

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND

DOMINION PIPELINE MONITORING)
COALITION, BOLD ALLIANCE, and)
PRESERVE CRAIG, INC.)

Petitioners,)

v.)

VIRGINIA DEPARTMENT OF)
ENVIRONMENTAL QUALITY and)
DAVID PAYLOR, DIRECTOR,)
VIRGINIA DEPARTMENT OF)
ENVIRONMENTAL QUALITY)

Respondents,)

Case No.: _____

Serve: David K. Paylor, Director)
Virginia Department of)
Environmental Quality)
629 East Main Street)
Richmond, VA 23219)

Mark Herring)
Attorney General of Virginia)
202 North Ninth Street)
Richmond, Virginia 23219)

PETITION FOR APPEAL

IN RE: ISSUANCE OF SECTION 401 WATER QUALITY CERTIFICATION FOR U.S.
ARMY CORPS OF ENGINEERS NATIONWIDE PERMIT NUMBER 12

REGULATORY DECISION APPEALED

1. Under the Virginia State Water Control Law, Va. Code Ann. §§ 62.1-44.15(5),
62.1-44.15:20, 62.1-44.29, the Virginia Administrative Process Act, Va. Code Ann. §§ 2.2-4026,

2.2-4027, 2.2-4029, 2.2-4030, the federal Clean Water Act, 33 U.S.C. § 1341 *et seq.*, and implementing regulations, Petitioners the Dominion Pipeline Monitoring Coalition, Bold Alliance, and Preserve Craig, Inc. (collectively “DPMC”) appeal the final decision of the Virginia Department of Environmental Quality (“DEQ”), to issue a Water Quality Certification (“Certification”) for the U.S. Army Corps of Engineers (“Corps”) Nationwide Permit Number 12 (“NWP 12”) for regulation of activities associated with the installation of utility lines in and adjacent to state waters under the Virginia Water Protection Permit (“VWPP”) Regulation, the Virginia State Water Control Law, and the federal Clean Water Act, and implementing regulations.

2. In compliance with Rule 2A:2 of the Rules of the Supreme Court of Virginia, DPMC filed a notice of appeal with David Paylor, Director of the Department of Environmental Quality on May 5, 2017, within 30 days of DEQ’s April 7, 2017 issuance of the Certification. A copy of the notice of appeal is attached with this petition as Attachment A.

3. In compliance with Rule 2A:4 of the Rules of the Supreme Court of Virginia, DPMC submits this petition for appeal within 30 days of filing its notice of appeal on May 5, 2017.

PARTIES

4. Petitioner, the Dominion Pipeline Monitoring Coalition (“DPMC”), is an organization of citizen volunteers, conservation groups, and environmental scientists convened in response to proposals to build natural gas pipelines across National Forest lands in Virginia and West Virginia and the adjacent mountains and valleys. In Virginia, DPMC’s primary geographic

area of focus extends from the western boundary of the state eastward to the Blue Ridge Mountains. DPMC investigates, analyzes, and documents environmental impacts from previously-approved natural gas pipelines and the potential impacts of proposed pipelines. DPMC is dedicated to ensuring that Virginia's environment is protected from detrimental impacts from activities related to the construction and operation of natural gas pipelines constructed or proposed for construction in Virginia. DPMC uses the Clean Water Act ("CWA" or the "Act") and other environmental laws to stop pollution that damages water quality and stream habitats and that negatively impacts the ability of DPMC's members and the public to use and enjoy state waters. DPMC intervenes in administrative processes governing pipeline proposals before state and federal agencies. DPMC includes fifteen organizational members, including Alleghany Highlands Alliance, Augusta County Alliance, Friends of Augusta, Friends of Middle River, Friends of Nelson County, Friends of Shenandoah Mountain, Greenbrier River Watershed Association, Highlanders for Responsible Development, Mountain Lakes Preservation Alliance, Shenandoah Valley Network, Virginia Chapter of the Sierra Club, Virginia Wilderness Committee, West Virginia Headwaters Waterkeeper, West Virginia Highlands Conservancy, and Wild Virginia. DPMC's members regularly use and enjoy the streams, wetlands, springs, and groundwater of the state for supplies of drinking water, fishing, swimming, boating, wildlife viewing, and other purposes.

5. Petitioner Bold Alliance is a network of groups across the United States that opposes fossil fuel projects, protects landowners against eminent domain abuse, and works for clean energy solutions while building an engaged base of citizens who care about the land, water,

and climate change. Bold Alliance employees and members in Virginia work to protect the state's waters and communities from damaging fossil fuel development projects, including natural gas pipelines proposed to cross Virginia.

6. Petitioner Preserve Craig, Inc. is a nonprofit organization whose purpose is to preserve and protect natural, historical, and cultural resources in Craig County, Virginia; conduct research and compile and publish information concerning natural, historical, and cultural resources; and conduct public education programs. Preserve Craig's members regularly depend upon and enjoy the streams, wetlands, springs, and groundwater of Craig County for supplies of drinking water, fishing, swimming, boating, wildlife viewing, research and other purposes.

7. On March 13, 2017, DPMC submitted comments in response to DEQ's Notice of Intent ("Notice") to provide Section 401 Water Quality Certification for activities authorized under the Corps' NWP 12, which regulates the construction and operation of utility lines, including natural gas pipelines, in state waters across Virginia. A copy of DPMC's comments is attached with this petition as Attachment B. Bold Alliance and Preserve Craig, Inc. submitted comments to DEQ in support of DPMC's comments.

8. Respondent Virginia Department of Environmental Quality (DEQ) is empowered, through delegation of authorities from the Virginia State Water Control Board, to perform certain functions as authorized by law. DEQ Director David Paylor may exercise the authorities delegated by the State Water Control Board and may designate other DEQ officials to exercise certain authorities on his behalf.

9. DEQ issued the Certification challenged here by letter from James J. Golden, DEQ Director of Operations, acting on behalf of DEQ Director Paylor, dated April 7, 2017. A copy of the Certification is attached with this petition as Attachment C. Director of Operations Golden acted without legal authority in issuing the Certification.

10. Under the State Water Control Law, Va. Code Ann. § 62.1-44.15(5), the State Water Control Board (“Board”) has the authority to issue general Certifications, such as that for work related to the installation of utility lines in and adjacent to state waters and regulated under the Corps’ NWP 12.

11. The DEQ issued the Certification without statutory authority, failed to follow procedural requirements for adoption of a regulation, and acted arbitrarily and capriciously in finding that water quality protection requirements would be met without having conducted necessary analyses and without taking account of adverse evidence in the record.

JURISDICTION AND VENUE

12. Under the Virginia Administrative Process Act, Va. Code Ann. § 2.2-4026, any person is entitled to judicial review of the final decision of a state agency to issue a rule if such person has participated in the public comment process and if such person meets the requirements for judicial review under Article III of the United States Constitution.

13. DPMC submitted written comments to the DEQ on March 13, 2017 objecting to the proposed issuance of the Certification for NWP 12. *Letter from David Sligh, DPMC, Re: Notice of Intent to Provide Section 401 Water Quality Certification for Activities Authorized Under Corps*

of Engineers Nationwide Permit 12, March 13, 2017 (“DPMC Comments”). Bold Alliance and Preserve Craig, Inc. submitted comments in support of DPMC’s comments.

14. DPMC has standing to seek judicial review of the DEQ’s issuance of the Certification for NWP 12 under Article III of the U.S. Constitution because: (i) the permitted activities would harm the organizations’ interests in preventing pollution and protecting and restoring aquatic habitats in Virginia; (ii) the injuries to the organizations’ interests are traceable to the DEQ’s decision to issue the Certification for NWP 12; and (iii) such injuries would be redressed by a favorable decision of this Court.

15. DPMC also has standing to seek judicial review of DEQ’s issuance of the Certification for NWP 12, under Article III of the U.S. Constitution because: (i) the activities permitted under the Certification would harm the uses of state waters for domestic uses, recreational, aesthetic, and scientific interests of the organizations’ members in using state waters; (ii) the injuries to the interests of the organizations and members are traceable to the DEQ’s decision to issue the Certification; and (iii) such injuries would be redressed by a favorable decision of this Court.

16. Under Va. Code Ann. § 62.1-44.29, DPMC is entitled to judicial review in accordance with the provisions of the Administrative Process Act (“APA”), Va. Code Ann. § 2.2-4000 et seq. As authorized by § 2.2-4026 of the Administrative Process Act, any person affected

by adoption of a rule by a Virginia state agency has the right to seek review of the agency's adoption of a rule by court action against the authorizing agency or its officers.

17. Venue is proper in this Court under Va. Code Ann. § 2.2-4003, § 2.2-4026, and § 8.01-261(1). In accordance with Va. Code § 8.01-261(1), this court is a preferred forum because DPMC “[r]egularly or systematically conducts affairs or business activity” in the City of Richmond. Va. Code § 8.01-261(1).

LEGAL BACKGROUND

18. The objective of the federal Clean Water Act is to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a).

19. The CWA set a goal that “wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983.” 33 U.S.C. § 1251(a)(2).

20. The CWA provides that “[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. . . .” 33 U.S.C. § 1341 (CWA section 401).

21. The Corps is empowered by the CWA to issue general permits for categories of activities, termed “Nationwide Permits,” for activities that “may result in any discharge into the navigable waters,” under 33 U.S.C. § 1344(e) (CWA section 404(e)) and implementing regulations at 40 CFR § 330.

22. The Corps issued NWP 12, effective March 19, 2017, to authorize “discharges of dredged or fill material into waters of the United States and structures or work in navigable waters of the United States for crossings of those waters associated with the construction, maintenance, repair, and removal of utility lines.” *Issuance and Reissuance of Nationwide Permits*, 82 Fed. Reg. 4, (January 6, 2017) at 1883.

23. The activities permitted by the Corps under NWP 12 “may result in [] discharge[s] into the navigable waters” and, therefore, parties seeking coverage under NWP 12 “shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate. . . .” in accordance with CWA section 401.

24. The Corps’ NWP 12 authorizes coverage of activities related to construction of utility lines in and adjacent to streams and wetlands under standards in section 404 of CWA that allow for some degree of loss of aquatic habitats and what the Corps terms minimal or insignificant negative impacts on water systems and their uses. Under CWA section 401 the state has independent and exclusive jurisdiction to enforce its water quality standards and other appropriate water protection requirements, which may be, and in some instances are, more protective than

section 404 standards. The state may issue a certification for NWP 12 only if it can assure that the activities authorized by the Corps permit will uphold state WQS. If the state cannot make this finding then the state must deny certification of NWP 12 or impose conditions to ensure compliance with state WQS. The Corps is required to incorporate any state 401 conditions into its permit and to enforce those conditions.

25. Parties may satisfy the requirements of CWA section 401 if the proposed activities are deemed by the Corps to be eligible for coverage under NWP 12 and if the state issues a general certification for NWP 12.

26. The State Water Control Law provides that “[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.

27. The Board “shall develop general permits for . . . activities governed by nationwide or regional permits approved by the Board and issued by the U.S. Army Corps of Engineers.” Va. Code Ann. § 62.1-44.15:21.D.

28. The Virginia State Water Control Board is authorized to issue general Virginia Water Protection Permits (VWPP) “by regulation,” pursuant to the Virginia Water Protection Permit Regulation at 9VAC25-210-130.

29. The Administrative Process Act defines a “rule” or “regulation” as “any statement of general application, having the force of law, affecting the rights or conduct of any person,

adopted by an agency in accordance with the authority conferred on it by applicable basic laws.”

Va. Code Ann. § 2.2-4001.

30. The DEQ Director or his designee “shall serve as executive officer of the” State Water Control Board and, in that role, the DEQ Director may perform certain functions by delegation from the Board. Va. Code Ann. § 62.1-44.14.

31. The State Water Control Law states that “[i]n no event shall the Executive Director have the authority to adopt or promulgate any regulation.” Va. Code Ann. § 62.1-44.14.

32. The Administrative Process Act provides that

In the case of all regulations, except those regulations exempted by § 2.2-4002, 2.2-4006, 2.2-4011, or 2.2-4012.1, an agency shall (i) provide the Registrar of Regulations with a Notice of Intended Regulatory Action that describes the subject matter and intent of the planned regulation and (ii) allow at least 30 days for public comment, to include an on-line public comment forum on the Virginia Regulatory Town Hall, after publication of the Notice of Intended Regulatory Action.

Va. Code Ann. § 2.2-4007.01.A.

33. The APA provides that “[i]n formulating any regulation . . . the agency pursuant to its public participation guidelines shall afford interested persons an opportunity to submit data, views, and arguments, either orally or in writing, to the agency, *to include an on-line public comment forum on the Virginia Regulatory Town Hall. . . .*” Va. Code Ann. § 2.2-4007.02.B.

(emphasis added).

34. All proposed regulations “shall be posted on the Virginia Regulatory Town Hall and published in the Virginia Register of Regulations (“Register”) in accordance with the provisions of subsection B of § 2.2-4031.” Publication in the Register “shall be made at least 60 days in advance of the last date prescribed in the notice for” submittal of public comments. Va. Code Ann. § 2.2-4007.03.A. The APA states that “[i]n no event shall the failure to comply with the requirements of this section be deemed mere harmless error for the purposes of § 2.2-4027.”

Id.

35. An agency proposing any regulation shall provide the Virginia Department of Planning and Budget with an estimate of the regulation’s “fiscal impacts on localities and sources of potential funds” and the Department of Planning and Budget shall determine the public benefit and “prepare an economic impact analysis of the proposed regulation.” Va. Code Ann. § 2.2-4007.04.

36. The Administrative Process Act requires that “[a] draft of the agency's summary description of public comment shall be sent by the agency to all public commenters on the proposed regulation at least five days before final adoption of the regulation.” Va. Code Ann. § 2.2-4012.E.

37. An agency “shall forward a copy of the final regulation to the Registrar of Regulations for publication as soon as practicable” upon final adoption. Va. Code Ann. § 2.2-4013.B.

38. Federal regulations require that a state providing a Certification in accordance with CWA section 401 include in the Certification “[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 CFR § 121.2(a)(3).

39. CWA section 401 provides that “[a]ny certification . . . shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant . . . will comply with any applicable effluent limitations and other limitations, under section [1311 or 1312 of this title] . . . and with any other appropriate requirement of State law set forth in such certification.” 33 U. S. C. § 1341(d).

40. Each VWPP “shall include requirements to comply with all appropriate provisions of state laws and regulations,” including water quality standards (“WQS”). 9 VAC 25-210-110.B.

41. The VWPP regulations provide that the Board “shall make a decision to tentatively deny the VWP permit . . . if the requirements of this chapter are not met” and one basis for denial is that the “project will result in violations of water quality standards or will impair the beneficial uses of state waters.” 9 VAC 25-210-230.

42. Under the CWA, Virginia is required to adopt and maintain water quality standards which “shall consist of the designated uses” of the waters and “the water quality criteria for such waters based upon such uses.” 33 U.S.C. § 1313(c)(2)(A).

43. Under federal regulations implementing the CWA, “States must adopt those water quality criteria that protect the designated use.” 40 CFR § 131.11(A).

44. Criteria are defined in the federal regulations as “elements of State water quality standards, expressed as constituent concentrations, levels, or narrative statements, representing a quality of water that supports a particular use.” 40 CFR § 131.3(b).

45. States must also adopt antidegradation policies which, at a minimum, shall maintain and protect “[e]xisting instream water uses and the level of water quality necessary to protect the existing uses.” 40 CFR § 131.12.

46. Federal regulations provide that state WQS “shall assure water quality adequate to protect existing uses fully.” 40 CFR. § 131.12(a)(2).

47. The regulatory requirement that existing uses be fully protected has been interpreted to mean that no activity that would “partially or completely eliminate any existing use” is permitted, even if it would leave the majority of a given body of water undisturbed.” *PUD No. 1 of Jefferson Cty. v. Washington Dep't of Ecology*, 511 U.S. at 718-19, 114 S.Ct. 1900 (quoting *EPA, Questions and Answers on Antidegradation* at 3 (Aug. 1985)).

48. The State of Virginia has adopted water quality standards at 9VAC25-260-5 *et seq.*

49. The Virginia water quality standards regulation states that “[a]ll state waters . . . 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.

50. Virginia WQS do not provide for partial or temporary impairment or denial of designated uses.

51. Virginia’s “General Criteria” require that “State waters . . . 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.

52. By providing that State waters shall be free of substances that interfere directly or indirectly with designated uses or which are inimical to humans or wildlife, Virginia WQS prohibit the creation of such conditions for any period and to any degree. The WQS do not provide for temporary or minimal impairments of designated uses.

FACTUAL BACKGROUND

53. The Corps issued NWP 12, effective March 19, 2017, to authorize “discharges of dredged or fill material into waters of the United States and structures or work in navigable waters of the United States for crossings of those waters associated with the construction, maintenance,

repair, and removal of utility lines.” *Issuance and Reissuance of Nationwide Permits*, 82 Fed. Reg. 4, (January 6, 2017) at 1883.

54. DEQ published a Notice of Intent Regarding Section 401 Water Quality Certification of Norfolk District Army Corps of Engineers 2017 Nationwide Permits on February 15, 2017 on the Virginia Regulatory Town Hall. A copy of the Notice is attached with this petition as Attachment D.

55. On March 6, 2017, a notice of the proposed Certification was published in the Virginia Register of Regulations under the section entitled General Notices/Errata. Virginia Register of Regulations, Volume 33, Issue 14, March 6, 2017, at 1857 - 1864. A copy of relevant excerpts from the Decision Document is attached with this petition as Attachment E.

56. DPMC submitted comments in response to the Notice on March 13, 2017. Attachment B.

57. DEQ issued the Certification on April 7, 2017, in the form of a letter from James J. Golden, DEQ Director of Operations to Colonel Jason E. Kelly of the Corps of Engineers. Attachment C.

58. DEQ did not submit a Notice of Intended Regulatory Act to the Virginia Register of Regulations for the proposed Certification and a NOIRA was not published in the Register.

59. The Notice published in the Virginia Regulatory Town Hall did not provide for an on-line public comment forum.

60. The Notice published in the Register of Regulations did not list the Certification as a Regulation and did not provide 60 days from the date of publication for the submittal of public

comments. The publication in the Register occurred just eleven days before the comment period was to end, in accordance with the Town Hall Notice.

61. DEQ did not provide the Virginia Department of Planning and Budget with an estimate of the regulation's "fiscal impacts on localities and sources of potential funds" and the Department of Planning and Budget did not make a determination of the public benefit of the proposed regulation nor "prepare an economic impact analysis of the proposed regulation."

62. DEQ did not provide a summary of the public comments to all commenters.

63. DEQ did not submit a copy of the final Certification to the Register of Regulations for publication.

64. DEQ's record for issuance of the Certification does not contain a summary of the public comments, a response to the substantive issues raised in public comments, or an analysis of the ability of activities permitted under NWP 12 to meet Virginia WQS.

65. The *Decision Document* published by the Corps to support issuance of NWP 12 acknowledges that its evaluation of potential impacts "must be speculative or predictive in general terms." *Decision Document, Nationwide Permit 12 ("Decision Document")* at 42. A copy of relevant excerpts from the Decision Document is attached with this petition as Attachment F. The full document may be accessed at the following internet address: http://www.usace.army.mil/Portals/2/docs/civilworks/nwp/2017/NWP_12_2017_final_Dec2016.pdf?ver=2017-01-06-125514-797.

66. The Corps states that, because of the national scale of NWP 12, local conditions may require additional conditions to “address locally important factors or to ensure that the authorized activity results in no more than minimal individual and cumulative adverse environmental effects,” *Id.*, Attachment F., and DEQ’s Certification includes no conditions to supplement the requirements of NWP 12 that take account of the locally-important factors that are present in Virginia state waters.

67. The Corps admits that work conducted in accordance with NWP 12 “may alter the habitat characteristics of streams, wetlands, and other waters of the United States, decreasing the quantity and quality of fish and wildlife habitat,” *Id.* at 58., Attachment F, and evidence in the record here indicates that these types of detrimental impacts can persist in streams for periods of 1 - 2 years or more. *See e.g.* DPMC Comments citing *Reid et al.*, 2002, (describing sediment load increases during construction that directly or indirectly affect fish through modification of their habitats where pre-construction conditions will generally be restored within 1 - 2 years).

68. The Certification states “[p]ursuant to 40 CFR 121.2 (a)(2) and (3), the State Water Control Board . . . has (i) examined the NWPs, the Norfolk District Regional Conditions, and (ii) other decision documents provided by the Corps to base its certification. Accordingly, the Board finds that there is a reasonable assurance that the activities permitted under the Corps' NWP program, including the Norfolk District Regional Conditions, will be conducted in a manner which will not violate applicable water quality standards, provided permittees comply with all applicable Section 401 conditions (see table herein).”

69. The Corps describes a range of impacts that can occur in streams when activities are conducted in accordance with NWP as “minimal” but provides no definition of the term nor any comparison of these “minimal” impacts to the levels of water quality required by Virginia WQS. *See e.g.: Decision Document at 4, Attachment F.*

70. The Corps admits that “[a]ctivities authorized by this NWP may change the recreational uses of the area. Certain recreational activities, such as bird watching, hunting, and fishing may no longer be available in the area. Some utility line activities may eliminate certain recreational uses of the area.” *Decision Document at 60, Attachment F.*

71. DEQ provided no analysis to make a finding that conformance with Virginia WQS is assured when activities are conducted under NWP 12 and therefore has not met its obligation under CWA section 401.

ASSIGNMENTS OF ERROR

CLAIM I

The General Water Quality Certification Issued by the DEQ Director is Invalid Because that Certification is a Regulation and the Director Lacks Authority to Issue Regulations

72. Allegations 1 through 71 are re-alleged in this section.

73. The State Water Control Law requires that the Board “shall develop general permits for . . . activities governed by nationwide or regional permits approved by the Board and issued by the U.S. Army Corps of Engineers.” Va. Code Ann. § 62.1-44.15:21.D.

74. The State Water Control Board may issue such general permits “by regulation” in accordance with the VWPP regulation.

75. The State Water Control Law provides that “[i]ssuance of a Virginia Water Protection Permit shall constitute the certification required under § 401 of the Clean Water Act.” Va. Code Ann. § 62.1-44.15:20.D.

76. The Certification issued by DEQ meets the definition of a “rule” or “regulation” in that it is a “statement of general application, having the force of law, affecting the rights or conduct of any person, adopted by an agency in accordance with the authority conferred on it by applicable basic laws.” Va. Code Ann. § 2.2-4001.

77. The DEQ Director serves as the Executive Director of the State Water Control Board and the State Water Control Law states that “[i]n no event shall the Executive Director have the authority to adopt or promulgate any regulation.” Va. Code Ann. § 62.1-44.14.

78. The DEQ Director possesses no statutory authority to issue general Virginia Water Protections Permits or general Certifications, because these general Permits or Certifications are regulations, which the Director is forbidden by law to issue.

79. In issuing the Certification, DEQ acted outside its statutory authority, jurisdiction limitations, or right as provided in the basic laws as to subject matter and the Certification is void or voidable.

CLAIM II

The State failed to comply with procedural requirements for issuance of a regulation imposed by the APA and the Certification is therefore invalid.

80. Allegations 1 through 79 are re-alleged in this section.

81. The State Water Control Law requires that the Board “shall develop general permits for . . . activities governed by nationwide or regional permits approved by the Board and issued by the U.S. Army Corps of Engineers.” Va. Code Ann. § 62.1-44.15:21.D.

82. The State Water Control Board may issue such general permits “by regulation” in accordance with the VWPP regulation. 9 VAC 25-210-130.

83. The State Water Control Law provides that “[i]ssuance of a Virginia Water Protection Permit shall constitute the certification required under § 401 of the Clean Water Act.” Va. Code Ann. § 62.1-44.15:20.D.

84. The Certification issued by DEQ meets the definition of a “rule” or “regulation” in that it is a “statement of general application, having the force of law, affecting the rights or conduct of any person, adopted by an agency in accordance with the authority conferred on it by applicable basic laws.” Va. Code Ann. § 2.2-4001.

85. The Administrative Process Act provides that

In the case of all regulations, except those regulations exempted by § 2.2-4002, 2.2-4006, 2.2-4011, or 2.2-4012.1, an agency shall (i) provide the Registrar of Regulations with a Notice of Intended Regulatory Action that describes the subject

matter and intent of the planned regulation and (ii) allow at least 30 days for public comment, to include an on-line public comment forum on the Virginia Regulatory Town Hall, after publication of the Notice of Intended Regulatory Action.

Va. Code Ann. § 2.2-4007.01.A.

86. DEQ did not submit a Notice of Intended Regulatory Action to the Virginia Register of Regulations for the proposed Certification and a NOIRA was not published in the Register.

87. The APA provides that “[i]n formulating any regulation . . . the agency pursuant to its public participation guidelines shall afford interested persons an opportunity to submit data, views, and arguments, either orally or in writing, to the agency, *to include an on-line public comment forum on the Virginia Regulatory Town Hall. . . .*” Va. Code Ann. § 2.2-4007.02.B. (emphasis added).

88. DEQ published a Notice of Intent Regarding Section 401 Water Quality Certification of Norfolk District Army Corps of Engineers 2017 Nationwide Permits on February 15, 2017 on the Virginia Regulatory Town Hall. Attachment D.

89. The Notice published in the Virginia Regulatory Town Hall did not provide for an on-line public comment forum.

90. All proposed regulations “shall be posted on the Virginia Regulatory Town Hall and published in the Virginia Register of Regulations in accordance with the provisions of subsection B of § 2.2-4031.” Publication in the Register “shall be made at least 60 days in advance

of the last date prescribed in the notice for” submittal of public comments. Va. Code Ann. § 2.2-4007.03.A. The APA states that “[i]n no event shall the failure to comply with the requirements of this section be deemed mere harmless error for the purposes of § 2.2-4027.” *Id.*

91. The Notice published in the Register of Regulations did not list the Certification as a Regulation and did not provide 60 days from the date of publication for the submittal of public comments. The publication in the Register occurred just eleven days before the comment period was to end, in accordance with the Town Hall Notice.

92. The Administrative Process Act requires that “[a] draft of the agency's summary description of public comment shall be sent by the agency to all public commenters on the proposed regulation at least five days before final adoption of the regulation.” Va. Code Ann. § 2.2-4012.E.

93. DEQ did not provide a summary of the public comments to all commenters.

94. An agency proposing any regulation shall provide the Virginia Department of Planning and Budget with an estimate of the regulation’s “fiscal impacts on localities and sources of potential funds” and the Department of Planning and Budget shall determine the public benefit and “prepare an economic impact analysis of the proposed regulation.” Va. Code Ann. § 2.2-4007.04.

95. DEQ did not provide the Virginia Department of Planning and Budget with an estimate of the regulation's "fiscal impacts on localities and sources of potential funds" and the Department of Planning and Budget did not make a determination of the public benefit of the proposed regulation nor "prepare an economic impact analysis of the proposed regulation."

96. An agency "shall forward a copy of the final regulation to the Registrar of Regulations for publication as soon as practicable" upon final adoption. Va. Code Ann. § 2.2-4013.B.

97. DEQ did not submit a copy of the final Certification to the Register of Regulations for publication.

98. The APA requirement that a Notice of Intended Regulatory Action be published in the Register and available for public review and comment is important to enable parties to participate in early stages of regulatory adoption processes, which benefits the agency through the information the public may provide and allows parties to protect their rights and interests. The requirement that an on-line comment forum be provided through the Regulatory Town Hall for proposed regulation facilitates public comment and likewise benefits the agency and enables parties to represent their interests. Publication of the proposed Certificate in the Register of Regulations in the General Comments/Errata Section and not as a regulation deprived the public of proper notice and concealed the nature of the action. In failing to provide a draft summary of public comments to all commenters, DEQ deprived the parties actively involved in the regulatory action of information affecting their interests. In failing to provide the Virginia Department of

Planning and Budget with an estimate of the regulation's "fiscal impacts on localities and sources of potential funds" and securing a determination as to the public benefit of the proposed regulation or an impact analysis of the proposed regulation from the Department of Planning and Budget, DEQ deprived the public of the protections intended by these reviews.

99. DEQ failed to observe the required procedures for issuance of the Certification and these failures are not mere harmless errors and the Certification is void or voidable.

CLAIM III

The DEQ failed to perform the required analysis to make a valid finding as to the conformance of activities covered under NWP 12 and the general certification with water quality standards.

100. Allegations 1 through 99 are re-alleged in this section.

101. Each VWPP "shall include requirements to comply with all appropriate provisions of state laws and regulations," including water quality standards. 9 VAC 25-210-110.B.

102. The VWPP regulations provide that the Board "shall make a decision to tentatively deny the VWP permit . . . if the requirements of this chapter are not met" and one basis for denial is that the "project will result in violations of water quality standards or will impair the beneficial uses of state waters." 9 VAC 25-210-230.

103. CWA section 401 provides that "[a]ny certification . . . shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any

applicant . . . will comply with any applicable effluent limitations and other limitations, under section [1311 or 1312 of this title] . . . and with any other appropriate requirement of State law set forth in such certification." 33 U. S. C. § 1341(d).

104. DEQ has provided no analysis to determine whether conformance with Virginia WQS will be assured if activities are conducted in accordance with NWP 12.

105. DEQ did not acknowledge or address evidence in the record asserting that activities permitted by NWP 12 will result in WQS violations.

106. Issuance of the Certification by DEQ is arbitrary and capricious because it is not supported by substantial evidence in the record.

CLAIM IV

Unrefuted evidence in the record shows that activities conforming to the requirements of NWP 12 and the general certification will violate water quality standards and issuance of the general certification is, therefore, arbitrary and capricious.

107. Allegations 1 through 106 are re-alleged in this section.

108. The Virginia water quality standards regulation provides that “[a]ll state waters . . . 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.

109. Virginia’s “General Criteria” require that “State waters . . . 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.

110. Virginia WQS do not provide for partial or temporary impairment or denial of designated uses.

111. The Corps admits that work conducted in accordance with NWP 12 “may alter the habitat characteristics of streams, wetlands, and other waters of the United States, decreasing the quantity and quality of fish and wildlife habitat,” *Id. at 58*, and evidence in the record indicates that these types of detrimental impacts can persist in streams for periods of 1 - 2 years or more. *See e.g.* DPMC Comments citing *Reid et al., 2002*, (describing sediment load increases during construction that directly or indirectly affect fish through modification of their habitats where pre-construction conditions will generally be restored with 1 - 2 years).

112. The Corps admits that “[a]ctivities authorized by this NWP may change the recreational uses of the area. Certain recreational activities, such as bird watching, hunting, and fishing may no longer be available in the area. Some utility line activities may eliminate certain recreational uses of the area.” *Decision Document at 60, Attachment F.*

113. Activities conducted in accordance with NWP 12 will interfere with and eliminate designated uses in Virginia WQS.

114. Existing uses in state waters include recreational uses and support of the propagation and growth of a balanced, indigenous population of aquatic life which might reasonably be expected to inhabit them.

115. Federal regulations provide that state WQS "shall assure water quality adequate to protect existing uses fully." 40 CFR. § 131.12(a)(2).

116. The regulatory requirement that existing uses be fully protected has been interpreted to mean that no activity that would "partially or completely eliminate any existing use" is permitted, even if it would leave the majority of a given body of water undisturbed." *PUD No. 1 of Jefferson Cty. v. Washington Dep't of Ecology*, 511 U.S. at 718-19, 114 S.Ct. 1900 (quoting *EPA, Questions and Answers on Antidegradation* at 3 (Aug. 1985)).

117. The Corps admits in the *Decision Document* that existing uses for aquatic life support will be impaired for extended periods of at least 1 - 2 years.

118. Virginia WQS do not provide for partial or temporary impairment or denial of existing aquatic life uses.

119. The Corps admits in the *Decision Document* that existing recreational uses "may no longer be available" in waters affected by projects permitted under NWP 12.

120. Virginia WQS do not provide for partial or temporary impairment or elimination of existing recreational uses.

121. Issuance of the Certification by DEQ is arbitrary and capricious because it is not supported by substantial evidence in the record.

122. Substantial evidence in the record indicates that activities permitted under NWP 12 and the Certificate will result in violations of Virginia WQS.

RELIEF REQUESTED

DPMC respectfully requests that this Court grant the following relief:

1. That this Court invalidate, vacate, and declare null and void the Water Quality Certification for U.S. Army Corps of Engineers Nationwide Permit Number 12 issued by DEQ on April 7, 2017;
2. That this Court remand the matter to the Virginia State Water Control Board to redress the errors assigned;
3. That this Court, under the authority of Va. Code Ann. § 2.2-4030, award Petitioner its reasonable costs and attorneys' fees; and
4. That this Court grant such other relief as may appear to be just and proper.

Respectfully submitted,

Dominion Pipeline Monitoring Coalition
Bold Alliance
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By Counsel

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