

DOMINION PIPELINE MONITORING COALITION

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May 24, 2017

Honorable Terry McAuliffe
Governor of Virginia
c/o Paul Reagan, Chief of Staff
paul.reagan@governor.virginia.gov

Sent Via Email

Re: DEQ Intentions for Regulatory Reviews of Atlantic Coast Pipeline and Mountain Valley Pipeline

Dear Governor McAuliffe:

Your administration intends to betray your promises and ignore the law regarding Virginia's regulation of the Atlantic Coast Pipeline (ACP) and the Mountain Valley Pipeline (MVP). We urgently request that you intervene to ensure that the Secretary of Natural Resources and Department of Environmental Quality (DEQ) fulfill the State's legal duties and the commitments you have made to Virginians.

Based on information just obtained from DEQ officials, the Dominion Pipeline Monitoring Coalition (DPMC) has learned that DEQ is attempting to evade its responsibilities to make detailed and public individual regulatory reviews of *all* threats to water quality posed by these pipeline proposals, including those caused by all waterbody crossings. You stated in 2014 that the ACP would be the "most environmentally responsible pipeline . . . ever built in the history of the United States of America."¹ You have made similar assurances regarding the MVP. The course DEQ has proposed would make it impossible for the State to live up to your promises and must be rejected.

For the last two years, DPMC has insisted that DEQ cannot meet legal mandates and responsibly address environmental threats from the proposed pipelines unless the Department conducts individual regulatory reviews that look at all potential water quality impacts that may result from each of these projects. DEQ is empowered and obligated to conduct these reviews under Clean Water Act (CWA) section 401 and under state law, which require that the State deny applications for a Water Quality Certification (WQC) unless the applicants prove that their proposals will meet all state water quality requirements. The burden of proof rests with the pipeline companies and DEQ to ensure that state waters will be fully protected.²

¹ Governor McAuliffe, Press Conference endorsing Atlantic Coast Pipeline, September 2, 2014, <https://www.youtube.com/watch?v=FMn16nJx7OU>.

² Your spokesperson, Brian Coy, was recently quoted as saying that "the governor has the power to stop the pipeline only if environmental studies show that it threatens water quality." Laura Vozella, Washington Post, *Va. climate protestors say Dominion gas pipeline requires 'mountaintop removal'*, May 4, 2017, https://www.washingtonpost.com/local/virginia-politics/va-climate-protesters-say-dominion-gas-pipeline-requires-mountaintop-removal/2017/05/04/e52a76ba-30f5-11e7-8674-437ddb6e813e_story.html?utm_term=.793ffbabab9a. This assertion from your office improperly shifts the burden of proof.

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After refusing for many months to tell the public whether the State would conduct individual WQC proceedings for each pipeline, despite direct questions to State environmental officials,³ DEQ finally issued a press release on April 6, 2017 affirming that it would conduct individual reviews. In that press release, DEQ spokesperson Bill Hayden stated that “[t]hese certifications will ensure that Virginia water quality standards are maintained *in all areas affected by the projects*” and that “[t]he public will have an opportunity to review and comment on these certifications and the conditions required to protect water quality.”⁴ In an email from Mr. Hayden that was quoted in the Roanoke Times, Mr. Hayden elaborated on the press release, saying that “[t]he ‘individual’ certification looks at each wetland, stream crossing, etc. separately to determine specific requirements that would be necessary.”⁵

According to a recent article in the Washington Post, you have endorsed the kind of detailed review Mr. Hayden promised. That article cites a letter from Lieutenant Governor Ralph Northam to DEQ, and states that Mr. Northam “recently urged the state’s Department of Environmental Quality to use a tougher, ‘site-specific’ standard to review the project, a move McAuliffe supports.”⁶

It now emerges that Mr. Hayden’s statements were inaccurate and DEQ plans to abandon the approach you have endorsed. Officials at DEQ have stated that the individual CWA reviews would assess only those aspects of each pipeline proposal not covered by the U.S. Army Corps of Engineers (COE) in the COE’s separate CWA review and permit. They have indicated that DEQ is prepared to rely on a blanket WQC issued by the state in response to the COE’s Nationwide Permit Number 12 (NWP 12) to cover stream and wetland crossings.

We must know - why has the public been misled about your administration’s intentions? If DEQ’s false public statements were due merely to miscommunications amongst agency staff, why has the Department taken six weeks to alert the public to that fact? Will you now ensure that your officials live up to their words and act in a way that fulfills your promises?

DEQ’s reversal from the April 6 statements would not only contradict the public promises cited above, it would be illegal. Coverage of these projects under DEQ’s rubber stamp approval of NWP 12 is unsupportable, both technically and legally, for the following reasons.

1. DEQ’s blanket WQC for NWP 12 is not legally supportable. DPMC filed a Notice of Appeal with DEQ on May 4, 2017 and is prepared to file suit in state court to prove as much. DPMC asked DEQ in Freedom of Information Act (FOIA) requests for all records that would support DEQ’s action on the blanket WQC and, in response to our requests, DEQ was unable to provide any such support. We requested “specific bases for a finding that there is a reasonable assurance that any activity covered by NWP 12 will meet all Virginia water quality standards.”⁷

³ See e.g.: Letter from Sec. of Natural Resources Molly Joseph Ward to David Sligh, DPMC, August 23, 2016 (“Regarding your question on the Clean Water Act Section 401 review, DEQ is currently evaluating the scope of its authority under FERC requirements for this review.”)

⁴ DEQ News Release, *DEQ will require additional individual 401 certifications for natural gas transmission pipeline projects*, April 6, 2017 (emphasis added), <http://www.deq.virginia.gov/ConnectWithDEQ/NewsReleases.aspx>.

⁵ Duncan Adams, Roanoke Times, *DEQ to require pipeline projects to secure state water quality certification*, April 6, 2017, http://www.roanoke.com/business/business/news/franklin_county/deq-to-require-pipeline-projects-to-secure-state-water-quality/article_b146ff9c-af82-500e-af72-eec4077062e2.html.

⁶ Laura Vozella, Washington Post, May 4, 2017.

⁷ Letter from David Sligh, DPMC to Diana Adams, DEQ, February 15, 2017; Letter from David Sligh, DPMC, to Diana Adams, DEQ, April 7, 2017.

A review of all documents DEQ supplied shows that the Department did not analyze the suitability of NWP 12 to meet Virginia Water Quality Standards (WQS). In fact, the only evidence in the record that addresses this question, supplied in comments by DPMC and dozens of other groups and individuals, shows that conformance with NWP 12 *will* lead to violations of Virginia's WQS. In its regulatory analysis for NWP 12 the COE admits that, even if projects comply with all of NWP 12's conditions, specific provisions of the WQS regulations will be violated in some cases. The COE describes impairments to aquatic systems that will persist for months or years; a result that directly violates state and federal requirements that Virginia must enforce. Further, the COE notes that recreational uses of streams, which must be fully protected, will sometimes be eliminated under NWP 12.⁸

2. DEQ's information requests and analyses, submitted to the Federal Energy Regulatory Commission (FERC) in response to Draft Environmental Impact Statements (DEISs) for both MVP and ACP, clearly indicate that work done in wetlands and streams may alter aquatic ecosystems affected by the pipelines in ways that would be very damaging. DEQ scientists stated that "pre-impact characterizations of proposed stream and wetland crossings to include sufficient evidence that the system[s] will be able to maintain [their] original functions indefinitely after restoration" were necessary due to concerns that "the proposed temporary impacts could result in a permanent alteration of the impacted systems post construction."⁹

DEQ also stated that the applicants should develop "comprehensive Water Quality Monitoring Plan[s] that describe[] how water quality monitoring will be conducted before, during, and up to five years after project construction," with "monitoring locations above and below where open trench crossing or HDD are used in critical areas. . . ."¹⁰ The fact that DEQ staff has expressed these concerns for each pipeline proposal clearly shows that the State lacks the necessary evidence to find that WQS can be met for these projects and that the Department must conduct site-specific analyses for waterbody crossings in the individual WQC processes.

As DPMC has stressed to DEQ Director Paylor, DEQ must 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 individual WQC applications can be declared complete."¹¹ The State of Virginia cannot proceed with regulatory reviews of these projects unless and until all such information is provided and the need for such site-specific data and plans for waterbody crossings would make coverage under the blanket WQC invalid. DEQ would abdicate its responsibilities by allowing such coverage and would deprive the public of its right to review and comment on this information. This would contradict your office's promise that "[a]ll decisions resulting from [the regulatory] process[es] will be subject to citizen review."¹²

3. To fully understand the water quality risks associated with each pipeline, DEQ must look at the potential cumulative impacts that might be caused in each waterbody and each watershed. The effects of upland excavations and roads, the possible impacts from directional drilling,

⁸ As explained in letter from David Sligh, DPMC to Steven Hardwick, DEQ, *Notice of Intent to Provide Section 401 Water Quality Certification for Activities Authorized Under Corps of Engineers Nationwide Permit 12*, March 13, 2017.

⁹ 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.)

¹⁰ Id.

¹¹ Letter from David Sligh, DPMC to DEQ Director Paylor, *Re: Applications for Clean Water Act Section 401 Certifications for ACP and MVP Proposals*, May 15, 2017.

¹² Christina Nuckols, Office of the Governor email to Duncan Adams, Roanoke Times, June 15, 2016.

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disturbances in karst areas, and those impacts caused by waterbody crossings cannot be segregated. This is especially important given that the COE analyses under NWP 12 improperly looks at waterbody crossings that would impact multiple tributaries in specific areas as separate and distinct impacts. Further, DEQ may not look at pipeline-related impacts in isolation from other conditions within these watersheds. For example, where streams in a watershed have already been designated as “impaired” due to other causes, the pipeline activities may not be approved if they would worsen existing problems.

We and the many thousands of Virginians concerned about the damages to our water resources that would result from these pipelines anxiously await your response. Please assure us that you will reject dangerous and illegal shortcuts to the regulatory process that the State of Virginia is obligated and has promised to conduct.

Thank you for your prompt attention to this matter.

Sincerely,

_____/s/_____
David Sligh
Senior Regulatory Systems Investigator

cc: Molly Ward - Secretary of Natural Resources
David Paylor - Virginia DEQ
James Golden - Virginia DEQ
Rick Webb - DPMC