February 28, 2019

Members of the State Water Control Board
c/o Office of Regulatory Affairs
Department of Environmental Quality
P.O. Box 1105
Richmond, Virginia 23218

Sent Via Email

Dear Chairman Wood and Members of the State Water Control Board:

I. Introduction

The State Water Control Board (Board) has the authority to revoke the water quality certification for upland activities that it issued to Mountain Valley Pipeline, LLC (MVP). The violations MVP has committed and the damage it has done easily meet and exceed the thresholds defined in Virginia law upon which revocation may be based.

We strongly urge the Board to order the Department of Environmental Quality (DEQ) to schedule and issue notice for a formal hearing by a specific date not to exceed ten days from the date of your decision. The delay that has followed the Board's order to DEQ to take those steps, issued on December 13, 2018, has already allowed harm to the environment and people to continue unabated for eleven weeks. In addition to proceeding to a revocation hearing for the water quality certification, we ask the Board to take all possible steps to stop work on this project immediately.

Section II of this letter includes an analysis of the legal issues that are pertinent to your decision. This analysis makes clear that the Board retains full authority to enforce the terms of its Certification, including the condition that allows for revocation in the case of non-compliance. The Board did not waive its authority to issue the upland certification and neither Clean Water Act subsection 401(a)(3) or 401(a)(5) limit the Board's authority to revoke MVP's certification in accordance with its terms.

Section III discusses the factual bases that support this revocation and the attachments depict specific sites that have caused continued violations for months. We specifically refute both legal and factual assertions that MVP made in a letter sent to DEQ Director Paylor on February 12, 2019, which was transmitted to Board members.

While MVP claims in its letter that the project is 70% complete, Jerome Brooks of DEQ testified to the Board in December that only about 20% of the project was complete in Virginia at that time. Regardless of the accuracy of these estimates, however, there remains a very real possibility that this pipeline will never be completed or will be forced to follow a different route. A federal court

invalidated the approval to cross the National Forest and all waterbody crossings are currently prohibited because Corps of Engineers' permits have either been struck down by the courts or suspended. The Fourth Circuit Court of Appeals' decision that the Atlantic Coast Pipeline cannot cross the Appalachian Trail on National Forest land is applicable to MVP as well.

The harm that is being caused all along the pipeline's path has proven that the "reasonable assurance" of water quality protection expressed in the certification issued in December 2017 was not justified. There is still time for the Board to take effective action. To fail to act now would be particularly tragic should the pipeline be abandoned or the route changed substantially. All of the harm to our waters and pain inflicted on residents will have been caused for no reason.

II. Legal Framework

A. The Board Did Not Waive its Authority to Issue the Certification for Upland Activities

Waiver under 33 U.S.C. § 1341(a)(1) is a complicated legal issue, and the timing of this case—MVP claiming waiver more than a year after accepting the 401 Certification—is unusual. To the best of our knowledge, no court has considered waiver of a state's Section 401 authority under the facts presented here—specifically, waiver after an applicant has accepted a state certification and commenced work on the project for almost a year. Here, we present what are, in our view, persuasive responses to a claim of waiver by MVP.

MVP has indicated it may argue that Section 401's one-year waiver period began in February 2016, when it first submitted an incomplete Joint Permit Application to the Army Corps of Engineers and DEQ for a Section 404 permit and Section 401 certification. This was more than a year before the Board issued the upland certification for the project in December 2017. However, as explained below, the upland certification is for discharges associated with a separate federal license—the FERC certificate— such that MVP's February 2016 application relating to the Corps' Section 404 permit could not have started the clock for waiver. Further, MVP has itself waived any argument that the Board waived its authority to issue the upland certification.

1. The Section 401 one-year period for the upland certification did not begin until May 2017.

The one-year period for the upland certification—the certification that the Board initiated revocation proceedings for—did not begin until May 2017. In February 2016, Mountain Valley requested a Section 404 Nationwide Permit 12 from the Corps to cover wetland, river, and streams crossings. DEQ issued a 401 certification of Nationwide Permit 12 in April 2017. Subsequently, DEQ

decided in May 2017 to also certify MVP's FERC permit to cover upland impacts of the pipeline, which are not regulated under Section 404. The Board issued a 401 certification of the FERC Certificate—the upland certification—in December 2017.

DEQ's May 2017 decision initiated a new 401 certification process. The language of DEQ's request supports this argument. In its letter to Mountain Valley, DEQ stated that "[a]ny additional certification conditions that may be developed will be separate from and in addition to any other requirements established by … Clean Water Act § 404 permits for the protection of stream and wetland crossings." Letter from Melanie Davenport, DEQ to John Centofanti, EQT (May 19, 2017) ("Davenport Letter"). This language and the scope of the upland certification, indicates that it is distinct from the Board's certification of Nationwide Permit 12. A recent D.C. Circuit decision supports this argument. In *Hoopa Valley Tribe v. FERC*, the D.C. Circuit found that resubmission of an identical request did not restart the one-year clock; however, the court did indicate a truly "new request" would restart the one-year clock. *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1104 (D.C. Cir. 2019). The court declined to address how different a request must be to constitute a "new request." *Id.* In MVP's case, DEQ's May 2017 decision – which requested entirely new information for certification of different discharges associated with a different federal license – constituted a new request and in turn triggered a new one-year period under Section 401.

The Second Circuit's recent decision in *N.Y. State Dept. of Envtl Conservation v. FERC* does not require a different result. There, the Second Circuit found that new information requests from the certifying agency did not restart or extend the one-year time period for certification. *N.Y. State Dept. of Envtl Conservation v. FERC*, 884 F.3d 450 (2d Cir. 2018) (Millennium). In that case, however, the new information requested pertained to the same activity covered by the same federal license for which certification had been requested. Here, the new information requested pertained to distinct discharges resulting from a separate federal license, *i.e.*¸ the discharges associated with upland activities authorized by the FERC license, than MVP's original request for certification, which pertained only to the Corps-authorized Section 404 discharges resulting from work directly in streams and wetlands.

2. Mountain Valley waived the Section 401 waiver defense.

Mountain Valley waived its right to raise the Section 401 waiver defense when it accepted the upland certification. Support for this counterargument can be found in cases considering whether parties have waived a right to raise certain claims under a contract. In these cases, the Virginia Supreme Court has found that the two essential elements of waiver are: (1) knowledge of the facts basic to the exercise of the right waived and (2) the intent to relinquish that right.

Stuarts Draft Shopping Center, L.P. v. S-D Associations, 251 Va. 483, 489-90 (1996). The Court requires these elements to be shown by "clear, precise, and unequivocal evidence." *Id.* at 490.

At issue here is whether Mountain Valley intended to relinquish its right to raise the Section 401 waiver defense. Of course, Mountain Valley accepted the upland certification—including the term that provides for revocation in the instance of non-compliance—and has constructed its pipeline under that permit for almost a year. Presumably, Mountain Valley did not indicate to the Board that it considered any certificate issued by the Board to be unenforceable at the time it accepted the permit. There are also good policy reasons that support this response. For example, the purpose of the one-year period in Section 401 is to prevent unreasonable delay. Here, any potential undue delay in issuing the certificate that may have occurred is over. Instead, Mountain Valley seeks to use the one-year period as a means of preventing legitimate enforcement by the Board of a condition of the certification. Rather than furthering the policies underlying Section 401, acceding to Mountain Valley's assertion of the Section 401 waiver defense would actually contravene another Section 401 policy – preserving state authority.

Mountain Valley may argue that the evidence of its relinquishment of the Section 401 waiver defense is not "unequivocal." In contract cases, the Virginia Supreme Court has found that neither delay in asserting a claim nor acceptance of less than full performance of a contract proves intent to waive such right. *See Stuarts Draft*, 251 Va. at 490; *Stanley's Cafeteria, Inc. v. Abramson*, 226 Va. 68, 74 (1983); *Horton v. Horton*, 254 Va. 111, 116 (1997); *May v. Martin*, 205 Va. 397 (1964). These cases are distinguishable on the grounds that Mountain Valley was presented with a binary choice when the permit issued—accept it or assert the Section 401 waiver defense. Unlike a traditional contract case, it is not the purpose of a Section 401 certification to allow the applicant to choose to assert waiver to prevent unreasonable delay or later down the road when the state decides to enforce a condition of its certification.

The equitable doctrines of laches and equitable estoppel from contract law are also persuasive in favor of the Board's continued authority. "Laches is the neglect or failure to assert a known right or claim for an unexplained period of time under circumstances prejudicial to the adverse party." *Princess Anne Hills Civic League, Inc. v. Susan Constant Real Estate Trust*, 243 Va. 53, 58 (Va. 1992). Here, MVP appears to have waited more than a year to raise the Section 401 waiver defense, and the Board and the public have relied on MVP's acceptance of the upland certification as a critical measure to ensure the protection of water quality. The doctrine of laches prevents MVP from sitting on its hands indefinitely before raising this claim.

Under Virginia law, equitable estoppel requires the following elements which must be proven by "clear, precise, and unequivocal evidence": "(1) representation, (2) reliance, (3) change of position, and (4) detriment." *Id.* at 59. Based on the evidence available to us, the Board has persuasive facts in its favor related to each of these elements. Specifically, MVP represented to the Board that it accepted the upland certification and its terms in December 2017, the Board and the public have relied on MVP's acceptance of the certification, and MVP has now changed its position to the substantial detriment of the Board. Like laches, the doctrine of equitable estoppel prevents MVP from waiting more than a year to assert the Section 401 waiver defense.

Finally, MVP is barred from challenging the term of its Certification allowing for revocation by the doctrine of *res judicata* because MVP was a party to the judicial challenge to the Board's certificate and failed to pursue a claim of waiver. It is thus bound by the Fourth Circuit's decision upholding the Board's Certification in *Sierra Club v. State Water Control Bd.*, 898 F.3d 383 (4th Cir. 2018). *See FPL Energy Maine Hydro LLC v. FERC*, 551 F.3d 58, 63 (1st Cir. 2008) (barring a party under *res judicata* from re-litigating the merits of a Section 401 certification that had already been subject to judicial review).

B. The Board has Authority to Revoke the Certification under Virginia Law

The water quality certification the Board issued for the upland activities related to the Mountain Valley Pipeline (pipeline) includes a condition stating that "[t]his Certification is subject to revocation for failure to comply with the above conditions after a proper hearing." *Certification No. 17-001, 401 Water Quality Certification Issued to Mountain Valley Pipeline, LLC*, at IV.14. The conditions referenced include a range of requirements specifically stated in the certification and reference the requirements of "the Stormwater Management Act (Va. Code § 62. 1-44. 15:24, etseq.) and Erosion and Sediment Control Law (Va. Code § 62. 1-44. 15:51, et seg.) and the Virginia Water Protection Permit Program Regulations (9 VAC 25-210-10, et seq.)." Id. at IV.13.

As explained below in regard to authority reserved to states under Clean Water Act (CWA) section 401, states may condition certifications and, those conditions must be incorporated into the federal license. The validity of those conditions is primarily judged under state law.

The State Water Control Law (SWCL) grants broad authority to the State Water Board that plainly includes authority to act on the cited condition in the certification. In particular, the Board has the power to issue, revoke, or amend "certificates"[1] for discharges, activities that would affect the properties of state

[1] The Code defines "certificate" as "any certificate issued by the Board."

waters, and for excavation and other actions in wetlands. Va. Code § 62.1-44.15(5).

The SWCL provides that any such certificate "may, after notice and opportunity for a hearing, be amended or revoked on any of the following grounds or for good cause as may be provided by the regulations of the Board:

> 1. The owner has violated any regulation or order of the Board, any condition of a certificate, any provision of this chapter, or any order of a court, where such violation results in a release of harmful substances into the environment or poses a substantial threat of release of harmful substances into the environment or presents a hazard to human health or the violation is representative of a pattern of serious or repeated violations which, in the opinion of the Board, demonstrates the owner's disregard for or inability to comply with applicable laws, regulations, or requirements;
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> 2. The owner has failed to disclose fully all relevant material facts or has misrepresented a material fact in applying for a certificate, or in any other report or document required under this law or under the regulations of the Board;
>
> 3. The activity for which the certificate was issued endangers human health or the environment and can be regulated to acceptable levels by amendment or revocation of the certificate; or
>
> 4. There exists a material change in the basis on which the permit was issued that requires either a temporary or a permanent reduction or elimination of any discharge controlled by the certificate necessary to protect human health or the environment.

Va. Code § 62.1-44.15(5b) (emphasis added).

C. Clean Water Act Subsection 401(a)(3) Does Not Apply in This Instance

Section 401 of the Clean Water Act does not limit the authority of the Board to revoke the 401 certification at issue here. Subsections 401(a)(3) and 401(a)(5) address particular circumstances under which state and federal agencies may withdraw coverage or revoke certification, or a federal permit. Neither of these provisions limits the state's authority to revoke in the case.

Some courts have interpreted Subsection 401(a)(3) to govern revocations. The subsection governs when a certification issued for construction of a facility will also be deemed certification for the operation of that same facility, unless the state takes certain actions. Therefore, the application of this section of the Act

is limited to facts not presented here. *See* 33 U.S. Code § 1341(a)(3). Here we have two separate sets of construction activities covered under two separate water quality certifications—one for those in-stream activities regulated by the Corps of Engineers and another for the broader set of upland activities regulated by FERC.

Nevertheless, a leading case discussing revocation is *Keating v. FERC*, 927 F.2d 616 (DC Cir. 1991). In Keating, the court determined that Keating's hydropower dam construction project had been covered by a blanket certification California issued for a Corps of Engineers' Nationwide Permit and the court held that the same certification applied to the FERC license to operate the same project once constructed. Therefore, the court ruled that California, having granted certification for the construction permit, could withdraw or revoke state certification for the FERC *operation* license only if it met the criteria listed in section 401(a)(3). The *Keating* court expressly and repeatedly limited its analysis and decision to subsection 401(a)(3). As the circumstances that trigger the requirements of paragraph (a)(3) do not exist in the case of Virginia's certification of upland pipeline *construction* activities, this subsection and the Keating case are not applicable to the Board's action here.

D. The Board's Authority to Enforce the Term of Its Certificate Allowing for Revocation Is Not Preempted by Clean Water Act Subsection 401(a)(5)

As explained above, Virginia law gives the Board the power to enforce the terms of the certificates it issues pursuant to its federally-delegated Clean Water Act authority. See Section II.B, *infra*; Va. Code § 62.1-44.15(6) (granting the power to enforce certificates); U.S. EPA, Office of Wetlands, Oceans, and Watersheds, *Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes*, at 32-33 (discussing state enforcement of the terms of Section 401 certifications). The Certification issued to and accepted by MVP plainly allows for revocation on the basis of the type of persistent non-compliance that MVP has demonstrated. *Certification No. 17-001*, at V.14 ("This Certification is subject to revocation for failure to comply with the above conditions after a proper hearing."); *Keating v. FERC*, 927 F.2d at 623–24 (dismissing a state's "general reservation of discretionary authority" to revoke previously issued certifications, but noting that when "states make compliance with specified conditions a prerequisite to the effectiveness of a certification," as the Board did in MVP's certificate, those conditions are enforceable). The revocation authority granted by the Certification is consistent with the Board's powers under Virginia law implementing the Clean Water Act. See, e.g., Va. Code § 62.1-44.15(5), (5b). And the Natural Gas Act specifically preserves the states' powers under the Clean Water Act. 15 U.S.C. § 717b(d)(3); *Am. Rivers, Inc. v. FERC*, 129 F.3d 99, 110–11 (2d Cir. 1997) ("While [FERC] may determine whether the proper state has issued the certification or whether a state has issued a certification within the prescribed period, [FERC] does not

possess a roving mandate to decide that substantive aspects of state-imposed conditions are inconsistent with the terms of § 401.”).

Clean Water Act Subsection 401(a)(5), 33 U.S.C. § 1341(a)(5), does not preempt the Board’s authority to enforce the terms of its certificates. “Preemption is strong medicine, not casually to be dispensed.” *Grant's Dairy—Maine, LLC v. Comm'r of Maine Dep't of Agric., Food, and Rural Res.*, 232 F.3d 8, 18 (1st Cir.2000). Preemption of state authority by federal law may be express, implied by the pervasiveness of the federal scheme (“field preemption”), or implied because of a direct conflict between state and federal authority (“conflict preemption”). *See Friends of Merrymeeting Bay v. Olsen*, 839 F. Supp. 2d 366, 372-73 (D. Me. 2012). None of those situations exist here.

First, Subsection 401(a)(5) does not expressly preempt any state authority. Express preemption of a state law occurs where “a federal statute explicitly confirms Congress's intention to preempt state law and defines the extent of that preclusion.” *Grant's Dairy—Maine, LLC*, 232 F.3d at 1. Section 401(a)(5) lacks any reference to state authority under Section 401 such that there is no express preemption.

Second, the Clean Water Act does not “occupy the field” of water quality regulation such that a state’s authority under Section 401 would be subject to field preemption. To the contrary, Virginia has been specifically delegated authority to implement the Clean Water Act within its borders and its state legislation provides explicit authority to enforce the terms of certificates issued by the Board, including the revocation term in MVP’s Certification. *See Wash., Dep't of Soc. & Health Servs. v. Bowen*, 815 F.2d 549, 557 (9th Cir.1987) (““Where coordinated state and federal efforts exist within a complementary administrative framework, and in the pursuit of common purposes, the case for federal preemption becomes a less persuasive one.”); *Pharm. Research & Mfrs. of Am. v. Concannon*, 249 F.3d 66, 75 n.6 (1st Cir. 2001) (finding no field preemption regarding Medicaid because the statute is a “cooperative federal and state program”), aff’d sub nom. *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644 (2003); *Friends of Merrymeeting Bay*, 839 F. Supp. 2d at 373 (“An inference that Congress intended to preclude state regulation is unreasonable in a cooperative federal and state program . . . .”). Indeed, the Clean Water Act’s basic structure provides for overlapping authorities of the states and federal agencies. For instance, states may assume responsibility for issuance and enforcement of Clean Water Act permits within their borders, see 33 U.S.C. § 1342(b), but, despite that authority, the U.S. Environmental Protection Agency may nonetheless enforce the terms of those state-issued permits. 33 U.S.C. § 1319. There is thus no implied field preemption.

Finally, there is no conflict between Subsection 401(a)(5) and the Board’s authority that would give rise to preemption. Subsection 401(a)(5) merely

provides additional federal authority to revoke an overlying federal license in the face of Clean Water Act violations. That authority is distinct from the state's independent authority to enforce the conditions of its Section 401 certification. Under 401(a)(5), the federal agency may revoke the entire federal license, which license may authorize activities far beyond the scope of a state's Clean Water Act authority.[2] *See Delaware Riverkeeper Network v. Fed. Energy Regulatory Comm'n*, 857 F.3d 388, 398–99 (D.C. Cir. 2017). A state's authority to enforce the terms of its Section 401 certifications is thus more narrow than the authority granted to federal agencies by 401(a)(5). But it is also more broad, because states may include in their Section 401 certifications enforceable conditions derived not only from the specific sections of the Clean Water Act listed in 401(a)(5), but also "any other appropriate requirement of State law." 33 U.S.C. § 1341(d); *PUD No. 1 of Jefferson Cty. v. Washington Dep't of Ecology*, 511 U.S. 700, 711–713 (1994). Though there may be some overlap in the federal and state authority, there is no direct conflict. Congress's grant of authority to the federal licensing agency thus does not impliedly preempt the state's authority to enforce the terms of its certifications, including the term in MVP's certification calling for revocation.

E. Procedural Requirements for Revocation

At its December 13, 2018 meeting, the Board ordered that notice and a hearing be held to consider whether MVP's upland certification should be revoked. Based on the wording of the motion that was approved by the Board and the discussions pertaining to that motion, the Board mandated that a formal hearing proceeding be conducted.

The following description of the Board's discussion is derived from a recording of the meeting (accessible at State Water Control Board meeting, December 13, 2018). The first motion relevant to this question was made by James Lofton, who called for the Board to "reconsider and go to notice and hearing whether this permit for the Mountain Valley Pipeline should be revoked." This motion passed by a 4 to 3 vote. That motion starts at about 1:11 of the video.

[2] U.S EPA mischaracterizes Subsection 401(a)(5) when discussing suspension of Section 401 certifications in its non-binding guidance document titled *Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes*. EPA claims that "certification" may be revoked by the federal agency based on violations of the enumerated section of the Clean Water Act. *Id.* at 33. But under the plain language of Subsection 401(a)(5), the federal agency may only revoke the overarching federal license, not the certification itself. And the discussion that follows relies on Subsection 401(a)(3), which, as explained in Section II.C, is inapplicable here. *See* id. at 33–34. Moreover, EPA's guidance document does not address the situation where, as here, the duly issued and accepted certification itself provides direct authority for revocation in the event of non-compliance.

Later, after some discussion about the meaning of the motion, Tim Hayes asked Lofton (beginning at about 1:24 on the video) to do him "the courtesy of withdrawing that motion and restating it requesting a formal hearing to consider revocation of the 401 certification for the Mountain Valley Pipeline, for the upland work on the Mountain Valley Pipeline." Lofton apparently stated "alright, I'll do that" and then stated a new motion in nearly the same words as the first motion. Lofton did not repeat the word "formal" in his new motion, however there seems to be no basis to question that this was the intent of the Board.

It is also notable that at the Board's April 12, 2018 meeting, Assistant A.G. Grandis told the Board that he believed a formal hearing would be required if it wanted to withdraw or revoke its certification of the Corps' Nationwide 12 permit. Hayes mentioned that advice from Grandis at the December 13 meeting, implying that it would apply here as well.[3]

1. Formal Hearings Under the Virginia APA

The Board is fully empowered by the Virginia Administrative Process Act (APA) and the State Water Control Law to convene a formal hearing at this time to consider revocation in this case.[4]

The APA provides the basic rules governing formal hearings. See Va. Code 2.2-4020 *et seq.* Its provisions require that parties receive "reasonable notice" of logistical information about the hearing as well as an explanation of the "basic law under which the agency contemplates its possible exercise of authority" and "matters of fact and law asserted or questioned by the agency." The Board's own procedural rules for formal hearings are also applicable to the

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[3] Whether the Board is required to hold a formal hearing for this action, it appears that the Board has the discretion to do so based on Va. Code 2.2-4020 (the agency may hold a formal hearing "in any case to the extent that informal procedures . . . have not been had or have failed to dispose of a case by consent).

[4] MVP suggests that a public (informal) hearing must be held on this matter before setting it down for a formal hearing. While the Board's regulations at 9VAC25-230-50 provide for a preliminary informal process in some cases, no such preliminary process is required by the APA. See Va. Code 2.2-4019, 4020. The State Water Control Law similarly fails to impose such a precondition. See 62.1-44.15 ("Any certificate issued by the Board may, after notice and opportunity for a hearing, be amended or revoked. . . "). Consistent with these statutes, the Certificate itself provides for possible revocation "after a proper hearing," with no requirement for an informal, preliminary process. See Certification No. 17-001, #14. Accordingly, it does not appear that an informal hearing is necessary in this case.

extent consistent with the APA and the State Water Control Law. *See* 9VAC25-230-100, et seq.

Specific procedural points:

- The Board's regulations clarify that each party (including permittee and intervenors) bears the burden of going forward and of persuasion on all issues in its petition. 9VAC25-230-110.
- The parties concerned shall be given opportunity, on request, to submit in writing for the record (i) proposed findings and conclusions and (ii) statements of reasons therefor.
- The agency or its designated subordinates may, and on request of any party to a case shall, issue subpoenas requiring testimony or the production of books, papers, and physical or other evidence.
- In all formal hearings conducted in accordance with § 2.2-4020, the hearing shall be presided over by a hearing officer selected from a list prepared by the Executive Secretary of the Supreme Court and maintained in the Office of the Executive Secretary of the Supreme Court.

2. Intervention by Parties

To participate in a formal hearing, any person may petition the executive secretary of the Board (the DEQ Director) or his/her designee to become a party. 9 VAC 25-230-140. The party must submit the petition within 15 days after notice of the executive secretary's decision to authorize a formal hearing. Id. The petition must contain:

(1) names and addresses of petitioner, petitioner's counsel, and all persons petitioner is acting as a representative for;
(2) statement of interest in the matter;
(3) statement that petitioner and all persons represented will be available to appear, without cost to any other party, at the hearing;
(4) statement setting forth the position of the petitioner with respect to errors alleged in the petition for hearing; and
(5) statement setting forth any cross-errors alleged in the board's action. *Id.*

The executive secretary must grant petitions that meet both requirements (1) through (5) above and raise a genuine and substantial issue in the petition for hearing, or cite one or more issues in the hearing notice, which, if resolved adversely to the petitioner, would result in an injury to an interest of the petitioner (i.e. cognizable injury). *Id.*

Parties may present direct and rebuttal evidence and may conduct cross-examination as necessary to elicit a full and fair disclosure of facts. 9 VAC 25-230-160. The hearing officer shall admit all relevant, competent and material evidence offered, but shall exclude repetitive, irrelevant, immaterial, or

otherwise inadmissible evidence. Id. Reasons for terminating a permit are: (1) noncompliance by the permittee with a condition of the permit; (2) permittee's failure to disclose all relevant facts or misrepresentation of facts during the permitting process; (3) permittee's violation of a special or judicial order; (4) Board determination that permitted activity endangers human health or the environment and can be regulated to acceptable levels by permit modification or termination; (5) change in condition that requires temporary or permanent reduction or elimination of activity controlled by permit; (6) permitted activities has ceased and compensation for unavoidable adverse impacts has been successfully complete. 9 VAC 25-210-180.

F. The Board Should Use All Available Tools to Immediately Halt Construction Pending the Outcome of Its Hearing

The mission and responsibility of the Board is to protect the sanctity of state waters and to achieve higher water quality in Virginia. "It is the policy of the Commonwealth of Virginia and the purpose of this law to: (1) protect existing high quality state waters and restore all other state waters to such condition of quality that any such waters will permit all reasonable public uses and will support the propagation and growth of all aquatic life, including game fish, which might reasonably be expected to inhabit them; (2) safeguard the clean waters of the Commonwealth from pollution; (3) prevent any increase in pollution; (4) reduce existing pollution; (5) promote and encourage the reclamation and reuse of wastewater in a manner protective of the environment and public health; and (6) promote water resource conservation, management and distribution, and encourage water consumption reduction in order to provide for the health, safety, and welfare of the present and future citizens of the Commonwealth." Va. Code Ann. § 62.1-44.2.

The record is replete with evidence of free flowing illegal discharges lasting for months along the MVP construction corridor and harm to groundwater in the Bent Mountain perched aquifer. We note that state law controls the water quality standards for groundwater as well as surface water. To prevent the continued destruction of water sources and to satisfy the Board's mission to improve water quality, the Board has at its disposal important enforcement tools. Contrary to MVP's assertion, not all these tools require months of hearings before implementation.

Virginia law, Va. Code Ann. § 62.1-44.15(8b), grants the Board specific legal authority to issue emergency special orders to stop ongoing violations if a project "is grossly affecting or presents an imminent and substantial danger to (i) the public health, safety or welfare, or the health of animals, fish or aquatic life; (ii) a public water supply; or (iii) recreational, commercial, industrial, agricultural or other reasonable uses." It may issue emergency special orders "without advance notice or hearing" . . . "directing the owner to cease such pollution or discharge immediately." We urge the Board to exercise this

authority in light of the serious, ongoing harm documented along the MVP construction corridor.

Further, Virginia law, Va. Code Ann. § 62.1-44.23, also grants the Board specific legal authority to enforce compliance with state law, regulations, and the conditions of its permits by initiating a proceeding in "any appropriate court." In that proceeding, the Board can seek a preliminary injunction to stop ongoing violations while the case proceeds. Here, the Board has already initiated an enforcement proceeding against MVP alleging as many as 300 violations of state law. Again, we strongly urge the Board to exercise this authority in light of the serious, ongoing harm documented along the MVP construction corridor.

III. The Evidence Justifies Revocation and Stop Work Actions

MVP claims that a "cooperative effort [between MVP and DEQ] on the Project has achieved a high level of environmental protection and overall is in very good order." Letter from Todd L. Normane, MVP to David Paylor, DEQ, *Request to Discontinue Process for Potential Reconsideration of 401 Water Quality Certification*, February 12, 2019 (MVP letter). The facts show that this statement is far from accurate. The company attempts to blame its failures on large storms but cannot hide behind this excuse. The Board did not give "reasonable assurance" that compliance with water quality standards would be achieved only during good weather. Further, many of the violations have occurred throughout the construction period and are not attributable to extreme weather events.

MVP's Certification No 17-001 provides that it may be revoked "for failure to comply with the above conditions." Similarly, Va. Code § 62.1-44.15(5b) provides that the Board may revoke a certificate based on one or more of four conditions or "for good cause." Evidence described in detail in the Commonwealth's enforcement complaint filed in state Circuit Court and in testimony and evidence submitted to the Board, both at its December 18, 2018 meeting and in prior meetings, will support the Board's decision.

The case examples described herein amplifiy and add to the body of evidence that should be considered by the Board in deciding to move forward with the notice and hearing process. A formal hearing, which would provide for the submission of testimony and documents and cross-examination of witnesses, would allow all sides to give further evidence to support the Board's final decision on revocation.

Meeting the description at Va. Code § 62.1-44.15(5b)(1), violations have resulted in release of harmful substances into the environment and continued violations pose a substantial threat of release of harmful substances into the

environment. In addition, the multitude of violations across four counties, affecting dozens of waterbodies, throughout the last seven months, are clear evidence of a pattern that "demonstrates the owner's disregard for or inability to comply with applicable laws, regulations, or requirements."

A limited review of the evidence illustrates serious and harmful individual violations which, taken as a whole, show that MVP has been unwilling or unable to prevent additional violations. For example:

- Contract inspectors for DEQ found:
  - 42 instances where sediment left the work areas and flowed onto adjacent properties and 16 instances where sediments were deposited in waterbodies,
  - 180 instances where deficiencies in pollution controls were not corrected within the required 24-hour period. Corrective action was delayed for long periods, up to 48 days, after the problems were identified,
  - 58 instances where DEQ's minimum standard 1, which requires that soil stabilization be applied within 7 days after active construction ends or it will be inactive for 14 days or more, was violated, and
  - 65 instances where Minimum Standard 2, which requires that soil stockpiles be stabilized or protected to prevent erosion, was violated.
- DEQ measured sediment deposits coating long stretches of stream bottom, constituting serious damage to stream ecosystems and violating water quality standards. For example, in a stream running parallel to Cahas Mountain Road in Franklin County and just downslope from the work area "the Department observed approximately 1,110 linear feet of stream channel containing sediment ranging from 1 to 11 inches in depth. In Montgomery County, DEQ observed "approximately 2,200 linear feet of stream channel containing sediment ranging from 1 to 5 inches in depth."

At sites addressed in the Appendices to this letter a wide range of violations and failures of pollution control measures have occurred repeatedly.

- At the Bernard's property, in Franklin County, perimeter control failed in early June, allowing large volumes of muddy water to flow from the right of way into a stream. Despite multiple attempts, MVP has failed to stop the sediment releases from pouring into the stream in this same area. These uncontrolled flows have caused the stream back to collapse and now to be continually eaten away.
- At the Angle property, failures of sediment basins and outflow controls have released large amounts of sediment off the work site and onto the landowner's field. Some of the sediments discharged have flowed downslope and inundated the landowner's pond with mud. A large plume of sediment-

laden water has flowed from the right of way and flowed overland to the nearby stream.

- At the Werner property, failures of perimeter controls have caused sediments to pollute both Teal Creek and Little Creek. Accumulation of a large ponded body of water on the site has changed the hydrologic flow patterns and caused sections of stream bank to collapse, causing severe damage to property and depositing large volume of dirt into the streams.
- Work on MVP's right of way has caused sediment to enter the groundwater in the karst formation and polluted springs in Montgomery County. Direct connections between sinkholes affected by MVP work and the springs has been shown through dye tracing. These releases violate groundwater quality standards, have damage water supplies, and the effects have persisted and will persist for many months.

These examples and many others also support a finding that "[t]he activity for which the certificate was issued endangers human health or the environment and can be regulated to acceptable levels by amendment or revocation of the certificate." Va. Code § 62.1-44.15(5b)(3). Problems that were identified months ago are still not corrected, so they pose ongoing and continual threats to the environment. The fact that, at multiple sites, large impoundments of muddy water have accumulated and been allowed to persist on work sites, means that each new storm poses the risk that that sediment-laden water will be pushed off-site and into state waters. Every day that large areas of disturbed soil lie bare and without proper stabilization, our waters and the properties of landowners are at risk.

The examples above are just a small sampling of the violations and instances of direct harm to private property and state waters. These facts also directly refute the claims in the MVP letter. In that letter, MVP states that it has been "proactive in working with DEQ to enhance its technical plans and compliance." A "proactive" approach might have led to changes in MVP's practices after the first few times the company failed or refused to correct identified deficiencies during the required 24-hour period. Such a proactive approach to compliance would not allow this same violation to occur 180 times and for delays to extend as much as 48 days. A proactive approach would have had the work site on the Angle's farm stabilized in days or weeks, not continuing to erode and pond with water five months after the pipe was buried.

In truth, the evidence shows a systematic and continual pattern of flouting the law and causing harm as a consequence. When caught in violations, MVP sometimes responds to those individual occurrences but does not seek to find and fix the other locations where those same conditions exist.

IV. Conclusion

In the public conversation over MVP's 401 Certification, some have suggested revocation would involve a change in the governing rules and resulting harm to Virginia's business reputation. As the foregoing demonstrates, however, revocation in the present circumstances would not involve a change in the rules, but its opposite: a decision by the Board to live up to its paramount duty to act in the public interest to ensure the protection of water quality in the Commonwealth in accordance with the unambiguous terms of its Certification. This duty must prompt the Board to take whatever actions are within its authority to stop MVP from inflicting damages on our water resources and citizens. The evidence of harm is already overwhelming and conclusive. However, a notice and formal hearing process will allow the Board to have assembled an even stronger record to support its final decision.

Thank you for your service to the Commonwealth and for considering our opinions and concerns.

Sincerely,

/s/ David Sligh
Conservation Director
Wild Virginia

/s/ Benjamin Luckett
Senior Attorney
Appalachian Mountain Advocates
Counsel for Sierra Club

/s/ Greg Buppert
Senior Attorney
Southern Environmental Law Center

/s/ Margaret L. (Peggy) Sanner
VA. Assistant Director & Senior Attorney
Chesapeake Bay Foundation

/s/ Anne Havemann
Anne Havemann
General Counsel
Chesapeake Climate Action Network

/s/ Thomas J. Bondurant, Jr.
Counsel for
Preserve Bent Mountain

/s/Roberta Bondurant
CoChair
Protect Our Water Heritage Rights Coalition

/s/ Tammy L. Belinsky
Counsel for
Preserve Craig, Inc, and Preserve Floyd

/s/ Peter Anderson
Virginia Program Manager
Appalachian Voices