

DOMINION PIPELINE MONITORING COALITION

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David Paylor
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Sent via Email

Re: Applications for Clean Water Act Section 401 Certifications for ACP and MVP Proposals

Dear Mr. Paylor:

I am writing, on behalf of the Dominion Pipeline Monitoring Coalition (“DPMC”), to continue the ongoing discussion about the processes through which the Virginia Department of Environmental Quality (“DEQ” or the “Department”) will assess the referenced applications. We were heartened by DEQ’s press release on April 6, 2017, in which the Department announced that individual regulatory processes will be conducted by the State for each of these proposed projects and that the public will be involved, through comment periods and hearings. We heartily agree with DEQ’s conclusion that such open and thorough individual reviews are necessary before the State may decide whether to grant or deny Clean Water Act (“CWA”) section 401 water quality certifications (“WQCs”).

In this letter, we describe information and analyses that must be included in applications submitted to DEQ for the Atlantic Coast Pipeline (“ACP”) and the Mountain Valley Pipeline (“MVP”) before each WQC process may proceed. Some of the most important submittals that each pipeline company must supply have already been identified by DEQ and its partner State agencies in comments on the draft environmental impact statements (“DEIS”) for each of the projects. We believe those comments by Virginia agencies provide excellent descriptions of data and studies necessary to prevent water quality damages from the activities that would be allowed under the Federal Energy Regulatory Commission’s (“FERC”) and U.S. Army Corps of Engineers’ approvals, if granted. Recommendations by the U.S. Forest Service and members of the public describe additional information that DEQ will need to complete thorough examinations of potential water quality impacts.

It is now time for DEQ to incorporate its information requests and requests for information cited by other parties into the State's regulatory process and deem them requirements that must be met before WQC applications can be declared complete. In keeping with its role in the National Environmental Policy Act ("NEPA") process, DEQ offered in its comments on each DEIS numerous recommendations and suggestions for analyses the companies must complete to fully and accurately describe potential water quality impacts.

However, as you know, the State has separate and independent legal duties it must meet in each case, regardless of FERC's actions. DEQ may not abdicate its responsibilities or defer to FERC in these matters. As stated in the CWA, "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources. . . ." 33 U.S.C. § 1251 (CWA § 101) (emphasis added).

FERC published its DEIS, despite the fact that there were gross deficiencies in the information before it. FERC accepted inaccurate and misleading information and improperly deferred important requirements until later in its process, depriving the public of its rightful role in reviewing and commenting on a complete and adequate record. We will continue to insist that those deficiencies be remedied by FERC and expect the State of Virginia to do so as well. But DEQ may not rely on the NEPA analyses and findings in any case.

Before addressing some of the specific types of information DEQ must demand in the WQC applications, we offer two comments on the nature of the public process that DEQ is to follow. We note that the Clean Water Act mandates that "[p]ublic participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this Act shall be provided for, encouraged, and assisted by the Administrator and the States." 33 U.S.C. § 1251(e) (CWA § 101(e) (emphasis added)). The following actions are vital to fulfilling that requirement.

First, we request that when the WQC applications are filed DEQ make those documents available online as soon as possible, to inform the public of the submittals and to provide the public with timely and ready access to those documents. Such a system will relieve the public of the need to make Freedom of Information Act requests to acquire these "public records" and will ease the burden on DEQ staff in responding to those requests. The West Virginia Department of Environmental Protection routinely makes such documents available on its website, making their process more accessible. Virginia should follow that example.

Second, in fulfilling DEQ's commitment to hold public hearings to facilitate public involvement, the Department must hold multiple hearings in locations along each of the proposed pipeline routes. Given that each project would impact hundreds of waterbodies across the state and affect the interests of many communities and thousands of citizens, DEQ must provide for hearings that members of the public can attend without traveling long distances. We assert that for the ACP, which proposes to cross the entire width of the state, a *minimum* of three hearings is essential. For MVP, because the proposed pipeline path is shorter, *at least* two hearings will be necessary to meet this goal.

Information Needs That Must be Met in Applications

As stated above, Virginia resource agencies have identified numerous studies and sources of data that are necessary to adequately understand the potential impacts from each pipeline and prevent any violations of state water quality standards ("WQS") and other pertinent water-protection requirements. The examples discussed below are some of the very important issues raised by DEQ and other parties, but they represent just a small sampling of the information needed in the § 401 certification applications. We trust and expect that DEQ will expand on this list as indicated by its comments and by the large body of additional comments and analyses available to it. The "Joint Applications" traditionally submitted for WQCs for pipelines regulated by the U.S. Army Corps of Engineers are completely inadequate for these reviews. Given that the Corps' reviews only focus on waterbody crossings and adjacent riparian areas, in contrast to the vast scope and scale of water quality-threatening activities FERC regulates, the narrow focus of those applications cannot suffice.

Virginia Comments

Aquatic Ecosystem Analyses and Monitoring Programs

DEQ recommended the following to FERC, as quoted from its comments on the MVP DEIS:

Add a recommendation to direct MVP, LLC to conduct pre-impact characterizations of proposed stream and wetland crossings to include sufficient evidence that the system will be able to maintain its original functions indefinitely after restoration. DEQ is concerned that the proposed temporary impacts could result in a permanent alteration of the impacted systems post construction. Pre-impact characterizations should include subsurface investigations at temporary stream and wetland impact areas to establish the feasibility of restoring the systems post construction and hydrologic assessments, including piezometers, to establish pre-impact hydrologic conditions at temporary wetland impact areas.

DEQ DEIS Comments for MVP, Attachment A, page 4. (The same recommendation is contained in DEQ's Comments for the ACP DEIS, Attachment A, page 4.)

We would add that the essential functions of these ecosystems must be maintained throughout the construction and restoration periods as well, to ensure that all designated and existing uses are fully and continuously supported in the affected waters, as the law requires. The provisions of Virginia's water quality standards regulation do not allow designated uses to be impaired or denied for any length of time.

DEQ also has expressed the need for submittal of monitoring plans to assess various aspects of water quality. These plans must be submitted to allow DEQ to meet its obligations under the CWA and state law. DEQ recommended that FERC

include a requirement that directs MVP, LLC to develop a comprehensive Water Quality Monitoring Plan that describes how water quality monitoring will be conducted before, during, and up to five years after project construction. The plan should focus on identifying an appropriate number of monitoring locations above and below where open trench crossing or HDD are used in critical areas such as wild/stocked trout streams, endangered/threatened species waters, public water supplies, total maximum daily load (TMDL) watersheds, Tier 3 streams, areas near acidic soils, and streams with high Virginia Stream Condition Index (VSCI) scores. The plan should consider real-time temperature, dissolved oxygen, and turbidity monitoring (such as that done in Virginia by the U.S. Geological Survey), which could allow the public and all agencies involved to access the data real-time. Additionally, the plan should include a collection of macroinvertebrates, fish, and habitat data, using DEQ-approved methods above and below identified crossings during the project, and the collection should be done yearly for 5 years after completion of the project.

DEQ DEIS Comments for MVP, Attachment A, page 4. Similar language is contained in DEQ's Comments for the ACP DEIS, Attachment A, page 4. Unless these monitoring plans are available for DEQ and public review when WQC applications are filed, parties cannot judge whether water quality would be fully protected.

Karst Analyses and Groundwater Protection Plans

In its comments to the MVP DEIS, DEQ explained and supported the need to

conduct dye trace studies, geological analysis and hydrological studies to determine subsurface flow paths in areas where the pipeline, access roads, layout yards, or fueling stations cross or lie upslope along drainages from karst features so that in the event of a spill, recovery and monitoring efforts

may begin immediately. Locations of where channels terminate downstream of the project in swallets, especially in cases where swallets are more than 400 feet from the project centerline, should be documented. Incorporate results into the Karst Mitigation Plan.

DEQ DEIS Comments for MVP, Attachment A, page 5.

In its comments for ACP, DEQ also noted that “[d]ye traces within the general project area have shown connections of karst features to springs and wells as far away as 7 miles for areas northwest of the Staunton/Pulaski/North Mountain Fault system (e.g., the Ridge and Valley).” DEQ Comments for ACP DEIS, Attachment A, page 5. We note however that, DEQ states that “[d]ye trace studies should occur [for ACP] after final route approval but prior to construction” and are needed “so that in the event of a spill, recovery and monitoring efforts may begin immediately.” *Id.* To the greatest extent possible, damages must be prohibited. Possible recovery efforts, to which DEQ refers, may well be useless and having the pipeline developers plan for them, while appropriate, cannot provide the required level of assurance that groundwater and surface water standards will be met.

The deferral of submission of these studies until after FERC approval of a “final” route, if that occurs, will not allow the State of Virginia to meet its legal duty to assure water quality protection. The companies must develop these plans for the routes reflected in the WQC applications when they are submitted, to allow DEQ and the public to review them and judge their sufficiency during the State’s regulatory process. The applications may not be deemed complete without this information and without proof that the companies can avoid adverse impacts based on the study findings. If the routes change at some later date, the companies must submit modified applications and analyses for the newly-impacted areas.

Acid Soil Mitigation Plans

DEQ has recommended that MVP

develop an Acid Soil Mitigation Plan to be approved by Virginia Department of Environmental Quality (DEQ) and implement horizontal directional drilling (HDD) to the maximum extent practicable in areas containing acid soils. DEQ cautions that exposing these soils to the atmosphere through open trenching operations could result in acidic runoff, potentially resulting in environmental impacts. The plan should address how these areas will be managed, the disposition of acid soils, and details regarding proper storage and disposal practices.

DEQ DEIS Comments for MVP, Attachment A, page 3.

DEQ included the same recommendation in its comments for the ACP DEIS at Attachment A, page 3. These recommendations embody the need for the pipeline companies to perform alternatives analyses for specific areas along the proposed paths. If HDD is necessary to prevent acid-related pollution impacts to individual waterbodies and watersheds and this method is determined to be impracticable in those locations, then DEQ must require that route variations that avoid these areas be analyzed in the applications and options that do not violate WQS must be required by DEQ.

Adequate Erosion and Sediment Control and Stormwater Management Plans

The pipeline companies, in accordance with FERC's inadequate procedures, have outlined a variety of erosion and sediment control measures that might be used at various sites that would be affected by construction. But the applicants seek to reserve the rights to devise plans for specific areas much later. These "menus" of "best management plans," ("BMPs") are also included in the Annual Standards and Specifications documents that have been submitted to DEQ. Because of the difficult terrains the pipeline developers propose to cross, which include areas with highly-erodible soils, steep slopes, and areas with high potential for landslides, some of the BMPs simply will not be sufficient to protect water bodies in some locations. In some watersheds, particularly those in the headwaters of certain stream systems, there may be no combination of BMPs that can assure full protection. The burden to prove that BMPs will work rests with the applicants.

In addition, both ACP and MVP assert that their proposed activities will not result in changes to the hydrologic characteristics in affected watersheds. These assertions are without scientific basis. The removal of mature forests, pipeline excavation, road construction, and activities designed to channel water flows in and along the pipeline paths will result in significant changes in the ways rainwater infiltrates into the land surface and flows off the land during storms. These changes will be immediate and may cause dire short- and long-term consequences for both surface waters and groundwater resources. The replacement of these forests with herbaceous plants and grass, while ameliorating the flow disturbances to some extent, will cause permanent changes in the hydrologic flow patterns.

DEQ has rightly stated that it "considers stormwater management and erosion and sediment control (ESC) measures to be critically important to minimizing potential water quality impacts" and noted that "[t]he ESC procedures contained in the DEIS are not representative of the full scope of Virginia's requirements for stormwater and ESC. DEQ has required MVP, LLC to submit site-specific ESC plans to be reviewed and approved prior to land-disturbing activity. These ESC plans will be expected to meet and exceed Virginia's requirements, particularly in areas of special interest." DEQ DEIS Comments for MVP, Attachment A, pages 3 - 4. The same concerns are equally valid for ACP and are reflected in DEQs comments for that proposal.

Of course, the plans must not just be available “prior to land-disturbing activity.” They must be provided in time for DEQ and the public to assess them. All of these problems must be addressed through site-specific erosion and sediment control *and* site-specific stormwater management plans that are included as part of the WQC applications. As is the case for other potential pollution impacts, this information will be required before DEQ can make findings that WQS will be met and must be available to the public when DEQ acquires it.

Forest Service Information Demands

The U.S. Forest Service (“FS” or the “Service”) has expressed, among many other issues of concern, that the viability of construction plans and pollution prevention methods are questionable in areas on the George Washington and Jefferson National Forests that could be affected by ACP and MVP, respectively. In letters to each pipeline company, the FS identified what it termed “high-hazard” areas in watersheds that drain public lands and stated that these areas had “[p]otentially difficult situations includ[ing] steep slopes, presence of headwater streams, geologic formations with high slippage potential, highly erodible soils, and the presence of high-value natural resources downslope of high hazard areas” and noted that “[t]hese hazards are exacerbated by high annual rates of precipitation and the potential for extreme precipitation events.” FS letter dated October 24, 2016, Accession No. 20161024-5105, FERC Docket CP 15-554; FS letter dated October 24, 2016, Accession No. 20161025-5044.

The Service also stated that, “[t]o further clarify the likelihood that the [pipelines] can be constructed through” the National Forest, “the Forest Service is requesting that ACP develop site-specific stabilization designs for selected areas of challenging terrain.” *Id.* The concerns and the need for site-specific analyses in areas on the Forests are just as valid for some areas outside the National Forests. DEQ is charged with protecting all state waters, both within the National Forests and outside their boundaries, and it is imperative that DEQ acknowledge these same risks and require the same kinds of site-specific analyses the Service has described for all watersheds where they may apply. As discussed below, these analyses are particularly necessary for the cumulative impacts analyses.

The concerns the FS has identified are well-founded and based on the substantial expertise of the federal resource managers and scientific experts. The FS supports the need for these detailed analyses, noting that “[s]imilar hazards on other smaller pipeline projects in the central Appalachians have led to slope failures, erosion and sedimentation incidents, and damage to aquatic resources. Therefore, the Forest Service (FS) is concerned that crossing such challenging terrain with a much larger pipeline could present a high risk of failures that lead to resource damage.” *Id.*

Public Comments

Cumulative Impacts

The cumulative impact analyses FERC has conducted in the DEISs for each pipeline are inadequate to properly assess effects of all project-related impacts in combination with non-project activities on the proper geographic and temporal scales. As noted in comments on the ACP DEIS, addressing impacts to trout waters:

In its submittals to the Commission, Atlantic provides tables describing locations where they propose to install the pipeline through streams. Reading through this table and the listing of crossings of designated trout waters, one could be misled into thinking that the pipeline would impact only a relatively small number of trout streams scattered along the construction path. To the contrary, a review of maps depicting the pipeline right-of-way and proposed access roads shows that in many cases the project poses a serious threat to dozens of trout streams.

It is imperative that the Commission and the Forest Service perform cumulative impacts analyses in such small watersheds to account for combinations of upland and instream work related to the pipeline and access roads with other factors. It should be noted that the cumulative impacts analyses for water impacts described the draft EIS all [sic] wholly inappropriate because they define the areas for review as those represented by 10-digit Hydrologic Unit Codes (“HUCs”); a scale that hides the degree to which multiple impacts of pipeline activities as well as other factors will seriously affect watersheds.

Comments of Appalachian Mountain Advocates on ACP DEIS, FERC Docket Accession No. 20170407-5203, page 283 (internal citations omitted).

The need for the federal agencies to require that cumulative impacts be assessed at proper scales, as asserted above, is even more urgent for DEQ. Without such an accounting for potential combined impacts in numerous small, headwater stream systems in the WQC applications, DEQ will have no valid basis for considering whether the pipeline companies’ activities will cause or contribute to WQS violations and, therefore, no legal basis for findings or decisions.

In its comments on the ACP DEIS, Wild Virginia also presented information on one small drainage in southwestern Highland County as an example of the kinds of cumulative impacts that are almost certain to produce impairments in multiple small streams. Preliminary Comment of Wild Virginia, Misty Boos, David Sligh and Ernest Reed under CP15-554, et. al.. Accession No. 20170406-5535.

Warwick Run¹ lies within the Back Creek/Jackson River watershed and drains a mountainous area that is 4,337 acres in size. The watershed is currently more than 96% forested and is almost entirely within the boundaries of the George Washington NF. Approximately four miles of the proposed pipeline path would affect the watershed, with more than half that length cutting directly across the area and the rest running along the ridge-top on the eastern border of the drainage. Applicant proposed a corridor that would plunge down the slope of the mountain for a distance of about 7,500 feet, on slopes that are sometimes greater than 40% and which are never less than 25%. In one section, the slope would be 105%. Due to these slopes, shallow bedrock, limited work areas on steep and narrow ridges, and evidence of “surficial creep,” the Forest Service included three separate portions of the pipeline route within the Warwick Run drainage in its request for site-specific assessments in high-hazard areas.

The right-of-way would cross two tributaries to Warwick Run that are designated trout waters by the state and which harbor rare and vulnerable populations of native brook trout. These tributaries and two others that would be crossed by the pipeline would flow directly into Warwick Run, which is also a brook trout stream. All of the upland construction areas and a 4,000+ foot stretch of access road would drain to Warwick Run and its tributaries as well. Warwick Run lies within an area that has been identified to have high quality, “intact” brook trout populations, one of only 103 areas so-designated out of 1,443 in the entire Chesapeake Bay drainage, and is therefore considered a high priority for preservation EPA’s Chesapeake Bay Program.

Even if Applicant implemented the most protective erosion and sediment control measures on upland construction areas in the Warwick Run watershed, if the greatest possible care was taken in construction of stream crossings (some of which would likely require blasting of bedrock), and if stream banks and riparian areas were restored to conditions as close as possible to those currently found, severe impairment of these waters is likely, if not certain. Cumulative impacts on stream temperatures, from clearing during construction, from the loss of hemlocks to pest infestations, and from global warming must also be considered. Likewise, the conversion of any significant areas of forest to other vegetation types that would accompany the pipeline will affect runoff and infiltration patterns, which will in turn degrade the streams.

¹ Note that the stream discussed is named Warwick Run on some maps and in Dominion filings but is named Townsend Draft on U.S. Geological Service maps.

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Id. at page 7 (internal citations omitted).

As Wild Virginia further noted, [t]he horror story presented by Applicant's proposal for the Warwick Run watershed is repeated numerous times along the proposed pipeline route. These circumstances make passage through these areas legally, if not technically, impossible. Of course, the similarities in terrain and other environmental factors make the concerns about impacts of ACP just as valid for MVP.

Conclusion

Again, we emphasize that this letter discusses just a few of the important issues that must be addressed through studies, analyses, and plans included with the § 401 certification applications for each of the major pipeline proposals. The most important point we wish to make is that DEQ and other parties have already identified many sources of data that may or may not be adequately included or assessed in the NEPA process. The important recommendations DEQ and other agencies made in NEPA comments must be converted into regulatory requirements by the State. Suggestions that FERC act responsibly are simply not good enough.

Citizens of Virginia expect and will demand more from DEQ, in keeping with Governor McAuliffe's promises that these projects be "constructed in the most environmentally protective manner." And if the most environmentally protective methods are shown to violate the State's requirements, they may not be constructed. Again, we are encouraged that DEQ has chosen to conduct individual analyses and public hearings for each project, in which all water quality-related aspects of each proposal will be assessed. The State can determine whether each project is legally permissible, only if such detailed and comprehensive reviews are completed.

Thank you for your attention these issues and we look forward to a thorough and detailed assessment of the WQC applications for the ACP and MVP proposals.

Sincerely,

/s/ David Sligh

David Sligh

Senior Regulatory Systems Investigator

cc: Molly Ward, Virginia Secretary of Natural Resources
Rick Webb, DPMC
James Golden, Virginia DEQ