

Governor McAuliffe Can and Must Protect Virginia Water Resources From Fracked-Gas Pipelines

Governor Terry McAuliffe frequently and inaccurately claims that two major fracked-gas pipelines proposed to bisect Virginia are exclusively a “federal issue.” These multi-billion dollar projects are the Mountain Valley Pipeline and the Atlantic Coast Pipeline.

However, the federal law that covers pipeline approvals, the Natural Gas Act, specifically preserves state power to approve or deny permits under specific environmental laws, particularly the Clean Water Act. In this way, Governor McAuliffe has clear authority to intervene to protect the drinking water and waterways on which Virginians depend.

Proposed Pipelines Pose Significant Threats to Clean Water

Both pipelines would be 42-inch, high pressure pipelines that would require the clearing and permanent disruption of large swaths of public and private land, including ecologically sensitive and fragile karst terrain, aquifers, and forests. As currently proposed:

- The 301-mile Mountain Valley Pipeline (MVP) would cross 373 waterbodies in Virginia, nearly missing two “exceptional state waters,” protected for their outstanding scenic, recreational, and historic characteristics, and increasing monthly sediment loads in certain mussel-rich streams by a staggering 81 percent.ⁱ
- The 600-mile Atlantic Coast Pipeline (ACP) would cross 560 waterbodies in Virginia, including 520 wetlands and six major rivers.ⁱⁱ
- Run-off and sedimentation during construction, as well as chemical additives used to keep rights-of-way clear, could impact local surface waters and the wildlife that depend on them, while chemicals could leak into groundwater.

Virginia Has Clear Permit Authority Under the Clean Water Act -- the McAuliffe Administration Must Use It

The ACP and the MVP need two important water permits under Clean Water Act sections 401 and 404. The McAuliffe administration has authority over 401 permits, while the Army Corps of Engineers is in charge of issuing 404 permits.

- The Virginia Code states that “The [State Water Control] Board shall, after providing an opportunity for public comment, issue a Virginia Water Protection Permit *if it has determined that the proposed activity is consistent with the provisions of the Clean Water Act* and the State Water Control Law and will protect instream beneficial uses.”ⁱⁱⁱ

Both pipelines have applied for a blanket “one-size-fits-all” permit, called Nationwide Permit 12 (NWP 12), which combines state 401 approval and Army Corps 404 approval into one process. **Governor McAuliffe’s Department of Environmental Quality must conduct a project-specific review of each pipeline before issuing a 401 certification.** If DEQ does not take any action, and cedes de facto permitting to the Army Corps, it will in effect rubber-stamp the pipelines without ever looking at whether they harm Virginia’s water resources.

A Nationwide Permit 12 Is Inadequate and Inappropriate for these Major Pipelines

The Army Corps’ NWP 12 process was designed for small projects with “no more than minimal individual and cumulative adverse environmental effects.”^{iv} **Authorization of the ACP or MVP under this general Army Corps permit would be unlawful because the scale of impacts from these Virginia projects is far beyond what was contemplated by the Corps.** The impacts are not “minimal.”

The Army Corps process does not allow for project-specific public input and it was never designed for projects the size of ACP or MVP:

- The Army Corps originally predicted that the NWP 12 would be used approximately 8,000 times per year nationally, and that these 8,000 approved projects would, in total, impact about 400 acres of waterways.^{iv}
- The Atlantic Coast Pipeline alone could impact more than 650 acres of wetlands^{vi}—*over 1.5 times the projected national impacts for all projects the Corps expected to authorize under NWP 12 annually.*
- NWP 12 does not cover many activities necessary for pipeline construction and maintenance, such as upland excavation, forest clearing, and road building, all of which threaten water quality.

The Army Corps has faced recent legal challenges and criticism from other federal agencies for using the NWP 12 process to fast-track approval of massive pipelines -- such as the 1,134-mile Dakota Access Pipeline -- without properly analyzing the full scope of environmental impacts.^{vii}

A Case Study: Governors Can Reject Pipelines Using State-Based 401 Authority

Governor McAuliffe would be following in the footsteps of Governor Andrew Cuomo of New York State by exercising state authority under section 401 of the Clean Water Act:

- On April 22, 2016, the Cuomo administration denied a 401 certification for the 124-mile Constitution Pipeline, another fracked-gas pipeline that would have crossed hundreds of streams and wetlands, including sources of drinking water.^{viii}
- The New York State Department of Environmental Conservation concluded that the company's application "fails in a meaningful way to address the significant water resource impacts that could occur."^{ix}
- The decision came after a multi-year review process in which the agency repeatedly asked the pipeline company to analyze alternative routes to avoid or minimize impacts to water resources.

This is the kind of active scrutiny and review that Virginians deserve from an agency tasked with protecting their water for future generations.

The Bottom Line

The McAuliffe administration has clear authority under the Clean Water Act to either approve or deny a 401 Water Quality Certificate for the Atlantic Coast Pipeline and the Mountain Valley Pipeline. Governor McAuliffe must ensure that state regulators exercise this authority -- just as Governor Cuomo did in New York State -- in order to protect the drinking water and waterways of Virginians now and for generations to come.

As the chief executive of Virginia, Governor McAuliffe must ensure that his Department of Environmental Quality undertakes a hard and thorough review of fracked-gas pipeline permits. A full and independent review is likely to find that the projects do not meet the standards of the Clean Water Act.

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ⁱ Mountain Valley Project and Equitrans Expansion Project, Draft Environmental Impact Statement, FERC/DEIS-D0272, at 4-87, -90, -110, available at <https://www.mountainvalleypipeline.info/-/media/Sites/MVP/Files/MVP%20EEP%20DEIS%20Sections%201-5.ashx?la=en>.

ⁱⁱ Virginia Joint Permit Application serving as a Pre-construction Notification for Authorization under Section 10 and Section 408 of the Rivers and Harbors Act, Section 404 of the Clean Water Act for Nationwide Permit 12 (Utility Line Activities), Virginia Water Quality Certificate under Section 401 of the Clean Water Act, Virginia Water Protection Permit, Stream Crossing Permit, and the Tidal Wetland Permit, available at <https://webapps.mrc.virginia.gov/public/habitat/getPDF.php?id=20151353>.

ⁱⁱⁱ Va. Code § 62.1-44.15:20.

^{iv} 81 Fed. Reg. 35,186 (June 1, 2016).

^v U.S. Army Corps of Engineers, Decision Document, Nationwide Permit 12, at 37, available at http://www.usace.army.mil/Portals/2/docs/civilworks/nwp/2012/NWP_12_2012.pdf.

^{vi} Atlantic Coast Pipeline, Resource Report 2: Water Use and Quality, at 2-35, available at <https://www.dom.com/library/domcom/pdfs/gas-transmission/atlantic-coast-pipeline/acp-shp-rr2-1.pdf?la=en>.

^{vii} Earthjustice, Complaint for Declaratory and Injunctive Relief, Case 1:16-cv-01534, available at <http://earthjustice.org/sites/default/files/files/3154%201%20Complaint.pdf>.

^{viii} Wall St. J., New York Environmental Regulators Deny Permit for Constitution Pipeline (Apr. 22 2016), available at <http://www.wsj.com/articles/new-york-environmental-regulators-deny-permit-for-constitution-pipeline-1461366759>.

^{ix} N.Y. State Dep't of Envtl. Conservation, Re: Joint Application: DEC Permit# 0-9999-00181/00024 Water Quality Certification/Notice of Denial, available at http://www.dec.ny.gov/docs/administration_pdf/constitutionwc42016.pdf.