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**CHESAPEAKE BAY
FOUNDATION**

Saving a National Treasure

October 25, 2017

Submitted via email and regular U.S. Mail to:

Members of the State Water Control Board
c/o Office of Regulatory Affairs
Department of Environmental Quality
P.O. Box 1105
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Dear Chairman Robert Dunn and Members of the State Water Control Board:

In December, the Department of Environmental Quality (DEQ or the Department) will ask you, members of the State Water Control Board (the Board), to determine whether the Atlantic Coast Pipeline and Mountain Valley Pipeline projects will meet Virginia water quality standards. If the Board lacks “reasonable assurance” that water quality will be protected—including if it does not have the necessary information to make a “reasonable assurance” finding—it cannot approve the requested water quality certifications without violating section 401 of the Clean Water Act. Thousands of Virginians have seriously questioned whether the Board can have such assurance in light of the inadequacy of the information provided by the pipeline developers and reviewed by the Department. This letter highlights the key legal issues to aid the Board in its review of these projects:

1. The Board has well-established legal authority to deny 401 certification for the Atlantic Coast and Mountain Valley pipelines to protect water quality.
2. DEQ has not provided the Board the information it needs to conclude that it has “reasonable assurance” that state water quality standards will be protected.

3. DEQ has excluded from consideration other critical information that is necessary for the Board to determine that there is “reasonable assurance” that water quality standards will be protected.

The concerns discussed in this letter are shared by state and federal regulators. For instance, while both pipelines were approved by the Federal Energy Regulatory Commission (FERC) on October 13, 2017, one of the three commissioners took the extraordinary step of dissenting. In what Senator Tim Kaine (D-VA) referred to as a “stinging” dissent,¹ Commissioner Cheryl LaFleur concluded that she is “not persuaded that both of these projects as proposed are in the public interest.”² LaFleur expressed particular concern about the “aggregate environmental impacts of the proposed project,” noting that both pipelines will “cross hundreds of miles of karst terrain [and] thousands of waterbodies.”³

State regulators assessing water quality impacts have also expressed concern. In response to public comment, North Carolina regulators requested a great deal of additional, site-specific information from Atlantic and pushed back its decision to late November. The agency also disapproved erosion and sediment control plans for the proposed pipeline, again requesting additional information that Atlantic had failed to provide.⁴ Also, the West Virginia Department of Environmental Protection recently moved in federal court to vacate its own water quality certification for the Mountain Valley Pipeline.⁵ The same deficiencies worrying regulators plague the 401 certification process in Virginia, and the Board must respond to Atlantic’s and EQT’s requests for water quality certification accordingly.

While it is the Board’s decision whether to certify the Atlantic Coast and Mountain Valley pipelines under section 401 of the Clean Water Act, DEQ must provide the Board

¹ Duncan Adams, *Politicians React to FERC Pipeline Certifications*, Roanoke Times (Oct. 16, 2017), http://www.roanoke.com/news/local/roanoke_county/politicians-react-to-ferc-pipeline-certifications/article_f9cbecc5-26a6-54b7-98d2-4f773e2ba8de.html.

² *Atlantic Coast Pipeline, LLC*, 161 FERC ¶ 61,042 (2017); *Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043 (2017) (orders granting certificates of public convenience and necessity).

³ *Atlantic Coast Pipeline, LLC*, 161 FERC ¶ 61,042, Dissent at 3 (2017).

⁴ Letter of Disapproval from William Denton, IV, Regional Eng’r, N.C. Dep’t of Env’tl. Quality, to Leslie N. Hartz, Atlantic Coast Pipeline, LLC (Sept. 26, 2017).

⁵ Consent Mot. for Voluntary Remand with Vacatur by Respondents W. Va. Dep’t of Env’tl. Protection and Austin Caperton, *Sierra Club v. W. Va. Dep’t of Env’tl. Protection*, No. 17-1714 (4th Cir. filed Sept. 13, 2017); Order, *Sierra Club v. W. Va. Dep’t of Env’tl. Protection*, No. 17-1714 (4th Cir. Oct. 17, 2017) (granting consent motion for voluntary vacatur and vacating water quality certification for Mountain Valley Pipeline).

with sufficient information to make that decision. As discussed in comments submitted on the draft certifications and throughout this letter, DEQ has not done so. As a result, the Board does not have the tools it needs to do its job, and approval of water quality certifications for these proposed pipelines would be vulnerable to challenge in federal court.

In December, the Board should vote to deny certification for the Atlantic Coast Pipeline and the Mountain Valley Pipeline and require the applicants to re-apply. While remanding the decision to the Department may appear to suffice to resolve the issues presented in this letter, a remand, as opposed to a denial, would put the Board at risk of waiving its section 401 authority altogether. The reason for this, as discussed below, is that FERC recently took a hardline approach that the State of New York inadvertently waived its section 401 authority because it did not deny a certification request within one year of the application. To avoid such a result here, the Board should deny the section 401 certification requests and provide the applicants an opportunity to re-apply. This approach will protect the state's authority under section 401 of the Clean Water Act.

I. THE BOARD HAS WELL-ESTABLISHED LEGAL AUTHORITY TO DENY WATER QUALITY CERTIFICATION FOR THE ATLANTIC COAST AND MOUNTAIN VALLEY PIPELINES TO PROTECT WATER QUALITY.

The Board plays an important role in the state's review of the proposed pipeline projects. While DEQ will make recommendations at the December Board meetings, DEQ's recommendations are just that—recommendations. Ultimately, the authority to grant or deny water quality certifications lies with the members of the State Water Control Board. We urge the Board to recognize and exercise this authority to the extent necessary to protect Virginia's waters and the communities that rely on them. The Board has the authority, and the obligation, to insist on the comprehensive analyses that the law requires.

The Clean Water Act defines a robust role for state decision-makers to ensure that federally-permitted projects like these proposed pipelines do not cause violations of state water quality standards. The Act is clear: "No license or permit shall be granted if [Section 401] certification has been denied by the State."⁶ Before certifying a federal permit or license, a state must have "reasonable assurance" that water quality standards

⁶ 33 U.S.C. §1341(a)(1).

will not be violated.⁷ Here, if the Board lacks such assurance, it must deny the requested water quality certifications. The State bears the burden of proof for this finding.

Courts upholding states' denials of water quality certifications have emphasized that section 401 is "a statutory scheme whereby a *single state agency* effectively *veto*es an energy pipeline that has secured approval from a host of other federal and state agencies."⁸ The D.C. Circuit has held that "[t]hrough [the section 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."⁹

We are aware that DEQ may point to Va. Code Ann. § 62.1-44.15:21 as a limitation on the Board's power to deny a water quality certification for an interstate natural gas pipeline. That provision states: "No Board action on an individual or general permit for . . . facilities [regulated by the Federal Energy Regulatory Commission] shall alter the siting determination made through Federal Energy Regulatory Commission . . . approval." But this provision in no way divests the Board of its authority under the Clean Water Act to deny water quality certifications for FERC-regulated projects when the Board lacks "reasonable assurance" that water quality will be protected.

Virginia's State Water Control Law and associated regulations confirm the Board's authority. Consistent with the Clean Water Act, Virginia Code § 62.1-44.15:5 provides that "[t]he Board shall . . . issue a Virginia Water Protection Permit *if* it has determined that the proposed activity is consistent with the provisions of the Clean Water Act and the State Water Control Law and will protect instream beneficial uses."¹⁰ And state regulations list the bases on which the Board can base a denial of a water quality certification, including a finding by the Board that the project will result in violations of water quality standards or will impair the beneficial uses of state waters.¹¹

Thus, while the Board may not designate a different route for a project already approved by FERC, it may still deny water quality certification for the project. In other words, it has final say whether or not the pipeline can be built along FERC's approved route. The Clean Water Act and state law leave no room for doubt: The Board has the power to

⁷ 40 C.F.R. § 121.2(a)(3).

⁸ *Constitution Pipeline Co., LLC v. N.Y. State Dep't of Env'tl. Conservation*, 868 F.3d 87, 101 (2d Cir. 2017) (upholding NYSDEC's decision to deny water quality certification for the Constitution Pipeline, which had already been approved by FERC) (quoting *Islander East Pipeline Co., LLC v. McCarthy*, 525 F.3d 141, 164 (2d Cir. 2008) (emphases added)).

⁹ *Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991) (emphasis added).

¹⁰ Va. Code § 62.1-44.15:20 (emphasis added).

¹¹ 9 Va. Admin. Code § 25-210-230.

reject a certification request for a federally-approved natural gas pipeline that has not clearly demonstrated it can be built without violating water quality standards.

Finally, we would like to highlight an important new development that counsels toward the Board denying the 401 certification outright, rather than merely remanding the current application to DEQ for additional analysis. Under Section 401 of the Clean Water Act, if a state “fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of request, the certification requirements of this subsection shall be waived with respect to such Federal application.”¹² FERC has recently established an aggressive position with regard to the one-year time frame for 401 Certification. On September 15, 2017, FERC issued an order concluding that the State of New York’s denial of a certification for a natural gas pipeline project under Section 401 was untimely because New York had failed to act on the application before it within one year of the date on which it received the application.¹³ What is clear from this decision is that FERC interprets the one-year period under section 401 to be triggered on the date of the receipt of a certification request, regardless of whether the request includes adequate information to make the required legal determinations.¹⁴

FERC’s position is wrong. Moreover, it is unlikely to receive deference from a federal court.¹⁵ That said, because FERC will continue to take this expansive waiver position until a federal court puts a stop to it, and because litigation over FERC’s position will not be resolved in the near term, the most prudent approach for a state presented with an insufficient application for a 401 certification from a pipeline is to deny that application without prejudice. In other words, to protect its authority under section 401 from unreasonable federal encroachment by FERC, the Board should deny—without prejudice to future requests—the applications by Mountain Valley and Atlantic based on the absence of information necessary to determine impacts to water quality standards. Such

¹² 33 U.S.C. § 1341(a)(1).

¹³ *In re Millennium Pipeline Co., LLC*, 160 FERC ¶ 61,065 (FERC Sept. 15, 2017).

¹⁴ *Id.*

¹⁵ *AES Sparrows Point LNG v. Wilson*, 589 F.3d 721, 729–30 (4th Cir. 2009) (refusing to give any deference to FERC’s interpretation of the one-year period because “FERC is not charged in any manner with administering the Clean Water Act”).

an action would protect Virginia from an argument that it has waived its section 401 authority and would be legally defensible.¹⁶

II. DEQ HAS NOT PROVIDED THE BOARD THE INFORMATION IT NEEDS TO CONCLUDE THAT IT HAS “REASONABLE ASSURANCE” THAT STATE WATER QUALITY STANDARDS WILL BE PROTECTED.

For the Board to exercise the authority granted it under the Clean Water Act, DEQ must provide the Board with sufficient information on which to base a decision. To date, DEQ has not done so. Namely, the Department has improperly relied on Nationwide Permit 12 for pipeline crossings, which deprives the Board of the ability to consider the individual and cumulative impacts of those crossings; it has not conducted an assessment of the impacts on water quality standards or an antidegradation analysis; and it has segregated consideration of critical relevant information from the section 401 certification process. Until the DEQ fixes these deficiencies in its review, the Board does not have the information it needs to reach the finding required by the Clean Water Act.

A. DEQ improperly relies on the Army Corps’ possible authorizations under NWP 12 and does not consider the cumulative impacts from crossings and upland activities.

DEQ proposes that the Board rely on reviews by the U.S. Army Corps of Engineers (the “Corps”) for waterbody crossing activities and has, therefore, excluded analyses of impacts from crossings from the section 401 reviews. This deficient approach would render any findings by the Board that it has “reasonable assurance” that water quality standards will not be violated arbitrary and capricious because a key set of effects—those caused by in-stream trenching and blasting—have not been reviewed. The Corps’ Nationwide Permit Number 12 (“NWP 12”) does not provide assurance that waterbody crossing impacts will not violate water quality standards, and the segregation of crossing-related impacts from those caused by “upland” activities is scientifically invalid.

The state cannot rely on NWP 12 for three significant reasons. First, assuming the Corps authorizes the proposed projects under NWP 12,¹⁷ the state cannot rely on NWP 12 because the Corps can allow variances from the NWP’s general conditions that could lead to violations of state water quality standards. When Virginia issued a water quality certification for NWP 12 in April 2017, the state did not include a condition limiting the

¹⁶ See *Constitution Pipeline Co., LLC v. N.Y. State Dep’t of Envtl. Conservation*, 868 F.3d 87, 103 (2d Cir. 2017) (upholding New York’s denial of a 401 certification for a pipeline where the application was missing relevant information).

¹⁷ DEQ presumes, without basis, that the Corps will decide to cover these projects under its NWP in the first place. The Corps has yet to decide whether such coverage is allowable for either project.

types of variances the Corps can allow. Because such a protection is not in place, reliance on this blanket permit means that the Corps could authorize variances for the Atlantic Coast and Mountain Valley pipelines that lead to violations of Virginia’s water quality standards. If the Board grants the water quality certifications despite this fundamental deficiency, that decision would not be based on an “examin[ation] of the relevant data,” *i.e.* the impact of the project on water quality standards, as required under the federal Administrative Procedure Act (APA).¹⁸

Second, the Corps applies different standards under section 404 of the Clean Water Act than those applicable to Virginia’s section 401 reviews. Contrary to DEQ’s claims, an independent state review of waterbody crossings would not needlessly duplicate the Corps’ reviews. Congress defined different responsibilities for the Corps and states to review proposals, and both must be met.

The purpose of NWP 12 is to streamline the permitting process for utility line crossings of streams and wetlands that will have no more than “minimal” impacts.¹⁹ The scope of the permit is limited to “temporary” water quality degradation and use impairments.²⁰ The Corps admits that projects covered under NWP 12 will cause significant discharges of sediments and other pollutants during construction in waterbodies and that habitats will be altered and aquatic species harmed.²¹ And the Corps’ “temporary” impacts allow changes to aquatic environments to persist for months or even years. Finally, the Corps acknowledges that some recreational uses will be eliminated altogether, even if parties comply with NWP 12.²²

In contrast, Virginia water quality standards require that designated and existing uses be fully protected at all times; temporary impairments of uses are not allowed and, certainly, long-term or permanent denial of uses is never acceptable. Likewise, discharges of pollutants that cause turbidity and other defined conditions in streams are prohibited by the General Criteria in Virginia water quality standards.²³ Also, antidegradation provisions in state water quality standards prohibit more than *de minimis* negative changes in high quality waters, whereas the increased pollutant loadings and habitat

¹⁸ See, e.g., *Motor Vehicle Mfrs. Ass’n. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 30 (1983).

¹⁹ Issuance and Reissuance of Nationwide Permits, Final Rule, 82 Fed. Reg. 1860, 1884 (Jan. 6, 2017).

²⁰ Dominion Pipeline Monitoring Coal., Comments on Proposed Certification of NWP 12 by DEQ, March 13, 2017 (submitted as part of comments on draft certifications for both ACP and MVP on August 22, 2017).

²¹ *Id.*

²² *Id.*

²³ 9 Va. Admin. Code § 25-260-20.

changes allowed under NWP 12 are far more than *de minimis*. Virginia water quality standards set a higher bar for water quality protection than the Corps' NWP 12 does, and the Board must have the opportunity to determine whether these projects will meet those higher standards.

But as discussed below, the record on which DEQ's draft Certification was based does not discuss the pertinent portions of state water quality standards or contain any analysis to assess compliance with those standards. DEQ seems to have ignored public comments and evidence showing that reliance on NWP 12 would allow violations of Virginia water quality standards—despite the Corps' own analyses showing that water quality standards will be violated under NWP 12.²⁴

When Virginia certified NWP 12 earlier this year, DEQ explicitly reserved its authority to require individual reviews of crossings when “concerns for water quality and the aquatic environment so indicate,” even when a project “could otherwise be covered under any of the [nationwide permits].”²⁵ These projects would affect thousands of waterbodies across Virginia, with sensitive species and particularly challenging environments like steep slopes and karst terrain. There can be no better examples of projects that warrant individual 401 assessments of crossings. In comments on the draft Environmental Impact Statements for these projects, state agencies described numerous studies and protective requirements that are necessary to protect waterbodies crossed by the pipelines, but those comments will be left wholly unaddressed unless DEQ conducts individual 401 review of stream and wetland crossings.

Finally, DEQ's decision to consider impacts to water quality from activities in upland areas but not impacts from pipeline crossings is arbitrary and unsupported by science. Water quality in a stream or wetland is a result of many factors and activities within the waterbody's drainage area.²⁶ This reality is confirmed by the overwhelming weight of scientific evidence. Watersheds are “natural systems” that “have interacting components

²⁴ Decision Document, Nationwide Permit 12, at 32 (“Some utility line activities may eliminate certain recreational uses of the area”), accessible at http://www.usace.army.mil/Portals/2/docs/civilworks/nwp/2012/NWP_12_2012.pdf.

²⁵ *Section 401 Water Quality Certification*, Va. Dep't of Env'tl. Quality (Apr. 7, 2017), <http://www.deq.virginia.gov/Portals/0/DEQ/Water/WetlandsStreams/Final%20401%20Certification%202017%20NWP%20with%20typos%20corrected.pdf?ver=2017-05-01-135819-313>.

²⁶ Angermeier et al., Evidence of Water Quality Threats from the Atlantic Coast Pipeline, Failure to Assure Compliance with Virginia Water Quality Standards 4 (Aug. 22, 2017); Angermeier et al., Evidence of Water Quality Threats from the Mountain Valley Pipeline, Failure to Assure Compliance with Virginia Water Quality Standards 4 (Aug. 22, 2017) (submitted as part of comments on draft certifications for both ACP and MVP on August 22, 2017).

that together perform work . . . and generate products”²⁷ The most important “product” of a watershed and activities conducted therein is the integrity of the waterbodies and the uses they support. All pipeline-related impacts must be considered holistically.

By definition, water quality standards apply to waterbodies,²⁸ not to the individual activities that may affect the aquatic environment. Thus, the Board cannot make valid findings as to compliance with water quality standards without assessing all effects on each waterbody in a cumulative fashion. By segregating water quality-related analyses and claiming the Corps’ separate regulatory measures will protect water quality, DEQ has proposed an arbitrary and capricious action to the Board. The Board must reject this approach.

B. DEQ has not conducted analyses sufficient to determine whether construction of the proposed pipelines would violate Virginia water quality standards.

As discussed throughout comments submitted on the draft 401 Certification, the Board can only issue water quality certifications for the proposed pipelines if it has “reasonable assurance” that water quality standards will not be violated. The burden is on the applicants, Atlantic and EQT, to provide DEQ with evidence of compliance with those standards. And the burden is on DEQ to determine whether those standards will be met and to make a recommendation to the Board accordingly.

Virginia’s water quality standards comprise three elements: 1) the designated uses of waterways, 2) narrative and numeric water quality criteria established to achieve designated uses, and 3) an antidegradation policy.²⁹ To date, DEQ has not done the analyses necessary to give the Board “reasonable assurance” required by section 401 of the Clean Water Act.

²⁷ Thomas O’Keefe et al., *Introduction to Watershed Ecology*, U.S. EPA Watershed Academy Web, https://cfpub.epa.gov/watertrain/moduleFrame.cfm?parent_object_id=516 (last visited Oct. 19, 2017).

²⁸ 40 C.F.R. § 130.3: “A water quality standard defines the water quality goals of a water body, or portion thereof”

²⁹ 33 U.S.C. § 1341(a); 40 C.F.R. § 121.2(a)(3); *Nat. Res. Def. Council v. U.S. E.P.A.*, 16 F.3d 1395, 1400 (4th Cir. 1993).

1. DEQ’s draft 401 Certification did not identify and assess whether the proposed pipelines will meet narrative and numeric water quality criteria as required by the Clean Water Act.

Narrative and numeric water quality criteria constitute the heart of state water quality standards—these criteria ensure that designated uses such as swimming, drinking, and the propagation of aquatic life are protected.³⁰ Therefore, the question whether the projects can meet relevant water quality criteria is absolutely necessary for the Board to have “reasonable assurance” that water quality standards will not be violated.

Not only has DEQ not provided an analysis as to why it believes the proposed pipelines will comply with water quality criteria, it has also not identified which criteria are relevant to that analysis. In assessing the potential impacts on water quality of the proposed pipelines, DEQ should have clearly identified, for the public and the Board, which water quality criteria are likely to be implicated by construction and operation. DEQ then should have provided analyses supporting their contention that the pipelines will not violate those criteria. Based on the draft certification, DEQ has taken neither of these steps, yet the agency expects the Board to conclude that it has “reasonable assurance” that these criteria will be met.

Impacts from the proposed pipelines are likely to lead to violations of state water quality criteria. For instance, the land clearing required for pipeline construction and operation will increase the volume and intensity of stormwater runoff and erosion and will, therefore, result in dramatically greater sediment loads delivered to waterways. Sedimentation can cause serious, long-term harm to aquatic ecosystems and species.³¹

Severe and irreparable impacts such as those caused by increased sedimentation will likely lead to violations of narrative and numeric water quality criteria. For instance, increased sediment loads “interfere directly or indirectly with . . . designated uses of such water [and] are inimical or harmful to human, animal, plant, or aquatic life.”³² And destruction of riparian buffers can increase stream temperatures in violation of numeric water quality criteria for natural and stocked trout waters.³³ Sediment also carries

³⁰ *Water Quality Criteria*, Va. Dep’t of Env’tl. Quality, <http://www.deq.virginia.gov/Programs/Water/WaterQualityInformationTMDLs/WaterQualityStandards/Criteria.aspx> (last visited Oct. 19, 2017).

³¹ Robert H. Hilderbrand, Ph.D., *Assessment of Potential Threats to Streams Occurring in Proximity to the Proposed Atlantic Coast Pipeline 2-3* (2017) (describing how increased sedimentation, flows, and stream temperatures can push populations of vulnerable brook trout toward an “extinction vortex” that can result in the loss of entire populations over time.)

³² 9VAC25-260-20.

³³ *See, e.g.*, 9VAC25-260-50; 9VAC25-260-60.

nutrients, and DEQ has not analyzed the impact to nutrient limited waters such as the Roanoke River. Nevertheless, DEQ has not explained why it believes that these criteria, and the designated uses they are designed to protect, will be met. Without that information, the Board cannot state that it has “reasonable assurance” that water quality will be protected.

2. DEQ has not conducted an anti-degradation analysis as required by the Clean Water Act.

In addition to not identifying relevant water quality criteria or assessing the likelihood that those criteria will be violated, DEQ has not conducted an antidegradation review in its certifications for the Mountain Valley or Atlantic Coast pipelines. This omission renders the DEQ’s draft section 401 certifications inconsistent with federal law and invalid.³⁴ For its section 401 certifications to be valid under the Clean Water Act, DEQ must conduct full antidegradation reviews that assess every body of water impacted by the two pipelines.

It is well established that a state’s antidegradation policy is part of its water quality standards.³⁵ As EPA has said, “[q]uite simply, antidegradation policies are part of water quality standards.”³⁶ And as the United States Supreme Court has held, “state water quality standards . . . are part of the federal law of water pollution control.”³⁷ Accordingly, if a state fails to conduct an antidegradation review before issuing a section 401 certification, it acts inconsistently with federal law.³⁸ Thus, in order to determine whether a federal permitted activity will comply with all water quality standards, a state must apply its antidegradation policy to the discharges from that facility in the course of its section 401 review.³⁹

³⁴ See Consent Mot. for Voluntary Remand with Vacatur by Respondents W. Va. Dep’t of Env’tl. Protection and Austin Caperton, *Sierra Club v. W. Va. Dep’t of Env’tl. Protection*, No. 17-1714 (4th Cir. filed Sept. 13, 2017); *Sierra Club v. W. Va. Dep’t of Env’tl. Protection* (4th Cir. Oct. 17, 2017) (order granting consent motion for voluntary vacatur and vacating water quality certification for Mountain Valley Pipeline).

³⁵ 40 C.F.R. § 131.6.

³⁶ 65 Fed. Reg. 43, 586, 43,607 (July 13, 2000). See also *PUD No. 1 of Jefferson Cty. v. Wash. Dep’t of Ecology*, 501 U.S. 700, 706 (1994) (holding that “EPA regulations implementing the Act require that state water quality standards include a ‘statewide antidegradation policy’” (quoting 40 C.F.R. §131.12)).

³⁷ *Arkansas v. Oklahoma*, 503 U.S. 91, 109 (1992).

³⁸ See 63 Fed. Reg. at 36,780 (“[A]t a minimum, States . . . must apply antidegradation requirements to . . . any activity requiring a CWA § 401 certification[.]”).

³⁹ 63 Fed. Reg. 36,742, 36,780 (July 7, 1998).

State antidegradation policies must be consistent with 40 C.F.R. § 131.12(a), and states must develop implementation methods consistent with that provision.⁴⁰ The federal regulation requires that antidegradation policies protect existing uses, maintain the existing quality of high-quality waters unless degradation is justified by socio-economic development, and prohibit degradation of Outstanding National Resource Waters.⁴¹

Virginia's antidegradation policy is set out in 9 Va. Admin. Code § 25-260-30, which mandates that the policy "shall be applied whenever any activity is proposed that has the potential to affect existing surface water quality." The policy assigns three tiers of protection to Virginia's waters, commonly known as Tier 1, Tier 2, and Tier 3, depending on their existing quality and national significance.⁴² A stream's tier-ranking determines the antidegradation analysis required. The analysis of Tier 2 "high quality" waters is particularly critical. In order to satisfy that requirement, DEQ must determine whether the affected streams exceed the minimum levels of quality necessary to support their designated uses, whether the water quality in those Tier 2 waters would be adversely affected, and if so, whether such a lowering of water quality "is necessary to accommodate important economic or social development in the area in which the waters are located."⁴³ Such a determination can only be made "after full satisfaction of the intergovernmental coordination and public participation provisions of the Commonwealth's continuing planning process."⁴⁴ For Tier 3 streams, no long-term degradation is allowed, regardless of the economic justification.

Here, DEQ has not performed any antidegradation analysis for the discharges that will result from the construction and operation of the Mountain Valley and Atlantic Coast pipelines. Such an analysis requires, at minimum, baseline water quality data for the receiving streams and a quantification of the additional pollutants that the proposed pipelines will add to those streams. If that review finds that high quality Tier 2 waters would be adversely affected, DEQ must engage in an economic analysis to determine if such changes are necessary to provide benefits to the local area. Without such an analysis, DEQ cannot make the required statement that it has a reasonable assurance that the Mountain Valley and Atlantic Coast pipelines will comply with all water quality

⁴⁰ 40 C.F.R. § 131.12(b).

⁴¹ *Id.* § 131.12(a).

⁴² 9VAC25-260-30A.

⁴³ 9VAC25-260-30A.2.

⁴⁴ *Id.*

standards.⁴⁵ Similarly, if DEQ's analysis determines that a Tier 3 stream would suffer long-term or permanent degradation, the certification may not be issued.

Because DEQ has not conducted an antidegradation review, the section 401 certifications for the Mountain Valley and Atlantic Coast pipelines are vulnerable to being set aside as arbitrary and capricious by federal courts reviewing the Board's actions. Indeed, just last month, the West Virginia Department of Environmental Protection chose to ask the United States Court of Appeals for the Fourth Circuit to vacate its section 401 certification for the Mountain Valley Pipeline and remand it back to the agency for further consideration, rather than defend that certification in court. West Virginia's express reason for making that request was that it "recognize[d] that it needs to reconsider its antidegradation analysis" in light of the requirement that section 401 certifications include an antidegradation analysis.⁴⁶ The Fourth Circuit granted that request and vacated and remanded the certification last week.⁴⁷

Here in Virginia, the Board can avoid finding itself in such an undesirable situation by taking the necessary steps *now* to do all analyses required under the law to assure that water quality standards will be met. The Board should not accept DEQ's recommendations that it certify the Mountain Valley and Atlantic Coast pipelines because a crucial and required part of the section 401 analysis is missing. The Board should request that DEQ obtain the necessary information and perform the required analysis prior to returning to the Board with a new recommendation.

III. DEQ EXCLUDED FROM CONSIDERATION OTHER CRITICAL INFORMATION THAT WOULD ALLOW THE BOARD TO DETERMINE WHETHER WATER QUALITY STANDARDS WILL BE PROTECTED.

DEQ has also excluded other critical information that would allow the Board to accurately assess whether the projects will lead to violations of water quality standards. Until DEQ provides that information, the Board cannot have reasonable assurance as required under the Clean Water Act.

⁴⁵ 63 Fed. Reg. 36,742, 36,780 (July 7, 1998); 40 C.F.R. § 121.2(a)(3).

⁴⁶ Consent Mot. for Voluntary Remand with Vacatur by Respondents W. Va. Dep't of Env'tl. Protection and Austin Caperton at 2, *Sierra Club v. W. Va. Dep't of Env'tl. Protection*, No. 17-1714 (4th Cir. filed Sept. 13, 2017).

⁴⁷ Order, *Sierra Club v. W. Va. Dep't of Env'tl. Protection*, No. 17-1714 (4th Cir. Oct. 17, 2017) (granting consent motion for voluntary vacatur and vacating water quality certification for Mountain Valley Pipeline).

DEQ staff has not performed analyses to assure the protection of Virginia water quality standards in part because to date the agency has not required the pipeline proponents to provide the information necessary to do so. Meeting the mandates of the Clean Water Act and protecting Virginia water quality standards commands more rigor from the Commonwealth, and a decision to grant 401 certification is premature without the necessary information and analyses.

A. DEQ will not consider highly relevant information such as erosion and sediment control and stormwater management plans as part of its 401 certification review.

The most concerning omission of critical information is DEQ's decision to conduct its analysis of the companies' erosion and sediment control and stormwater management plans *separately* from the section 401 certifications reviews. The information provided and determinations made in that review, however, are critical to DEQ's assessment of whether the proposed projects will lead to violations of Virginia's water quality standards. The Board cannot rationally conclude that it has reasonable assurance that water quality will be protected before reviewing how the project proponents intend to control the greatest source of water pollution associated with pipeline construction.

DEQ states that its section 401 review is separate from its review of the pipeline projects' erosion and sedimentation control and stormwater plans, despite the fact that those plans are meant to "protect surface water quality during and after construction completion."⁴⁸ The agency has gone so far as to state that it will not consider any public comments on the erosion and sediment plans as part of its section 401 review. The majority of the plans, particularly for the Mountain Valley Pipeline, were not even available for public review during the comment period on the section 401 certifications.

The information in these plans is absolutely necessary to determining the proposed projects' impacts on water quality. For example, FERC's final EIS for the Mountain Valley Pipeline described the likely harm to fisheries, including the smothering of fish eggs, loss of spawning habitat and other negative habitat changes, and reduced food sources that will result from sediment released during pipeline construction.⁴⁹ DEQ cannot evaluate the extent of those impacts without determining what measures will be used to control erosion and sedimentation and assessing the likely success of those

⁴⁸ *Pipeline Erosion and Sediment Control and Stormwater Management Plan Review*, Va. Dep't of Env'tl. Quality, <http://www.deq.virginia.gov/Programs/Water/StormwaterManagement/ErosionandSedimentControl/NaturalGasPipelineErosionandSedimentControlandPostConstructionStormwaterManagement.aspx> (last visited Oct. 18, 2017).

⁴⁹ Final EIS for the Mountain Valley Pipeline at 4-216 to 4-217.

measures. Indeed, DEQ itself stated in its comments on the draft EIS for the Atlantic Coast Pipeline, “DEQ considers stormwater management and ESC measures to be *critically important to minimizing potential water quality impacts* from the ACP project.”⁵⁰

DEQ’s decision to consider erosion and sediment control and stormwater management plans separately from the 401 review process is exacerbated by the inadequacy of those plans. Many of the segments of the plans that are publicly available were deemed woefully incomplete and inadequate by the consulting firm hired by DEQ to assess their sufficiency.⁵¹

Furthermore, there is no evidence that industry-standard practices for stormwater management and erosion and sediment control will protect state waters. Pipeline proponents use industry-standard best management practices to control erosion and stream sedimentation regardless of the construction terrain. Neither the pipeline proponents nor FERC have proved the efficacy of those practices in the extraordinary geography that these pipelines will traverse. DEQ has used the phrase “technology-based limits” to characterize the erosion and sediment control measures, but there is no evidence that the industry-standard measures can provide reasonable assurance that sediment will not reach state waters in the steep, rugged and highly erodible terrain in the mountains of western Virginia. FERC’s final EIS for the Atlantic Coast Pipeline acknowledges that sedimentation rates will be as much as 800% over baseline and higher in steep terrain.⁵² Conversely, the West Virginia DEP recently admitted that the industry standards are incapable of controlling erosion and sedimentation on the Rover Pipeline project in less severe terrain than is proposed for the Atlantic Coast and Mountain Valley Pipelines.⁵³

⁵⁰ Va. Dep’t of Env’tl. Quality, Comments on FERC Draft Environmental Impact Statement for the Atlantic Coast Pipeline and Supply Header Project, Att. B DEQ Consolidated Program Comments at 13 (Feb. 16, 2017; submitted to FERC Apr. 6, 2017) (emphasis added).

⁵¹ See, e.g., Letter from Andrew E. Kasoff, President, Env’tl., Eng’g, & Educ. Sols., to Ben Leach, Dep’t of Env’tl. Quality, re: Mountain Valley Pipeline Spread 8 Plan Submission Completeness Review (July 10, 2017) (explaining that the “plans submitted do not constitute a complete plan package with sufficient information to move forward to the plan review phase,” finding that both MVP’s water quality and water quantity calculations are not consistent with Virginia law, and noting that MVP’s requested variances from certain Virginia’s standards are unjustified and would lead to unacceptable impacts).

⁵² See Final EIS for the Atlantic Coast Pipeline at 4-240.

⁵³ See W.Va. Dep’t of Env’tl. Protection, Order No. 8749 Issued Under The Water Pollution Control Act, West Virginia Code, Chapter 22, Article 11 (July 17, 2017) (“Rover Pipeline LLC shall immediately cease & desist any further land development activity until such time when compliance with the terms and

In light of DEQ's own recognition of the critical role erosion and sediment control and stormwater management will play in protection of water quality, its decision to divorce consideration of erosion and sediment control and stormwater management plans from the 401 process, the purpose of which is to ensure protection of water quality, is unsupported. Without assessing the degree to which the plans will reduce erosion and sedimentation as part of the 401 certification process, DEQ lacks a rational basis for determining the projects' impacts on Virginia's water quality standards. The record before the Board is thus insufficient for it to determine that it has reasonable assurance that Virginia's water quality standards will be protected.

B. DEQ did not consider other information critical to the Board's decisions.

DEQ's decision to omit consideration of these critically important plans is accompanied by the agency's reliance on incomplete information to assess impacts it considers within the scope of Virginia's 401 reviews. In addition to constructing on steep slopes and highly erodible soils, both pipelines are proposed to be built through karst geology.⁵⁴ Karst, an underground matrix of voids and channels, introduces the opportunity for sediment and other pollutants to flow into groundwater, among other hazards.⁵⁵ Some of the karst that will be crossed by the projects is so unique that the Commonwealth has granted conservation-site status, which should be a red flag to both the proponents and the DEQ.⁵⁶

Nevertheless, the DEQ has not required dye-tracing to disclose the full scope of the threat to both surface and groundwaters to inform the consideration of 401 certifications. Rather, the draft certifications only require the applicants to develop karst dye tracing plans before construction—not before certification that the project will not violate water quality standards.⁵⁷ Without dye tracing, which creates a “map” to illustrate the potential impacts to groundwater from these pipelines, neither the Department nor the Board will be able to determine whether water quality will be protected.⁵⁸

condition of its permit and all pertinent laws and rules is achieved”), <http://wvivers.org/wpcontent/uploads/2017/05/Rover-Pipeline-8749-Unilateral-Order.pdf>.

⁵⁴ See Final EIS for Atlantic Coast Pipeline at ES-4; Final EIS for Mountain Valley Pipeline at ES-4.

⁵⁵ See Final EIS for Atlantic Coast Pipeline at 4-7 to 4-8.

⁵⁶ See *id.* at 4-15.

⁵⁷ DEQ Draft 401 Certifications at 5.

⁵⁸ Dr. Chris Groves, Crawford Hydrology Laboratory, *Comments on Karst-Related Environmental Issues in the Atlantic Coast Pipeline (ACP) Response (5/31/17) and Second Response (6/23/17) and (6/27/17) to*

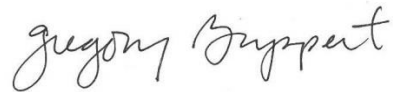
Similarly, the Virginia Department of Health has requested the conduct of sanitary surveys within 1,000 feet on either side of each proposed pipeline route to assess potential impacts to drinking water wells and septic systems. The 401 certification process is going forward without any understanding of the threat to drinking water wells. Well-water users adjacent to the proposed pipeline routes have no alternative sources of drinking water, that is, in most cases there are no public water supplies to replace contaminated wells. At this time, the Commonwealth has no accounting of the potential loss of drinking water supplies with which to inform the 401 certification process.

CONCLUSION

The Atlantic Coast Pipeline and Mountain Valley Pipeline are controversial, high-profile projects, and state and federal decision makers are subject to an enormous degree of pressure to approve them. But these proposed pipelines must proceed through the same regulatory processes as any other project, and the Board must adhere to the high standards set by the Clean Water Act and Virginia state law in reviewing the proposed 401 certifications. The developers' desire to begin construction on these projects as soon as possible must be irrelevant to the Board's decisions.

The Board must be certain that it has "reasonable assurance" that the Atlantic Coast and Mountain Valley pipelines will not violate Virginia's water quality standards. The draft 401 Certifications before the Board suffer from critical deficiencies that render it impossible for the Board to make the determination that the Clean Water Act requires. The Board must therefore deny the applications and reconsider certification for these projects only after the problems identified here are fixed. We urge you to consider the concerns set out in this letter seriously as you undertake these important decisions.

Sincerely,



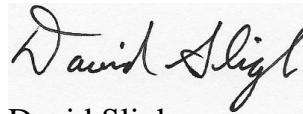
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