

DOMINION PIPELINE MONITORING COALITION

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July 25, 2017

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

Sent Via Email

Re: Pre-judging Pipeline Decisions - Atlantic Coast Pipeline and Mountain Valley Pipeline

Dear Governor McAuliffe:

Your administration's regulatory reviews of the two huge natural gas pipelines proposed to cross Virginia have been biased and that bias must be corrected. The Department of Environmental Quality (DEQ) has refused to seriously consider that it may need to deny water quality certifications for either project, as demonstrated by its words and actions. In a recently-revealed letter from Secretary of Natural Resources Molly Ward to Dominion Power, the Secretary stated that "there can be no predetermined outcomes" in the State's actions on proposals for the pipelines.¹ That assurance rings hollow in light of records describing DEQ's deliberations.

Your top environmental officials have structured review and approval processes such that the result, if not the intent, is that the true cumulative impacts on our water resources will not be honestly documented or unacceptable damages prohibited. Rather, the DEQ has devised a confusing and evolving system of partial and inadequate regulatory measures that do not fulfill its legal duties. Most of the state actions done outside individual Clean Water Act section 401 reviews exclude citizens from any useful role. By following a piecemeal approach and segregating reviews of various pollution threats, DEQ proposes to avoid unified considerations of impacts. The Department has misled the public and, we believe, you and other elected officials as well with unfounded assurances that it is using all proper authorities to protect our waters and our communities and giving the public the chance to be fully involved.

Unfortunately, your endorsement of these projects before regulatory reviews had even begun set the tone that has led to this result. Your promises and those of your top environmental officials will be broken if the State proceeds as currently planned. Only you can correct this situation and restore the public's trust in our government's actions. We ask that you order Secretary Ward and DEQ Director David Paylor to reject this irresponsible approach. To do so, the premature public comment periods must be re-started or extended and the scheduled hearings must be postponed until the State has gathered all necessary information, made the correct comprehensive analyses, incorporated all of those findings into its water quality certification review, and formed recommendations that truly meet its responsibilities under the Clean Water Act (CWA) and state laws.

Issuance of Water Quality Certifications May Not be Presumed

¹ Duncan Adams, *State official advises Dominion: Integrity of permitting process for Atlantic Coast Pipeline is 'nonnegotiable'*, June 24, 2017.

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The most glaring fault in DEQ's approach has been its refusal to hold the applicants for water quality certifications to their burdens to prove all water quality standards can and will be met if the combination of activities federal agencies may approve are undertaken. To meet its obligations under section 401 of the CWA, the State of Virginia has three options: to issue a water quality certification, issue a certification with conditions, or deny certification. The record shows that DEQ has consistently failed to even consider the third option. And yet, in these cases, as in every regulatory decision the State makes, the presumption must be that proposals to cause damaging impacts to water quality are to be rejected unless and until DEQ can provide assurance that our water quality requirements will be met.

The most blatant indication of the State's refusal to seriously consider denial of state approvals was revealed in a Roanoke Times article last July. James Golden, DEQ's Director of Operations, indicated that the applications for water qualification certifications could be denied "in theory." Enforcement of the law through all necessary means must never be merely theoretical.² And Mr. Golden's viewpoint is not an anomaly but simply reflects the full record of Virginia's deliberations on the pipelines.

For nearly three years your environmental officials have arbitrarily limited the range of options they would consider in carrying out their duties under the Clean Water Act and state law. In our reviews of thousands of pages of internal documents and public statements from administration officials we have discovered no discussion of possible denial of a certification for either pipeline company's proposal, in whole or in part. This skewed focus promises only that negative water quality effects will be limited, not that maintenance of all standards will be ensured. Time and again the State's documents discuss ways to minimize impacts from construction and maintenance of the pipelines but this is not the standard under which proposals are to be judged. High quality waters are to be maintained in existing conditions and all existing and designated uses are to be fully protected. Yet the record shows that minimization of pollution, especially as defined by FERC and the Corps of Engineers, does not equate to compliance with water quality standards.

In a presentation to the State Water Control Board on July 19, 2017, DEQ's Water Permitting Division Director, Melanie Davenport, failed to explain to the Board that denial of water quality certifications was an option or that such denials were required unless conformance with all state standards is assured. Thus, your administration is misleading the Board and failing in its duty to see that legal processes are properly explained and conducted. Ms. Davenport claimed in her comments that impacts from waterbody crossings would generally be only temporary, a claim that is contradicted by the Corps of Engineers in its documents supporting its applicable Nationwide Permit for utility lines (and by concerns expressed by DEQ's own staff, as described below in this letter). Ms. Davenport further failed to acknowledge that the Corps has yet to decide whether these projects will be covered under that Nationwide Permit - DEQ has merely presumed that such coverage will be approved and has chosen to rush forward with inadequate individual review processes based on that presumption.

We believe other parties who have sought approvals of polluting activities in Virginia would rightly be dismayed to know that the treatment they received from DEQ differs so starkly from that applied to the pipelines. One case example, in which DEQ and the State Water Control Board rejected a private developer's proposal to affect state waters, provides an illustration of the way DEQ is supposed to do its job. When Captains Cove Utilities proposed to discharge treated sewage into state waters, DEQ determined that the discharge could not be allowed because shellfish harvesting and recreational uses would be eliminated in portions Chincoteague Bay. That rejection of the proposal was endorsed by the Board and the Virginia Court of Appeals upheld the

² Duncan Adams, Roanoke Times, *Residents challenge DEQ to 'step up' to scrutinize pipeline projects*, July 18, 2016.

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State's permit denial.³ Rightly, DEQ did not presume that the Captains Cove discharge would be allowed or settle for merely minimizing negative impacts.

DEQ's approach to ACP and MVP stands in stark contrast to its actions on the Captains Cove permit and on other regulatory reviews. The draft water quality certifications for the pipelines recently published by DEQ fail to account for some of the most serious impairments that will result from pipeline construction by excluding waterbody crossings from the analyses and DEQ plans to allow the companies to submit certain studies and final corrective action plans only after the certifications are issued. Through this approach, the State would forfeit its ability to reject the projects even if later findings show that unacceptable water impacts will result.

Both citizens and state agency scientists have explained numerous ways in which pipeline construction through streams and across mountainous watersheds pose serious threats for which solutions may not be available to prevent standards violations. In its comments on Draft Environmental Impact Statements (DEISs) for both pipelines, DEQ made clear that "pre-impact characterizations of proposed stream and wetland crossings" were needed to show that aquatic ecosystems "will be able to maintain [their] original functions indefinitely after restoration," expressing the concern that "the proposed temporary impacts could result in a permanent alteration of the impacted systems."⁴ These staff scientists clearly did not accept that the Corps blanket approval was adequate. Despite these well-supported analyses, DEQ management proposes to brush these concerns aside and hide behind a blanket certification of all utility line water crossings in Virginia. The permanent alteration of aquatic systems is the very definition of a Clean Water Act violation such as DEQ is obligated to prevent, as those changes could impair the integrity of waterbodies forever. Still, DEQ has not done the individual reviews necessary to prevent such violations.

There are also very serious concerns that so-called "upland" activities DEQ claims to review in its current individual regulatory processes cannot be mitigated and will cause serious, long-lasting damage to groundwater and surface waters. Both ACP and MVP propose measures to control erosion and sediment discharges through measures not proven to meet standards, yet the scientific literature forcefully demonstrates that these measures will not work in certain circumstances. Yet DEQ proposes to rely on general assurances and the reviews of a private consultant that has serious conflicts of interest and DEQ fails to even consider the possibility that the plans will not be sufficiently protective. And the Department proposes to delay even these incomplete reviews until after certifications are issued.

Also, the companies claim, with no scientific support, that patterns of rainfall infiltration and runoff that exist in undisturbed watersheds will not be altered by the removal of large swathes of forest, disturbance of many acres of land on steep mountainsides, and channeling of water through and around the disturbed areas. Thousands of construction companies across Virginia, who are held to stringent requirements to prevent changes to stormwater runoff volumes and frequencies, will be surprised to find that these rules do not apply to some of the largest construction projects ever proposed to cross the state.

³ *State Water Control Board v. Captains Cove Utility Company, Inc.*, Record No. 2735-07-1, Court of Appeals of Virginia, Chesapeake, 2008.

⁴ Virginia DEQ Letter to FERC, *Federal Energy Regulatory Commission Draft Environmental Impact Statement for the Mountain Valley Project (FERC/DEIS-D0272; FERC Docket Number CP16-10-000; DEQ 16-194F)*, December 22, 2016. (The same concerns were included in DEQ's comments on the DEIS for ACP dated April 6, 2017).

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Other states have not improperly or arbitrarily rejected the need to consider denial of water quality certifications for natural gas pipelines as DEQ has done. Rhode Island⁵ and New York⁶ have found that pipeline companies failed to meet their burdens of proof to justify state certifications of projects and have, therefore, denied approvals. Do Virginians deserve less protection than our fellow citizens? Will you accept DEQ's proposals to forego its responsibilities where others have fully exercised their authorities to protect their citizens and environments?

History shows that neither FERC nor the Corps will reject even the most damaging pipeline construction proposals. Reliance by our state officials on the blanket approvals of the Corps and unfulfilled promises by FERC cannot be held acceptable by you and by your top officials. Only you can set these processes back on the correct path. Only you can ensure that your promises will be met - that these projects will not be approved unless full protection of citizens' rights and interests are respected and that the public is involved at each step. We are counting on you.

Thank you and we sincerely hope you will act decisively to ensure DEQ's recommendations are truly based on fair and impartial judgements and that, if required by the facts and the law, water quality certifications will be rejected.

Sincerely,

_____/s/_____
David Sligh
Senior Regulatory Systems Investigator

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

⁵ Islander East Pipeline Company, LLC v. McCarthy, 525 F.3d 141 (2nd Cir. 2008). The Connecticut DEP's denial of certification was upheld by the federal appeals court.

⁶ The New York Department of Environmental Conservation denied water quality certifications for both the Constitution Pipeline and Northern Access project.