

Legal Bases for CWA Section 401 Reviews

Through this individual review process DEQ will develop a recommendation to the State Water Control Board (Board), which has the authority to make the final decision under the State's authority from section 401 of the Clean Water Act (CWA). Federal approvals cannot be given unless the state grants a Water Quality Certification (Certification) stating there's a reasonable assurance that all Virginia water quality standards (WQS) will be met if the projects are built in accordance with the conditions in the Certification.

Tell DEQ the draft Certification it has published is inadequate to ensure compliance with WQS, because DEQ has failed to require all necessary information from the companies and has not made the necessary analyses. DEQ must recommend the Board deny Certification, based on the record that currently exists.

Your comments should be aimed as specifically as possible at ways the pipelines can or will cause or contribute to violations of the WQS. That is the legal question that will determine whether a Certification is legally supportable or not.

Water Quality Standards consist of several parts. Those most pertinent here are:

- Designated Uses - recreation and support of native aquatic life communities are designated uses in all state waters. More specific uses, such as trout waters and public water supplies, are designated for only certain specified streams. Anything that negatively affects the stream habitat, results in discharges of pollutants (especially sediments), or changes the way stormwater flows off the land may cause designated uses to be damaged or eliminated.
- Antidegradation requirements - high water quality must not be lowered in streams where it currently exists and, even where there are some pollution problems (impairments), all "existing uses" must be fully supported.

If you can, describe ways you use waterbodies that would be directly affected by pipeline work or are downstream of those areas. If you use a stream for fishing, boating, swimming, or just for aesthetic enjoyment those are valid recreational use that DEQ must protect. Describe waters you know to have valuable and sensitive species (brook trout, mussels, endangered species, etc.).

The draft Certification says these reviews cover "all proposed upland land-disturbing activities associated with the construction, operation, maintenance, and repair of the pipeline . . . related access roads and rights-of-way as well as certain project-related surface water withdrawals. This Certification covers all relevant upland Project activities within the route identified in the Environmental Impact Statement."

The activities DEQ says are covered by the individual 401 process may violate WQS by themselves or in combination with other pollution sources that DEQ is refusing to address here. It is the cumulative effects or all sources that will determine whether standards can be met and DEQ can't ignore other factors, even if they are not explicitly covered in this review. In some streams and watersheds, pipeline construction would include land disturbance along the pipeline path for miles (land disturbance, removal of vegetation, blasting rock, etc.), building new roads and upgrading existing ones, stream crossings, water withdrawals, etc. So far, DEQ has made no assessment of cumulative impacts.

DEQ claims it is fully protecting our waters through a number of blanket approvals in combination with these individual 401 Certifications. None of those separate approvals ensures WQS will be met nor do the conditions in the individual draft Certification. DEQ proposes to complete reviews of erosion and sediment control plans, stormwater management plans, and many detailed plans, such as characterizations of karst areas, after the public comment period ends and DEQ refuses to consider the results of those reviews in this process.

Discharges from upland activities will result in sediment discharges and the pollution control measures proposed will not prevent stream impairments in some cases, where there are steep slopes, highly erodible soils, and fine soils that cannot be filtered out by silt fences and other methods. Such discharges will impair habitats and fish populations for months or years and will prevent people from using those stream sections. Even temporary impairments of uses are prohibited in Virginia WQS. DEQ has failed to analyze whether antidegradation requirements can be met in any of its analyses.