphases added).

<sup>4</sup> Atlantic Coast Pipeline & Supply Header Project, Final Env’tl. Impact Statement, App. K at K-18–K-19, K-28–K-32, K-34–K-36 (July 2017).

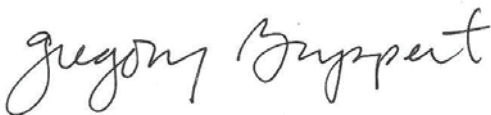
<sup>5</sup> Other serious problems with the Section 401 Water Quality Certification No. 17-002 are described in Petitioners’ opening brief in cases 18-1077 and 18-1079, pending before the U.S. Fourth Circuit Court of Appeals.

<sup>6</sup> Letter to K. Bose, FERC, from P. Hunter, SELC (Apr. 30, 2018), FERC eLibrary No. 20180502-5040 (copy attached).

consultation under the Endangered Species Act, the Board and DEQ do not have “reasonable assurance” that the project will not be harmful to this species as required by Virginia’s water quality standards.

For these reasons, we strongly urge the Board and DEQ to prevent immediate and significant harm to Virginia water quality caused by the construction of the Atlantic Coast Pipeline and stay the effective date of Section 401 Water Quality Certification No. 17-002 until the Board completes its evaluation of the adequacy of Nationwide Permit 12 and the litigation challenging the Certification is resolved.

Sincerely,



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cc: Matt Strickler, Secretary of Natural Resources  
David Grandis, Office of the Attorney General  
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# COMMONWEALTH of VIRGINIA

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May 7, 2018

The Hon. Patricia Connor  
United States Court of Appeals  
for the Fourth Circuit  
Lewis F. Powell Jr. Courthouse & Annex  
1100 East Main Street  
Richmond, Virginia 23219

Re: *Sierra Club v. State Water Control Board*, No. 17-2406  
Response to R. 28(j) Letter

Petitioners assert that “[r]ecent actions of the Board and DEQ undermine the earlier conclusion that [Nationwide Permit] 12’s conditions are adequate to prevent water quality standards violations.” There are at least three problems with that claim.

The first involves timing. The Board’s discussion and vote took place on April 12—the same day petitioners filed their reply brief and more than three weeks before petitioners’ 28(j) letter.

Petitioners also omit several critical pieces of information from the very document they cite. Far from “effectively repudiat[ing] the agencies’ prior position,” Pet. 28(j) Letter 2, that document makes clear that “[t]he board took no action to revisit certification of NWP 12 as it relates to MVP.” Exhibit 1. The document also notes that “the [Board] members raised no specific areas of concerns and provided no technical information that NWP 12 was insufficient,” that “[t]he sole purpose of the comment period is for interested parties to submit crossing-specific technical information to DEQ” about three specified topics, and that “[n]o further action by the Board is required.” *Id.*

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Most fundamentally, neither the Corps' Nationwide Permit 12 nor the Commonwealth's NWP Certification is even before this Court. The petition for review cites *only* "the order of the [Board] and [DEQ] issuing a Water Quality Certification under Section 401 of the Clean Water Act . . . for the Mountain Valley Pipeline entered on December 8, 2017." Pet. for Review 1. The petition makes no mention of the Board's NWP 12 certification (which occurred on April 7, 2017, see JA 452), or the Corps issuance of coverage to the pipeline company under NWP 12. And the Board's December 8 certification—the only order properly before this Court—makes clear that it "addresses Project activities in upland areas *outside* the Corps jurisdictional areas under 33 U.S.C. § 1344." JA 48 (emphasis added).

Put simply, the Board issued two separate Section 401 certifications: one in April 2017 involving matters within the Corps' jurisdiction (JA 452-53); and one in December involving upland activities outside the Corps' jurisdiction (JA 46-54). Only the latter is currently before this Court.

Respectfully submitted,

/s/ Toby J. Heytens

Toby J. Heytens  
Solicitor General of Virginia

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cc: Counsel of Record



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April 30, 2018

*Via First Class U.S. Mail and FERC Docket*

Ms. Kimberly Bose, Secretary  
Federal Energy Regulatory Commission  
888 First Street NE, Room 1A  
Washington, D.C. 20426

Re: Listing of the Yellow Lance as Threatened under the Endangered Species Act

Dear Ms. Bose:

On April 3, 2018, the U.S. Fish and Wildlife Service (FWS) issued a final rule listing the yellow lance as threatened under the Endangered Species Act. 83 Fed. Reg. 14,189 (April 3, 2018). The rule becomes effective May 3, 2018. *Id.*

As disclosed in your July 2017 Final Environmental Impact Statement, the Atlantic Coast Pipeline will cross yellow lance habitat. “In Virginia, the yellow lance is known to occur in the Cowpasture River, Nottoway River, Meherrin River, [ ] Sturgeon Creek,” and the James River. FEIS, 4-307. In North Carolina, yellow lance has been documented in Swift Creek and Little River, and may occur in the Tar River. *Id.* The Atlantic Coast Pipeline is proposed to cross each of these waterbodies and multiple of their tributaries. *See* FEIS, Appendix K.

These crossings are likely to affect yellow lance. Atlantic proposes to use dry construction methods for some of the crossings. In some places, that may require in-stream blasting. *See, e.g., id.*, K-53. Other waterbodies will be crossed by horizontal directional drilling. “Mussels occurring in waterbodies crossed by HDD may be affected if there is an inadvertent release of drilling fluid in or near the waterbody.” FEIS, 4-309. These activities may kill, harm, harass, or otherwise result in take of yellow lance at the crossing site or downstream.

Crossing waterbodies is not the only pipeline activity that poses a risk to yellow lance. The rule listing yellow lance as threatened recognizes timbering as a primary threat to the species. 83 Fed. Reg. 14,193. While silvicultural best management practices are required for pipeline construction, they “are not 100 percent effective.” FEIS, 4-75. Improper implementation “can have drastic effects” and impacts to riparian areas “can cause sedimentation and habitat degradation for miles downstream.” 83 Fed. Reg. 14,194.

On October 16, 2017, FWS transmitted a biological opinion and incidental take statement to the Federal Energy Regulatory Commission (FERC) assessing impacts from the Atlantic



Coast Pipeline on listed species. That opinion did not assess impacts to yellow lance or provide incidental take coverage for yellow lance. Re-initiation of formal consultation under the ESA is required when “a new species is listed . . . that may be affected by the action,” so long as “discretionary Federal involvement or control over the action has been retained or is authorized by law.” 50 C.F.R. § 402.16(d); *see* Oct. 16, 2017 Biological Opinion, 60.

FERC has clearly retained discretionary involvement or control over the action, as further confirmed by issuing notices to proceed over the past several weeks. As a result, it must reinitiate formal consultation with FWS to fully assess project impacts on yellow lance. FERC previously committed that “[s]hould a federally listed . . . species be identified . . . that has not been previously . . . assessed through consultation, and project activities could adversely affect the species, the Applicants are required to suspend the construction activity.” FEIS, 4-245. “The construction activity could not resume until [FERC] completes its section 7 consultation with the FWS.” *Id.* Likewise, Condition No. 54 of FERC’s Oct. 13, 2017 Certificate of Public Necessity requires Atlantic to “complete any necessary section 7 consultation with the FWS” *before* it begins construction. FERC Order, 146. Finally, take of yellow lance that occurs outside the safe harbor provisions of an incidental take statement may be subject to civil and criminal penalties under the Endangered Species Act.

Please confirm that FERC will reinitiate consultation with FWS in light of the recent listing conferring federal protection on the yellow lance under the Endangered Species Act.

Sincerely,



Patrick Hunter

Cc: (via email)

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