

DOMINION PIPELINE MONITORING COALITION

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September 21, 2017

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

Sent Via Email

Re: Are Virginians Equal to Our Fellow Citizens?

Dear Governor McAuliffe:

In a July 25, 2017 letter asking you to restore the integrity and credibility of your administration's regulatory reviews of the Atlantic Coast Pipeline (ACP) and Mountain Valley Pipeline (MVP) proposals, we asked you:

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?

These questions become more relevant by the day. Since we sent you that July 25 letter, a federal appeals court has upheld New York's action to strictly regulate a natural gas pipeline and deny certification under the Clean Water Act (CWA). Our neighboring states have judged the information and analyses supposed to justify CWA section 401 water quality certification (WQC) of each major pipeline to be inadequate. These judicial and state actions further illustrate that Virginia has all necessary authority to reject pipeline projects unless it is proven that water protection standards will be met and that the evidence now before the State fails to meet that requirement for either ACP or MVP.

So far, we've received no direct response to the questions we posed to you. Therefore, we are forced to rely on the actions of the Virginia Department of Environmental Quality (DEQ) to divine answers to our questions. DEQ has refused to require all necessary proof for either project or to reform its processes to treat citizens fairly. Unless you insist that DEQ change its approach, we must assume your answers are as follows:

"No," you will not protect our waters and our communities from degradation in the manner all Americans have a right to expect and "yes," you endorse DEQ's refusal to use its authority fully and honestly.

Please act quickly and decisively to show all Virginians that you reject these answers; that you will fulfill your repeated promises that these pipelines will be rejected unless you can ensure that our precious water resources are safeguarded. Please reward our trust that you intend to do the right thing.

As described in our previous letter, the State of New York denied certification for the Constitution Pipeline, based primarily on the fact that the pipeline company failed to provide the necessary analyses and prove its proposal would not impair state waters. Constitution Pipeline Co., LLC challenged New York's action in the federal appeals court, claiming the state exceeded its authority and its decision was arbitrary and capricious.

On August 18, 2017 the Second Circuit Court of Appeals stated that it “considered all of Constitution's arguments and [] found in them no basis for granting the petition for review,” ruling that “to the extent that the petition challenges the NYSDEC Decision on the merits, the petition is denied.”¹ The court's opinion in the Constitution case reflects the findings of previous federal court decisions that “[t]hrough [the § 401 certification] requirement, Congress intended that the states would retain the power to block, for environmental reasons, local water projects that might otherwise win federal approval.”² Records show that your environmental officials have so far refused to even seriously consider recommending denial of WQCs in these cases, apparently willing to cede the powers reserved to states in the CWA.³

The West Virginia Department of Environmental Protection (DEP) issued a WQC for the Mountain Valley Pipeline in March of 2017. That certification was not adequately supported by the information MVP had submitted or the analyses the state conducted. Therefore, citizens were forced to sue DEP in federal court to push the agency to do its job properly. Just two weeks ago, faced with an imminent deadline to answer the citizens' court petition, West Virginia was compelled to admit it needed “to reevaluate the complete application to determine whether the state's certification is in compliance” with the CWA.⁴ Just as the flaws in DEP's process and the information supporting its decision were clearly deficient, Virginia's draft WQCs for both ACP and MVP are not supported by adequate evidence and the state has not allowed citizens their proper roles in the processes.

The North Carolina DEQ, like the Virginia DEQ, has conducted public hearings and comment periods for the ACP certification process. Generally, a state should have complete information before starting formal citizen comment proceedings. Recently though, North Carolina determined it needed a significant amount of new information to properly assess waterbody impacts. Virginia must do the same. The deficiencies in ACP's application materials for water quality impacts in our state are even greater than those identified by the North Carolina DEQ. Your own state scientists have explained some of the serious problems.⁵

¹ *Constitution Pipeline Co., LLC v. New York State Department of Environmental Conservation*, Docket No. 16-1568 (2nd Cir. 2017) at 8/9.

² *Id.* at 7/9, quoting *Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991).

³ See DPMC's May 24, 2017 letter to you, describing that DEQ has conceded only “in theory” that Virginia can deny WQCs.

⁴ Letter from Scott G. Mandirola, West Virginia DEP, to U.S. Army Corps of Engineers, September 7, 2017, <https://www.documentcloud.org/documents/3989670-DEP-MVP-Vacate-Letter.html>.

⁵ See attached DPMC letter to DEQ Director Paylor regarding an August 21, 2017 DCR letter to FERC describing a “high potential” of negative impacts on aquatic resources still not fully assessed for ACP.

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North Carolina has chosen a path for pipeline reviews that serves its citizens and environment more responsibly than that West Virginia was forced to abandon. West Virginia pushed through a WQC approval for MVP prematurely, when the inadequacy of its evidence was clear. Only under the pressure of legal action did that state agree to do better. In contrast, North Carolina did not force its people to identify the deficiencies in company submittals that were in plain view; instead the DEQ in that state sought to meet its obligation to do that important task and acted, despite the advanced stage its regulatory process has reached. It is not too late to correct the inadequacies in Virginia's processes but your officials risk the loss of their authority to protect us if they proceed with the current, irresponsible rush to judgement.

Your administration must follow the example North Carolina has shown. Do not force your constituents to take problems with ACP and MVP before a judge when those deficiencies are already so clearly known to state agency staff. Do not burden Virginia taxpayers with the expense of attempts to defend the indefensible in court.

So, the key question remains: will you treat Virginians fairly and put our interests on the same plain with those of the people of New York, North Carolina, and West Virginia?

Please respond. The Virginians who deluged DEQ with 20,000 comments on the draft WQCs for the pipelines expect answers and demand the respect we deserve from you and our environmental officials.

Sincerely,

_____/s/____

David Sligh
Senior Regulatory Systems Investigator

cc: Honorable Molly Ward, Secretary of Natural Resources
David Paylor, DEQ Director
Rick Webb - DPMC