

October 8, 2015

Colonel Jason Kelly
District Commander
U.S. Army Corps of Engineers
Norfolk District

Sent Via Email

Re: Request by Dominion Resources for Coverage of Atlantic Coast Pipeline by Nationwide Permit 12

Colonel Kelly:

We write on behalf of our organizations to request an opportunity to meet with you to express our concerns about the referenced topic. We assert that coverage of the Atlantic Coast Pipeline (ACP) under the Nationwide Permit (NWP) would be contrary to law and inappropriate and we feel it is urgent that we have the chance to explain to you the bases of this assertion. Since Dominion Resources notified your office of its intent to be covered by NWP 12 by letter dated September 15, 2015, it is our understanding that the company may “presume that [its] project qualifies for the NWP unless [it] is otherwise notified by the DE within a 45-day period.” 33 CFR § 330.1 (e)(1). Therefore, we hope to speak with you as soon as possible, in consideration of the Corps’ need to act in the near future.

As stated, we wish to convey our concerns to you in person but provide here an outline of the primary issues we wish to present:

- 1) Despite assertions by Dominion Resources to the contrary, the project proposed by the company cannot meet the basic requirement for coverage under Nationwide Permit 12 - that there be no more than minimal adverse impacts to the Nation’s waters from the proposed activities. The company’s Joint Application, at Table B-2, lists over 500 water crossings in Virginia alone. Any contention that severe impacts can be wholly avoided is simply not credible. In many cases, cold water streams holding especially sensitive species will be excavated and possibly blasted and, while the effects of such actions may be lessened with proper procedures or mitigated for, they would inevitably cause significant changes to in-stream habitat and endanger the health of these organisms. We are prepared to explain numerous other ways in which the Dominion proposal could and would have serious individual and cumulative impacts.
- 2) Even if the stream crossings where construction methods are described in Dominion’s application were deemed to meet the threshold for coverage under NWP 12, there are one hundred and forty-one water bodies, listed under the heading “Desktop Delineated Features,” for which the company has failed to list the construction method proposed for making the crossing. We believe it is impossible for Dominion or the Corps to conclude that these actions will not cause significant impacts, without first knowing what would be done in and around these waters. The need to have specific details about these crossings alone provides a basis for rejecting NWP 12 coverage.

3) We contend that conditions placed on the State of Virginia's Clean Water Act section 401 certification for NWP 12, issued in 2012, preclude coverage of this proposal under the certification. We are pursuing this issue with the State but, if our contention on this matter is correct, then coverage under NWP 12 cannot be granted. As stated at 33 CFR § 330.4 (c)(3), "[i]f a state denies a required 401 water quality certification for an activity otherwise meeting the terms and conditions of a particular NWP, that NWP's authorization for all such activities within that state is denied without prejudice until the state issues an individual 401 water quality certification or waives its right to do so." The conditions in the 2012 Virginia 401 certification constitute a denial for any specific project that fails to meet those conditions.

4) Two requirements under Environmental Protection Agency (EPA) regulations (commonly termed "404(b)(1) guidelines"), should require individual analyses for many of the water body crossings proposed. First, "[t]he discharge of dredged or fill material into waters of the United States is prohibited if there is a "practicable alternative" to the proposed discharge that would have a less adverse impact on the aquatic ecosystem." 40 C.F.R. § 230.10(a). While it may be possible to make this determination for some projects to be covered by NWP 12, in a short amount of time and with minimal investigation, such is simply not the case with this project. Sufficient investigation and analysis has not been done here and so NWP 12 is not acceptable.

Second, "[t]here is a presumption that practicable alternatives are available where the proposed discharge occurs in special aquatic sites, such as wetlands, and the activity does not require access or proximity or siting within the special aquatic site to fulfill its basic purpose (i.e. are not water-dependent)." 40 C.F.R. § 230.10(a)(3). As shown in this quote, wetlands are "special aquatic sites." The regulatory definition includes, more broadly, sites that have "special ecological characteristics of productivity, habitat, wildlife protection, or other important and easily disrupted ecological values" and those that "are generally recognized as significantly influencing or positively contributing to the general overall environmental health or vitality of the entire ecosystem of a region." 40 C.F.R. § 230.10(a)(3). There are numerous aquatic resources in the APC's path that fall into these categories and crossings are, therefore, presumed to be prohibited, unless proven otherwise. One specific category that abounds in West Virginia and western Virginia are streams with "riffle and pool complexes," which qualify as "special aquatic sites" and are presumed to be "off-limits" for pipeline crossings. 40 C.F.R. § 230.45.

5) Under the Clean Water Act, public participation in permitting actions is a primary value that is to be "provided for, encouraged, and assisted by the Administrator and the States." 33 U.S.C. § 1251(e) [Section 101(e)] Though the NWPs are publicly noticed and citizen comments are solicited and considered in their issuance, members of the public could never have anticipated the need to comment on a project such as the ACP when the current version of NWP 12 was issued in 2012. Commenters at that time would certainly have envisioned much smaller, less complex projects when providing information and opinions, because most projects covered by NWP 12 are in no way similar to this proposed action by Dominion. Indeed, the Corps' decision document for NWP 12 predicted the Nationwide Permit would authorize "impacts to approximately 400 acres of waters of the United States, including jurisdictional wetlands" per year. See Decision Document at 37. The ACP's notification estimates that the project would impact 306 acres of wetlands in Virginia alone. See Notification at B-30. This clearly establishes

that NWP 12 was not meant to authorize such large-scale projects with significant and widespread impacts to waters of the U.S. Therefore, members of the public will have been deprived of their right to make meaningful comments pertinent to this project when NWP 12 was issued.

We emphasize also that notice and comment procedures, as used under the federal Administrative Procedures Act, are devised “to allow the agency to benefit from the experience and input of the parties who file comments . . . and to see to it that the agency maintains a flexible and open-minded attitude towards its own rules.” National Tour Brokers Ass'n v. United States, 591 F.2d 896, 902 (D.C.Cir.1978). The notice-and-comment procedure encourages public participation in the administrative process and educates the agency, thereby helping to ensure informed agency decisionmaking. Spartan Radiocasting Co. v. FCC, 619 F.2d 314, 321 (4th Cir. 1980); BASF Wyandotte Corp. v. Costle, 598 F.2d 637, 642 (1st Cir.1979), cert. denied, 444 U.S. 1096, 100 S.Ct. 1063, 62 L.Ed.2d 784 (1980). Thus, the kind of public process that would accompany the processing of an individual permit for the ACP, would benefit both the public and the Corps, as is intended by federal law.

6) Finally, even if the Corps should decide that the ACP qualifies for coverage under NWP 12, despite all of the arguments against such a decision, we request that the Division Engineer use the available “discretionary authority to modify, suspend, or revoke NWP authorizations” for a “class of activities” that would encompass ACP and any other projects with a similar scope and complexity, as allowed under 33 CFR § 330.5(c)(1).

An individual review process for a Clean Water Act section 404 permit is necessary for the ACP, on legal, technical, and public policy grounds. We hope you will agree that such a process is in the National interest. We also want to alert you to the fact that we have joined with twenty-six-other groups in Virginia and West Virginia who call on the Corps of Engineers to value their voices in regard to Dominion’s application and will be making a press release this afternoon, to express our concerns to the public. We have attached a copy of that press release to this letter for your information.

Thank you very much for considering our request and we look forward to hearing from you soon. Please contact David Sligh at 434-964-7455 or david@wildvirginia.org with any questions or replies.

Sincerely,

David Sligh
Wild Virginia

Rick Webb
Dominion Pipeline Monitoring Coalition

Ernie Reed
Friends of Nelson

cc: Steve Gibson, U.S. Corps of Engineers, Norfolk District
Jon M. Capacasa, U.S. EPA Region 3