

# DOMINION PIPELINE MONITORING COALITION

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January 17, 2018

Honorable Ralph Northam  
Governor of Virginia  
c/o Clark Mercer, Chief of Staff  
[clark.mercer@governor.virginia.gov](mailto:clark.mercer@governor.virginia.gov)

Sent Via Email

Re: Urgent Need for Fair, Transparent, and Science-based Reviews of Pipeline Proposals

Dear Governor Northam:

As Lieutenant Governor and as a candidate for Governor you clearly described your expectations for the State of Virginia's processes to consider whether to issue water quality certifications (WQCs) for the Atlantic Coast Pipeline (ACP) and the Mountain Valley Pipeline (MVP). You have emphasized that the outcome of those deliberations must be based on scientific evidence, that proceedings must be conducted in a transparent manner, and that approvals must be denied unless actions can be fully protective of Virginia's environment and its citizens. You now have the opportunity and the duty to ensure that those principles are upheld and that the processes for these two proposed projects will be completed in ways that reflect the evidence, treat Virginian's fairly, and preserve our natural treasures, as the law requires.

Unfortunately, the Department of Environmental Quality (DEQ) has taken or failed to take actions very recently that betray the principles you've espoused, the clearly-expressed intentions and expectations of the State Water Control Board (SWCB), and the rights and interests of the people of Virginia. We ask you to order responsible officials in your administration to correct these failures and improper actions immediately. Timing is vital. Degradation of our waters could be imminent if you fail to act and act quickly.

Three specific actions by your administration are required to meet the law and satisfy your stated intentions:

1. Your environmental officials must use their authority to review and approve or disapprove waterbody crossings covered by the Corps of Engineers' general permit.
2. Your environmental officials must prohibit *any and all* activities related to construction of the pipelines that might affect water quality unless and until all requirements of the WQCs are met.
3. Your environmental officials must ensure that before the ACP certification is deemed effective: a) remaining plans submitted by the company are made available to the public for review and comment and that DEQ considers and addresses those comments, b) DEQ makes a final recommendation to the SWCB, based on its review of the final plans and of public submissions, and c) DEQ requests formal Board action on its recommendation.

## 1. Individual Section 401 Reviews of Waterbody Crossings

When DEQ issued a blanket certification for the Corps of Engineers' Nationwide 12 Permit (NWP 12) it reserved its authority to review waterbody crossing proposals for utility lines on an individual basis and not simply rely on the Corps' analyses.<sup>1</sup> Of all potential utility line construction proposals that seek coverage under NWP 12 in Virginia, the need for individual state reviews of these two projects is greater than for any other that we can imagine. If your officials refuse to use their powers to do these detailed reviews in these instances, the expressed reservation of that right will be shown to be an empty gesture that DEQ never intended to honor. This must not be allowed.

By letter dated December 22, 2017, the Corps of Engineers provided a "Nationwide Permit No. 12 Verification," to MVP, stating: "Based on the provided information, it has been determined the discharge of dredged and/or fill material into waters of the U.S. at 591 separate and distant locations in conjunction with the utility line project meets the criteria for Nationwide Permit (NWP) #12. . . ."<sup>2</sup> Two days later, MVP filed a "Request for Notice to Proceed" with FERC, which highlights the urgent need for swift action by the State of Virginia.<sup>3</sup>

So far, DEQ has shown no intent to exercise its reserved authority, despite abundant proof in the record for each project that the Corps' requirements will not uphold Virginia water quality standards. In comments to DEQ and testimony before the SWCB, we have shown that conditions the Corps expressly allows under NWP 12 will violate our standards. DEQ has not responded to those assertions in any manner and cannot support its contention that its detailed review of crossings would merely duplicate the Corps' efforts. Rather DEQ proposes to abandon its responsibilities in this regard.

As you know, DEQ claimed it would perform these site-by-site analyses of waterbody crossings early in 2017, after you and many others had expressed the need for such actions. Many weeks later, DEQ finally admitted under direct questioning that it had never intended to meet that high standard of review, thereby showing that it planned to cede its authority over waterbody crossings to a federal agency that has no right or ability to judge whether the projects would uphold our water quality standards.

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<sup>1</sup> Letter from James J. Golden, DEQ Director of Operations to Col. Jason E. Kelly, USCOE, *Section 401 Water Quality Certification of the 2017 Nationwide Permits*, April 7, 2017 (stating: "The Commonwealth reserves its right to require an individual application for a permit or a certificate or otherwise take action on any specific project that could otherwise be covered under any of the NWPs when it determines on a case-by-case basis that concerns for water quality and the aquatic environment so indicate.")

<sup>2</sup> Included in MVP submittal to FERC Docket No. CP16-10-000, Accession No. 20180103-5172.

<sup>3</sup> Letter from MVP, LLC to FERC, *Mountain Valley Pipeline, LLC, Docket No. CP16-10-000, Request for Notice to Proceed No. 1*, January 5, 2018, FERC Docket No. CP16-10-000, Accession No. 20180105-5200.

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Members of the State Water Control Board expressed strong concerns that waterbody crossings could cause water quality problems and Board members crafted language with the specific and express intent to preserve the State's right to do individual crossing reviews. SWCB members Dean and Kellam voted to reject the certification for MVP and Mr. Wayland joined them in voting against the ACP approval, based primarily on the absence of important plans and analyses for them to consider in making informed and reasoned decisions. Ms. Dean expressed that for specific streams, such as those designated as Exceptional State Waters (Tier 3 waters), proposed crossings should be looked at individually. However, even those who voted to approve the certifications clearly believed reservation of the authority for individual reviews of waterbody crossings was of great importance. We must assume that Board members did not work to preserve those authorities without any expectation that DEQ would exercise them where appropriate.

You must insist that DEQ notify FERC, the Corps of Engineers, and the two pipeline companies that it will conduct individual Clean Water Act section 401 reviews for specific waterbody crossings. Then, DEQ must undertake a process through which individual crossing activities are assessed in context with all other activities proposed for the subject watersheds. By demanding this action of your staff, you will be standing with the citizen members of the SWCB and with members of the public who have identified numerous ways in which crossing activities would specifically impair or destroy their rightful uses of particular streams; uses that are defined in our water quality standards and which must be fully protected.

## 2. Prohibition of Tree Cutting Until All Reviews are Completed

The WQC's issued by the SWCB are both conditioned on the requirement that erosion and sediment control (E&S) and stormwater management plans, among other plans and analyses, be completed by the pipeline companies and approved by DEQ before construction can begin. For ACP, the WQC does not become effective until these and other requirements are met, as discussed below but, in both cases, it will be irresponsible and improper to allow any construction-related actions to be taken before all of the prerequisites in the certifications are met.

However, DEQ has defined an arbitrary and unsupportable distinction between certain forest removal activities and "land disturbance," and asserted that it has no authority to prohibit certain tree cutting, even if all conditions of the certifications are not or will not be met. A detailed discussion of legal reasons this distinction is invalid and impractical has been prepared by the Southern Environmental Law Center in response to ACP's request to begin tree cutting filed with FERC, and that document is attached to this letter.<sup>4</sup> And, in any case, Virginia has full authority under the Clean Water Act to regulate all activities allowed under FERC's approval that might affect water quality, whether those activities are deemed by DEQ to fall under other specific state regulations or not.

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<sup>4</sup> [\*Answer in Opposition to Request by Atlantic for Limited Notice to Proceed\*](#), Shenandoah Valley Network et al., December 21, 2017, FERC Docket Nos. CP15-554-000 etc., Accession No. 20171221-5201.

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It must be remembered that approval of E&S and stormwater plans may not be assumed and, if those plans are not approvable, then having allowed removal of forest environments, as a first step in the construction process, will have permitted changes to watersheds, water flows, and pollution discharges that degrade streams and people's uses, possibly without any purpose. The tragedy that resulted when the State of Pennsylvania allowed tree removal operations for the Constitution Pipeline when final approval of the project has not and very well may never be granted is a cautionary example that Virginia should heed.<sup>5</sup>

Citizens and technical experts placed substantial evidence in the record for each WQC action that demonstrates that the initial plans submitted by each company are not sufficient to ensure protection of water quality and, further, that in some areas that would be impacted the nature of the terrain and the sensitivity of aquatic systems may well make it impossible to meet water quality standards with existing pollution control technologies. Despite this evidence, DEQ has at no time given any indication that it may withhold approval of the plans if protections are not ensured. We have reviewed thousands of pages of records of Virginia agency actions and deliberations for each pipeline and have yet to find one piece of evidence that DEQ considered the possibility of denial of WQC's. By improperly segregating reviews of various aspects of the projects in different processes and refusing to analyze cumulative impacts on watersheds and waterbodies, DEQ created a system that was slanted in favor of approvals. Indeed, one DEQ official indicated that the applications for water qualification certifications could be denied only "in theory."<sup>6</sup> Enforcement of the law through all necessary means must never be merely theoretical.

In fact, DEQ proposes to allow the companies to leave significant details of their plans for construction and pollution control measures undefined until after all regulatory reviews are complete and approvals are granted, essentially endorsing self-regulation by the pipeline builders. A record of severe water quality degradation from other pipeline projects in Virginia and other states shows both the risk in allowing the corporations undue latitude outside the regulatory process and the reality that protective measures are doomed to fail in the kinds of challenging circumstances posed by both MVP and ACP.

We ask that you order your environmental officials to notify both MVP and ACP, as well as FERC, that no construction-related activities, to include even limited tree cutting, is prohibited under Virginia's WQCs unless and until all required plans are submitted and approved. Any delay in doing so could result in damages to forest lands and watersheds, both privately- and publicly-owned, and to state waters in ways that can never be repaired once they are created.

### 3. Proper Process to Decide Whether the ACP WQC Will Become Effective

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<sup>5</sup> Constitution Pipeline delayed, but hundreds of trees already cut down, Pennlive, March 10, 2016, [http://www.pennlive.com/news/2016/03/constitution\\_pipeline\\_delayed.html](http://www.pennlive.com/news/2016/03/constitution_pipeline_delayed.html).

<sup>6</sup> Duncan Adams, Roanoke Times, *Residents challenge DEQ to 'step up' to scrutinize pipeline projects*, July 18, 2016.

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The members of the State Water Control Board rejected DEQ's recommendation that they give final and irrevocable approval to ACP at the Board's December meeting. Instead, the Board specified that the certification would not become effective until all required plans and analyses had been submitted and both DEQ and the Board had deemed them approvable. Also, as part of this process, Board member Hayes, who proposed the language delaying the effectiveness of the certification, described certain procedural steps that should be taken by DEQ and the Board. We note that the understandings expressed by Mr. Hayes were not disputed or contradicted by any Board member and clearly were intended to guide DEQ's actions.

Mr. Hayes described a number of steps, to include further public involvement in the process before the ACP certification would become effective, stating his intention that the Board would "have an opportunity to take one more swing at it if we have to."<sup>7</sup> Mr. Hayes further stated "[y]ou'll be coming back to us directly and specifically with the results of what happens on these things that are included [referring to the additional submittals and reviews required in the certification]" and that "[i]f it turns out that there's a major problem that we want to address, we at least still have an opportunity to try to go back and address [sic]." Finally, Mr. Hayes stated his assumption that DEQ would prepare a report of its findings and conclusions on the additional submittals from ACP and

I guess post it on the DEQ website for public review . . . . And the board members, once they review that report, and I'm assuming you'll get comments back from the public on the website by whatever means you specify. Once the board reviews that information and the public responds, we can decide if we need to go back and put additional conditions or not.

Given the serious concerns expressed by Board members that additional reviews were required and the clear understanding that both they and the public would have further opportunities to effectively participate in the process, we were surprised to find that DEQ posted information on its web site, apparently the day before you took office, that seems to disregard the intentions expressed by the Board, stating that "DEQ will prepare a report to the board on the adequacy of the approved materials" and that

The report will be submitted to the board upon completion and concurrently made available to the public by posting of the report on DEQ's website. The report will be a compilation of factual information on actions taken by DEQ in accordance with the board-approved certification; and, as such will not be the subject of a public comment period. . . . Upon submittal of the report documenting approval of the, Supplemental Karst Evaluation Plan annual standards and specifications, erosion and sediment control plans, and stormwater management plans, Virginia's Section 401 water quality certification for activities in upland areas becomes effective.<sup>8</sup>

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<sup>7</sup> All quotations of Board member comments are taken from a transcript of the SWCB meeting on 12/12/17 that was commissioned by citizens.

<sup>8</sup> DEQ web site, *Process for Report to the State Water Control Board*, accessed on January 16, 2018 at

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Thus, DEQ officials have seemingly taken it upon themselves to disregard the Board's wishes, to exclude the public from any useful role in ensuring the plans are acceptable, and to override the Board's wish to "have an opportunity to take one more swing at it if we have to." This presumption by DEQ is outrageous and must not be allowed to stand. You must insist that a protocol be defined by which these additional reviews involve effective and formal involvement by both the public and the Board. You must insist that your stated command that the processes be fully transparent is fulfilled and that the Board, which has ultimate authority over the WQC process be respected by carrying out their wishes and intentions.

We hope and trust that you will respond to the concerns we've expressed and demonstrate that you have heard the thousands of Virginians who have made extraordinary efforts to participate in these regulatory processes. People whose rights as users of waterbodies and landowners with direct and important interests in the water quality of specific streams and wetlands have a right to expect answers and demand the respect we deserve from you and our environmental officials - respect and consideration that has not been given previously.

Thank you for your attention to these concerns. Please know that we and other citizens are prepared to meet with you at any time to further explain our concerns and contribute to completion of these processes in a way that truly vindicates the public interest. Please let us know if you are willing to meet with us.

Sincerely,

\_\_\_\_\_/s/\_\_\_\_\_  
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David Sligh  
Senior Regulatory Systems Investigator

cc: Honorable Matt Strickler, Secretary of Natural Resources  
Members of the State Water Control Board  
David Paylor, DEQ Director  
Rick Webb, DPMC

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<http://www.deq.virginia.gov/Programs/Water/ProtectionRequirementsforPipelines/ACP.aspx>  
(emphasis added).