



September 17, 2018

Austin Caperton, Secretary  
WV Department of Environmental Protection  
Division of Water and Waste Management  
601 57th Street SE  
Charleston, WV 25304

Submitted via email to [WQSComments@wv.gov](mailto:WQSComments@wv.gov)

Re: 401 Water Quality Certification Program

Secretary Caperton:

West Virginia Rivers Coalition, on behalf of our members and the organizations signed below, respectfully submit the following comments on the proposed modifications to the West Virginia 401 Water Quality Certification for U.S. Army Corps of Engineers (USACE) Nationwide Permits. We oppose proposed changes related to the waivers of conditions, which leave no hard-and-fast protections for West Virginia's rivers and streams.

**The Modifications Allow Changing or Eliminating Protections for Every Nationwide Permit.** Proposed revisions to Standard Condition 22 allows DEP to waive, change, or eliminate any of the standard or special conditions of the State 401 Water Quality Certification applicable to Nationwide Permits where the applicant provides proof that it will employ a method or plan that will be more environmentally protective than any of the Standard or Special Conditions of State 401 Water Quality Certification Applicable to Nationwide Permits.

The concern about this paragraph is that it is overly broad and vague. It applies to every nationwide permit. It does not provide any specifics regarding what will be considered "proof." And it does not specify what public process, if any, will be undertaken to ensure that waivers, changes, or elimination of standard or special conditions will undergo public notice, scrutiny, and comment.

**The Modifications Open the Door for Waiver of All NWP 12 Special Conditions.** We adamantly oppose to the proposed changes to Nationwide Permit 12 West Virginia 401

Water Quality Certification Special Conditions, appearing under 12.A. on page nine of the public notice document. The relevant underlined added language reads:

“If the State waives the 401 certifications pursuant to this provision, it reserves the right to waive other 401 special conditions on NWP 12, but it must do so in its waiver letter.”

As written, this added language allows the state to waive any and all 401 special conditions, regardless if it has to do with employing a more environmentally protective plan or method, which is irresponsible and counter to how the agency presented the intent of these modifications in the public notice. This would be able to be done without any public scrutiny or input, which is unacceptable. The change would make special conditions meaningless and cut the public out of any decision making processes and must be rejected.

The 40 special conditions on NWP 12 were subjected to public notice and comment, and stakeholders had the opportunity to seek administrative and judicial review of them. The proposed change enabling the state to unilaterally waive those special conditions now deprives stakeholders of the opportunity for public participation or to seek administrative or judicial review.

Moreover, because the 401 special conditions on NWP 12 are now conditions of the nationwide permit itself, DEP does not have the authority under federal or state law to unilaterally waive those conditions.

**Removing the 72-hour Requirement Will Impact Aquatic Life.** The proposed change to the Special Condition C under Nationwide 12 allows for the exemption of the 72-hour crossing time restriction, but the longer crossing time does not consider the effects on aquatic life. DEP claims that allowing a longer crossing time is more protective of the waterbody; however, the effect of dewatering the stream bed for prolonged periods on aquatic life was not taken into consideration when making this assumption.

In its biological opinion for the Atlantic Coast Pipeline, the U.S. Fish and Wildlife Service lists dewatering of mussel beds and increased sedimentation as two of the threats leading to the decline of Clubshell mussels. Clubshell mussels are also listed as species of concern for three water crossings on the Mountain Valley Pipeline.

Candy Darters are also known to inhabit the Greenbrier and Gauley River Watersheds and are proposed for listing under the Endangered Species Act. The impacts of

dewatering the streambed for prolonged periods on species of concern, such as Candy Darters and Clubshell mussels, must be taken into consideration prior to removing the 72-hour requirement.

**The Change to the 72-hour Requirement is Vague.** The proposed change to the Special Condition C under Nationwide 12 would apply to “dry cuts and other environmentally-protective methods.” Should this change be adopted, the phrase “other environmentally-protective methods” must be fully defined. Otherwise, Special Condition C could potentially be used for all types of crossings and would no longer restrict the completion time to 72 hours.

**The Change to the 72-hour Requirement Has Effects on Other Agency Decisions.** DEP relied on the 72-hour stream crossing condition when issuing the State General Water Pollution Control Permit for the Atlantic Coast and Mountain Valley Pipelines. On both projects in its response to comments for why an antidegradation review is not needed, DEP states, “The Stormwater Pollution Prevention Plan (SWPPP) for this project requires that additional protective measures will be employed at crossings of and in proximity to Tier 3 and trout streams. The additional measures include...stream crossings in these areas will be completed within 72 hours once the crossing has begun...” By exempting rivers and streams from the 72-hour stream crossing condition, DEP would also invalidate the protections afforded streams under the General Stormwater Construction Permit and undermine its own rationale of why an anti-degradation review is unnecessary.

Other state agencies rely on the special conditions included within the Nationwide Permits. WVDNR refers to the condition requiring crossings to be completed in 72 hours in its spawning waiver approvals, and assumes when issuing those waivers that the applicant will comply with the 72-hour restriction. Allowing crossings an exemption to this condition would therefore undermine WVDNR’s spawning waiver approvals. Changing this condition to allow longer crossing durations during which the stream bed is dewatered for prolonged periods would have detrimental effects on aquatic life, especially in areas where WVDNR relied on this rule to allow construction during the spawning season.

**Modifications Undermine the Secretary’s Position That NWP 12 Special Conditions Are Needed to Prevent Impacts.** In your November 13, 2017 letter posted on the DEP news page directed to staff regarding the Mountain Valley Pipeline 401 Waiver, you

endorse the conditions put in place by your agency when certifying the 404 permit that you are now proposing to change. You stated:

“That 401 Certification had several conditions to ensure that temporary impacts to West Virginia’s waters would be minimized, and mitigation would be provided for permanent impacts. Importantly, during the same period of time that the WVDEP was working on this MVP individual certification, it was also developing special conditions for the reissuance of the USACE nationwide permit...The special conditions West Virginia included in it is certification on the newly reissued Nationwide 12 permit (in April 2017) largely mirrored the conditions that West Virginia had previously placed (in March 2017) on the MVP’s 401 Individual Certification...Because the newly issued Nationwide 12 permit included updated state conditions that were similar to those contained in MVP’s previous individual 401 Certification, WVDEP determined it was unnecessary to repeat them in an Individual Certification. As a result, it waived the 401 Certification...To be clear – by waiving the 401 Individual Certification, we are not abandoning our duty to protect the water quality of West Virginia. In fact, the new Nationwide 12 permit is 401 certified by West Virginia and includes state specific conditions relative to pipelines. Combined with the state Construction Stormwater Permit, we are in a stronger position to effectively regulate all pipeline construction in West Virginia.”

The DEP has relied on and endorsed the conditions under the 401 Certification for nationwide permits. It is untoward for DEP to change its course now in what appears to be a move to accommodate non-compliant plans and NWP 12 permits of certain projects.

**Modifications are Untimely and Unnecessary.** The DEP issued its recertification of the 401 for nationwide permits in 2017. Nationwide recertification is only necessary every five years. These modifications must wait until the 2022 recertification period. Opening the recertification process prematurely sets a precedent and disrupts the regulatory framework that industry, citizens, state regulatory agencies, and other stakeholders rely on for continuity, transparency and certainty. Setting a precedent to modify nationwide permits mid-stream, give companies no predictability or certainty about what requirements will apply to any given project. It becomes a moving target that hampers industry in planning their projects and sidesteps the public in knowing when and if

their input matters.

The bottom line is that modifications are not necessary for DEP to enable a company to use the most environmentally protective methods available. The agency has the authority now to deny large construction projects coverage under nationwide permits and require individual 401 Water Quality Certifications. Instead of following through with the proposed modifications, DEP should use individual 401 Water Quality Certifications to provide stream and wetland protections tailored to each project.

Signed,

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