

The agency has no records . . .
DEQ's Failure to Use Sound Science to Protect
Virginian's from Pipeline Threats

A Report of the Dominion Pipeline Monitoring Coalition

June 5, 2018

Executive Summary

Virginia officials have repeatedly insisted the state's reviews of the Mountain Valley Pipeline (MVP) and the Atlantic Coast Pipeline (ACP) are based on science - that the Department of Environmental Quality (DEQ) has simply relied on facts. DEQ has claimed its experience, its investigations, and its analyses provide evidence that these two huge pipeline projects will uphold Virginia's water quality standards in all cases where waterbody crossings are proposed.

Supposedly, those facts gathered by DEQ led the agency to conclude that the Corps of Engineers (Corps) Nationwide Permit Number 12 (NWP 12) is fully protective of Virginia's waters, wherever that federal permit is applied to waterbody crossings by natural gas pipelines. However, DEQ cannot supply records to support its conclusions. And, without documentation of the facts and analyses, DEQ is left with mere claims. Claims without proof are not science.

Through a series of records requests under the Freedom of Information Act (FOIA), citizens asked for specific records that would support statements by DEQ about the state's regulatory review process. In response to those records requests, DEQ had to answer in nearly every instance that it "has no records," showing that the basic procedures used to make scientific conclusions have not been followed by the Department.

The State Water Control Board (Board) bears the heavy responsibility to "ensure" that these projects can dig and blast through our streams and wetlands without violating regulations designed to protect these state waters. The administration and the Board must act to insist that sound science be used, by requiring individual assessments of proposed waterbody crossings. Citizens have been asked to provide evidence that NWP 12 will not ensure compliance with our water quality standards. Conservation groups and individuals are supplying facts and technical analyses in response to that challenge. But the public's evidence must be laid alongside the record DEQ has built - a record that is shown by DEQ's own admissions to be largely devoid of any solid proof.

Introduction

As recently as May 30, 2018, Governor Ralph Northam repeated claims that DEQ and other administration officials have made in regard to the pipeline reviews. In response to a question during an interview on WTOP radio, the Governor stated: "We have moved forward with this in a way that is using science and also the law. . . . We're doing everything that we can with our agencies . . . to make sure that if they do move forward that it's done, one, with transparency, two, with science, and three with the law."¹

The Governor, the Board, and the citizens of Virginia have been misled. The scientific rigor we have been promised by DEQ, and which we have a right to expect, does not exist. The Department's general assurances are shown to be without evidentiary support.

DEQ and the Board routinely apply a range of scientifically-valid procedures to predict the impacts of proposed projects on Virginia's waters and to prevent harm. These basic protocols are used in developing regulations and in considering whether individual permits may be issued.

¹ WTOP radio show, May 30, 2018, <https://www.facebook.com/wtopnews/videos/10156414176971484/>

Reviews of polluting projects should and generally do include:

- examination of past projects in Virginia where regulatory requirements were imposed, to see if our waters were fully protected,
- examination of findings from other localities and from the scientific literature,
- application of those findings to circumstances present in our waters, and
- analyses of specific evidence pertinent to the particular cases where decisions are required.

In this report, we recount specific claims by DEQ that it followed the protocols described, in relation to waterbody crossing methods pipeline companies propose to use in thousands of instances across Virginia. The evidence disproves DEQ's claims.

DEQ's Experience with NWP 12 in Virginia

One valid method used to predict environmental impacts from prospective actions is to look at the record of past events. And while such observations should be supplemented by analyses to apply those past results to current projects, such an investigation should be a required step in any regulatory review. Given that thousands of smaller utility line projects have been built in Virginia under the requirements of NWP 12, there must be abundant information for DEQ to assess.

DEQ claims it has made just such an investigation and that the results support a conclusion that NWP 12 will be fully protective of waterbodies to be crossed by MVP and ACP. For example, in a letter dated April 17, 2018, DEQ Director David Paylor stated: "Based on DEQ's experience observing linear projects constructed under the requirements of NWP 12, DEQ determined that NWP 12 will protect water quality at each site."

Mr. Paylor's claim compels an obvious question: what is DEQ's "experience observing" these projects? The Dominion Pipeline Monitoring Coalition (DPMC) attempted to find the answer to this question. In a FOIA request dated April 16, 2018, we asked for "[a]ny data or other information collected or reviewed by DEQ with the purpose and intent to assess whether activities that have previously been covered by and were in compliance with U.S. Army Corps of Engineers Nationwide Permit number 12 (NWP 12) and Regional conditions associated with NWP 12 can meet or have met Virginia water quality standards." We also asked for "[a]ny analysis or discussion of data or information as described above."

DEQ's response: "The agency has no records regarding your 4.16.18" FOIA request.

This shocking admission by DEQ shows that the Department apparently skipped this vital step and failed in its promise to use common scientific methods.

DEQ's Investigation of Crossings in West Virginia

Another valid scientific approach to predict effects of projects in one area is to examine impacts in other jurisdictions where similar conditions exist. DEQ officials claimed to have done this but could supply no records to prove its claim.

In a brief discussion by Melanie Davenport, DEQ's water permitting division director, during her presentation to the Board on December 7, 2017, Ms. Davenport described actions and deliberations that apparently, in her mind, support DEQ's choice not to require individual applications and hold individual crossing review processes for the two pipelines. Of course, we recognize this discussion was not intended to be an exhaustive review of DEQ's thinking but, because it is some of the only evidence available to us and the Board, we have examined it closely. We must assume, since Ms. Davenport offered this description to the Board, that she considered it a valid general depiction of the considerations DEQ has had and the reasoning it has followed.

Ms. Davenport stated the following, during day two of the Board's meeting for MVP:

I reached out to our VWP folks. I sent Dave Davis and one or two of his stream restoration folks for two or three days out to West Virginia to go into the field with West Virginia DEP staff to see post-construction stream restoration: how were the stream construction practices used; were they successful in returning crossed streams to their natural contour and Dave came back and said "you know they've done a pretty good job. We saw a lot of decent stream restoration after construction." So, I don't want you to be left with the idea that we haven't thought about these things; we haven't tried to educate ourselves.

Again, we asked to see documents that describe the observations DEQ staff made in their visits to West Virginia projects and the analyses they conducted based on those observations. Specifically, in a FOIA request dated April 30, 2018 we asked for:

Any records that contain or describe the actions and impacts DEQ personnel observed at sites in West Virginia, as mentioned in Ms. Davenport's report to the Board, and any analysis of those observations or findings as they relate to the requirements in Virginia water quality standards.

DEQ's response included not one word of description or explanation of what DEQ staff saw in West Virginia and not one bit of analysis of what those observations taught them. Instead, we received a set of photographs. These photos included no captions to describe where they were taken or what they depict. The records acquired from DEQ provide no indication of any kind as to whether the sites DEQ viewed or the streams crossed in West Virginia have any resemblance to the broad range of crossings MVP and ACP propose for Virginia. Many questions must be answered before the Board and the public can know the value of DEQ's efforts, the most basic being, "why did staff fail to document their work in a way that's consistent with thorough scientific analysis. Just a few of the issues DEQ should have but failed to address include:

- Were any of these crossings blasted through bedrock stream bottoms, as the companies propose to do in hundreds of cases in Virginia? If so, did the companies place concrete in the stream bottoms, as they propose to do in Virginia, and how have those actions affected stream quality and uses? Did the companies, in those cases, conduct subsurface

investigations to see what effects the blasting would cause or any follow-up to assess lasting impacts?

- Are any of the streams depicted in the photos from West Virginia in karst terrain or near sinkholes and caves, as many proposed crossings would be in our waters? If so, did those crossings contribute pollutants to groundwater, wells, and springs? Did those crossing activities disrupt underground flows and damage associated drinking water supplies?
- How long after the crossings occurred were these photographs taken? If significant time had not elapsed, how can we be confident that the “restored” stream beds and banks are stable and habitats were protected?
- Were these streams assessed for changes in water temperature or habitat quality after forest cover was replaced by large open areas in the riparian zone and in the watershed as a whole?
- The photos supplied by DEQ did not include any areas where natural stream banks were replaced with riprap or other “engineered” structures. Did DEQ staff look at such sites and, if not, why not? If such structures are used to stabilize stream banks and riparian areas, as the Corps’ permit will allow in Virginia if the agency decides it is not “practicable” to do otherwise, how did these methods affect aquatic habitats and functions and human uses?
- Are there ponds, reservoirs, or slow-flowing waters downstream of the crossing points shown in West Virginia, such that sediments released during crossing construction would or could alter habitat for extended periods? Such conditions do exist in numerous locations along each pipeline route in Virginia.
- Are there multiple crossings that DEQ viewed that lie within small, connected drainage areas, such that they have combined effects?

DEQ’s failure to present any details of its investigation of projects in West Virginia and the absence of any analysis to show how those projects compare to Virginia environments betrays the very concept of scientific rigor.

Lack of DEQ Analyses of Individual Crossings

Before DEQ can make valid findings as to the ability of projects covered by NWP 12 to meet Virginia’s standards, DEQ must either examine individual reviews of crossing points conducted by the Corps if, as DEQ claims, those reviews were adequate. Or DEQ must conduct its own individual reviews. DEQ has done neither. Such reviews are especially important, given DEQ’s failure to look at previous examples of projects, as demonstrated above.

In a series of five FOIA requests to DEQ, all dated May 7, 2018, we asked for records related to sixty-five separate crossings (19 for MVP and 46 for ACP). The individual crossings are found in small headwater drainages where they must have combined impacts. In each case we sought the following records.

1) “Any site-specific records that DEQ has created or reviewed in the course of its decisional process in relation to its Clean Water Act (CWA) section 401 responsibilities for the proposed crossing sites” including “site-specific descriptions or characterizations of the physical, chemical, or biological characteristics of the sections of waterbodies associated with any one of the crossings or of any combination of the crossings and should include but not be limited to data, photographs, drawings, or narrative descriptions.”

2) “Any records that describe site-specific analyses performed by DEQ or reviewed by DEQ as to the potential for proposed project-related activities at any of the individual sites listed . . . to cause or contribute to violations of Virginia water quality standards (WQS) for either surface waters or groundwater, either at crossing sites or in other portions of the waterbody or watershed that may be affected by the crossing activities.”

3) “Any records that describe waterbody-specific or watershed-specific analyses performed by DEQ or reviewed by DEQ as to the potential for proposed project-related activities at any or all of the listed sites to cause or contribute to cumulative impacts and the potential for those cumulative impacts to violate Virginia WQS, for either surface waters or groundwater.”

Note that these requests were for information created or reviewed by DEQ. This would include work done by Virginia or work done by the Corps, the pipeline companies, or any other party and reviewed by DEQ.

DEQ’s answers these requests: “The agency does not have any . . . records that would be substantive to your requests submitted.”

DEQ has claimed that it has looked at every foot of the pipeline routes but the Department clearly cannot back up that assertion.

DEQ Experts’ Recommendations

The need for individual analyses for specific waterbody crossings was strongly demonstrated by comments DEQ’s technical staff made in submittals to the Federal Energy Regulatory Commission (FERC) in response to draft environmental impacts statements for each pipeline. In each case the staff stated that FERC should

[a]dd a recommendation to direct [MVP and ACP] to conduct pre-impact characterizations of proposed stream and wetland crossings to include sufficient evidence that the system will be able to maintain its original functions indefinitely after restoration. DEQ is concerned that the proposed temporary impacts could result in a permanent alteration of the impacted systems post construction. Pre-impact characterizations should include subsurface investigations at temporary stream and wetland impact areas to establish the feasibility of restoring the systems post construction and hydrologic assessments, including piezometers, to establish pre-impact hydrologic conditions at temporary wetland impact areas.

DEQ staff’s statement that it was “concerned that the proposed temporary impacts could result in a permanent alteration of the impacted systems post construction” should have prompted the kinds of individual assessments citizens have consistently called for and strongly supports the need for the Board to insist on individual crossing review. The staff’s recommendation that “[p]re-impact characterizations should include subsurface investigations at temporary stream and wetland impact areas to establish the feasibility of restoring the systems post construction and hydrologic assessments . . . to establish pre-impact hydrologic conditions at temporary wetland impact areas” clearly demonstrate the urgent need state staff saw for some party to conduct individual and intensive assessments.

To see whether the DEQ experts' concerns had been heeded by agency officials, we filed a FOIA request on April 30, 2018 seeking:

Any records describing or discussing pre-construction investigations such as those described in staff comments to FERC that have been conducted by any party and reviewed by DEQ and any results of such investigations incorporated into DEQ analyses or used to decide that individual waterbody crossing reviews by DEQ are not necessary.

DEQ's response to this request: "There are no records regarding [the request]."

Thus, DEQ leadership apparently ignored or dismissed its own staff's concerns. No party - not DEQ, the Corps, nor FERC - required such testing or analyses. Is this a demonstration of the sound science we've been promised?

DEQ's Reservation of Authority to Conduct Individual Crossing Reviews

When DEQ issued a blanket certification for NWP 12 to cover all utility line crossings in Virginia, the Department stated:

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.

This reservation of authority by DEQ would seem to indicate the Department believed that circumstances could arise when individual crossing reviews would be required; that the one-size-fits-all requirements of NWP 12 would be insufficient to protect Virginia waters in at least some instances. To understand DEQ's reasoning and actions in this regard, we asked for the following in a FOIA request dated April 30, 2018.

- *Any records that contain or describe a protocol or decision framework to guide DEQ's analysis of whether individual reviews are warranted and, if so, what are the substantive and procedural components of that protocol.*
- *Any lists or discussions of factors to be used in deciding whether to exercise DEQ's authority "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," and rationales for including, excluding, or weighting the value of certain factors used in analyses.*
- *All records for projects where DEQ has exercised its reserved authority to require individual 401 reviews of any utility line crossing and, if such reserved authority was exercised, any records describing how the subject project(s) compare with MVP and ACP.*

DEQ's response on these issues: "The agency has no records."

This answer from DEQ shows that the Department has no plan or procedures to review NWP 12 projects or to exercise the authority it reserved. Indeed, DEQ apparently has never used the powers it retained through this condition.

We cannot know the reasons DEQ placed this clause in the certification. In response to another request contained in the April 30 FOIA, where we asked for “[a]ny records that describe the reasoning that led DEQ to insert the reserve clause in the general certification,” DEQ withheld “2 email chains . . . in accordance with the attorney client privilege Va. Code 2.2-3705.1(2).” We insisted that “[i]f the rationales for regulatory actions are to be withheld from the public, then DEQ will be guilty of depriving the public of vital information about how our government operates. This will certainly violate the spirit of the FOIA law. . . . Even if the exclusion applies, DEQ has the authority to release the records unless such disclosure is prohibited by law.”

If DEQ is ever to use its reserved authority to review individual pipeline crossings, the MVP and ACP cases provide the most obvious and urgent cases for doing so. Given the huge scale and widespread impacts of each project, the sensitivity of aquatic environments to be affected, and the fact that the Corps’ analysis fails to take any account of cumulative impacts of multiple crossings in certain small watershed areas, individual analyses are vital for these projects. DEQ must answer for its refusal to do so. The Board must insist on those answers.

Conclusion

The State Water Control Board is attempting to fulfill its duty, by seeking information about the degree to which NWP 12 may or may not protect state waters from damage caused by these pipelines. We sincerely ask that, in addition to its review of evidence provided by the public, the Board order DEQ to explain and fill the gaps in the record demonstrated by the findings from records requests described above. Then, individual certification reviews for crossings must be completed before MVP and ACP are allowed to invade and destroy our precious streams and wetlands.

Will the State of Virginia finally use science and restore the integrity of this regulatory system and the confidence of the public?