



Suggestions for Comments in Response to DEQ Public Notice Impacts from Waterbody Crossings and Water Quality Standards

Wild Virginia offers the following to help citizens begin to frame their comments in response to DEQ's public notice. We plan to provide additional help, including some examples of comments we develop for some specific stream crossing areas. We welcome any comments, questions, or examples of issues you plan to raise in comments but don't see discussed here. You can contact Dave Sligh at david@wildvirginia.org. Any comments you submit will be enhanced by photos of existing good conditions or any other background documents that show a history of usage of waterbodies and the values they have held for people. We also welcome you to send us any copies of comments you send to DEQ so that we can keep track of the places addressed and the issues raised for both pipelines.

Procedure

Deadline for comments: May 30, 2018, 11:59 p.m.

Include in your comments:

- The name(s), mailing address(es) and telephone number(s) of the person(s) commenting.
- Information about specific wetland or stream crossings. Comments should reference exact wetlands and streams crossings by the identifiers provided in documents supplied by DEQ.
- Submit:

by email - NWP12InfoOnMVP@deq.virginia.gov
NWP12InfoOnACP@deq.virginia.gov

by mail - DEQ, P.O. Box 1105, Richmond, VA 23218
deliver to - DEQ, 1111 East Main Street
Richmond, VA 23219

Substance of Comments

DEQ's public notice states:

The sole purpose of the written public comment period is for interested persons to submit technical comments and/or information for the MVP and ACP projects relevant to:

- 1) the sufficiency of the Corps NWP 12 permit's general and regional conditions, as they relate to specific, wetland or stream crossing(s);*
- 2) the sufficiency of the Corps NWP 12 permit authorization for each project, as related to specific, wetland or stream crossing(s); and/or*
- 3) the sufficiency of the Commonwealth's § 401 water quality certification of NWP 12, as related to specific, wetland or stream crossing(s).*

In simple language, we need to show that the requirements applicable to the Corps permit will not uphold our Water Quality Standards (WQS) in specific places. If they will not, then Virginia's Clean Water Act (CWA) section 401 Water Quality Certification (WQC) for any particular crossing is not legally valid. The State of Virginia must "ensure" that state Water Quality Standards (WQS) will not be violated by the activities covered.

The parts of Virginia's WQS that will likely be most pertinent are: 1) designated uses and 2) antidegradation requirements. In addressing each of these issues, there are technical analyses that require expertise in certain scientific and engineering fields.

However, there are important facts that landowners or others can raise that are absolutely valid for you to address. Do not be deterred by the fact that DEQ's notice specifies that the comments are to be "technical" in nature.

Also, don't think that the interests and threats you can address must be exactly at the crossing point. These activities *will* affect downstream areas and, though DEQ tries to deny or minimize their importance, downstream water quality must also be protected. This is especially important where multiple crossings of tributaries or a single stream will have cumulative impacts on downstream waters. In some cases, you may want to cite a group of crossings and discuss both the individual impacts and the combined impacts.

One particularly egregious deficiency in the Corps' analysis is that it examines each crossing that it deems "separate and distant" (a term the Corps refuses to precisely define) as stand-alone projects and ignores the overall impacts. This is especially important in some headwater drainages where as many as eight or more crossings are proposed.

Designated Uses

All state waters have designated uses for aquatic life support, recreation, support wildlife, and production of edible or marketable resources such as fish and shellfish. Other designated uses that apply only in specified waters include support of trout populations and public water supplies.

The WQS name swimming and boating as examples of recreational uses but this category includes any recreational uses, including wading (where the stream is too small for swimming), fishing, and simply aesthetic enjoyment. Also, note that many of these uses also qualify as "existing uses," even if Virginia has failed to list them as designated uses (more discussion of this below under the antidegradation section). Note: the water quality impacts that are prohibited need not be of a type that are dangerous to health, they may simply make use of the area unpleasant or cause users to abandon these areas in favor of other more acceptable waters.

Examples of "recreational" uses you can demand that Virginia protect:

- You, your kids, or your dogs like to jump in the stream.
- You hike, camp, or picnic along a stream.
- The waterbody is an amenity for your local community, the people who visit and enjoy your inn, bed and breakfast, etc.

- You use public recreational areas, including the National Forest, state or national parks, local parks, etc. in and around the affected waterbody.
- You fish, take photos of natural environments, bird, hunt, etc. on any part of the waterbody that may be affected

Examples of impacts that may affect your recreational uses:

- Sediments that will be released during crossing construction activities and after will affect the appearance and viability of using the stream. The Corps permit assumes that as long as the sediment in the waters only persists for a short time in the area directly in and around the construction site and that any discharges are minimized, this pollution need not be counted as an impairment of uses. Sediments in the water also interfere with fishing, because they lessen the ability of the fish to see lures and of the fisherman to fish by sight. This directly conflicts with WQS, which require that uses be protected at all times.
- Sediment deposition on the stream bottom that, in some cases, will stay in place for extended periods before they are swept away by high flow events. These occurrences will interfere with the aesthetic value of the stream, with the habitat that supports fish and the insects, etc. that they feed on. Sediments may also flow into reservoirs or impounded sections of streams and will not disperse. Sediment input to such waters are one of the major sources of impairments and may also carry other pollutants into the reservoirs, such as nutrients which contribute to algae blooms.
- Elimination of streamside trees, which will drastically change the appearance of the stream and its surroundings and allow more light to reach the stream when leaves are off and the temperatures are highest. This also eliminates habitat for wildlife that lives near but not in the waterbody.
- Changes to the banks and the bed of the stream will change the appearance of these waters and affect uses. Elimination of vegetation from banks will increase the likelihood of erosion in those areas. Replacement of that vegetation by rip-rap, which the Corps discourages but will allow in some circumstances, eliminates the biological values provided by native plants, such as hiding places for fish and habitat that is necessary for other organisms.
- Changes to the physical structure of the stream bottom. The Corps requires that the ditch through the stream be filled after construction so that the “original contours” are restored. However, if the ditch is refilled with loose materials, that soil and rock mixture may wash away in storms, resulting in a depression and even exposing the pipeline. Where construction requires ripping or blasting through solid rock stream bottoms, the materials put in to replace that bottom may be much less durable than the bedrock and may degrade. In some cases, the companies propose to fill bedrock cuts with concrete.

Reasons the Corps Permit Requirements Will Not Prevent Impairment of Uses

- The Corps does not place adequate requirements on the physical changes to the stream and banks in light of recreational uses. In fact, the Corps has admitted that: “Activities authorized by this NWP may change the recreational uses of the area. Certain recreational activities, such as bird watching, hunting, and fishing may no longer be available in the area. Some utility line activities may eliminate certain recreational uses of the area.”
- Some of the Corps’ requirements prohibit more than “minimal adverse impact” but the Corps admits that “[t]he term ‘minimal adverse effect’ cannot be defined because it is a subjective

term, with ‘minimal’ and ‘adverse effect’ dependent on the perspective of the person conducting the evaluation or assessment.” The state has a duty to define the level of impact that is allowable under its WQS and that definition, when applied to recreational and aesthetic uses should reflect the users’ values, not that of the Corps or the pipeline company.

- In numerous cases, the Corps imposes requirements that are necessary to protect uses only “to the maximum extent practicable.” Violations of WQS may not be permitted by Virginia just because the Corps or the company cannot identify a “practicable” alternative. If there is no method of building the pipeline through a waterbody to meet WQS, then that activity is not allowed.

Antidegradation

Any activity that lowers water quality in state waters may violate antidegradation requirements in state law. The Corps has made no specific analyses that address antidegradation in covering these projects under NWP 12. As explained above, in many cases the Corps expresses the vague requirement that water quality impacts be minimized, which cannot ensure that antidegradation conditions are met. As with all other portions of the WQS, these requirements apply to water directly at the crossing points and in any other portions of the waterbody where effects may be caused.

For all state waters, the antidegradation policy requires that all “existing uses” be fully supported. Under both state and federal law, “existing uses” are “those uses actually attained in the waterbody on or after November 28, 1975, whether or not they are included in the water quality standards.”

If you have made beneficial use of a waterbody addressed in your comments in the last four decades, that use is protected. This includes any of the uses listed above but may also include a range of other uses. Examples could include use of the water for livestock watering, irrigation of gardens or crops, a commercial or industrial purpose - any use that is of value to you and does not damage the waterbody.

Antidegradation requirements contain even greater protections for high quality waters (Tier 2 waters), where conditions are better than the minimums otherwise provided in the WQS. In those cases, water quality may not be lessened unless “allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located.” Neither the Corps nor DEQ has conducted antidegradation analyses for any of the waterbodies that would be affected by these pipelines. Further, since the supposed economic or social benefits the projects would not occur “in the area[s] in which the waters are located,” lowering of water quality could not be allowed in any case.

Finally, antidegradation requirements provide the highest level of protections for designated “exceptional state waters” (also known as Tier 3 waters). To gain this designation, citizens must go through an extensive process and show that there are very high value resources. Most new discharges are prohibited into these waters. Any lowering of water quality must be of very short duration and “after a minimal period of time the waters [must be] returned or restored to conditions equal to or better than those existing just prior to the temporary source of pollution.”