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Paul Busam
Water and Science Administration
Wetlands and Waterways Program
Maryland Department of the Environment
1800 Washington Boulevard
Baltimore, MD 21230
Via Electronic Mail
Paul.busam@maryland.gov

Re: Potomac Riverkeeper et al Comments on Case No. 201760592/17-NT-3089

Dear Mr. Busam,

Please accept the following comments on behalf of Potomac Riverkeeper Network, Upper Potomac Riverkeeper, Food and Water Watch, Waterkeepers Chesapeake and Chesapeake Climate Action Network ("Commenters") regarding the Nontidal Wetlands and Waterways Permit application for the Eastern Panhandle Expansion Project ("Project"). For the reasons detailed below and in the enclosed attachments, Commenters urge the Maryland Department of Environment ("MDE") to deny this permit.

Commenters have expressed our concerns about the permitting process and likely environmental risks and impacts of this Project to MDE on numerous occasions over the past year.¹ In particular, we are concerned that this Project has been allowed to apply for coverage under MDSPGP-5, the Maryland General Permit applicable to projects that have only minimal adverse impacts on the environment. As described in detail in Commenters' January 19, 2018 letter to the Army Corps of Engineers², it is clear that the Project will likely result in more than minimal impacts, particularly when cumulative impacts of the Eastern Panhandle and Mountaineer Gas pipeline proposals are properly reviewed as mutually dependent, connected actions that merit a holistic environmental review.

As a result, MDE and the Army Corps must require individual Clean Water Act Section 401 and 404 approvals, respectively, rather than rely improperly on a Maryland General Permit and generic Section 401 Certification. The need for an individual Section 401 Certification for this Project is demonstrated by the fact that reliance on MDSPGP-5 and this Nontidal Wetlands Permit will not result in the comprehensive review of water quality impacts and

¹ As additional support for these comments, Commenters append our August 8, 2017 letter to Maryland Secretary of the Environment Ben Grumbles (Attachment A), May 25, 2017 Scoping Comments to FERC re: CP17-80 (Attachment B) and January 19, 2018 letter to the Army Corps of Engineers (Attachment C).

² Enclosed herein as Attachment C.



determination as to whether the Project will comply with Maryland water quality standards that is at the core of a state's Section 401 Water Quality Certification authority and responsibility. By thus far ignoring the need for an individual 401 Certification process, MDE has abdicated its responsibility to ensure that projects of this scale do not violate state water quality standards or otherwise degrade Maryland water resources.

In terms of the MDE Nontidal Wetlands and Waterways permit at issue here, the Permit Application is entirely deficient and does not meet the permit criteria spelled out in Section 5-907 of the Maryland Code and related regulations.³ For starters, the Application states the following:

The limits of disturbance (LOD) for the project will temporarily impact one wetland and six streams. Table 1 provided in Attachment 8 summarizes the wetlands, wetland buffers, streams and FEMA 100-year floodplains impacted by the proposed project. *Please note that two sections of the pipeline will be installed using Horizontal Directional Drill (HDD) technology, including the Little Tonoloway Creek and the Potomac River. During a pre-application meeting October 13, 2016 with Maryland Department of the Environment (MDE) staff, it was confirmed that the underground crossing of an aquatic resource via HDD technology does not require a permit. As such, the aquatic resources crossed using HDD technology are not accounted for in this permit application.*⁴ (emphasis added)

Commenters understand this to mean that the potential impacts to Little Tonoloway Creek and the Potomac River posed by the use of HDD drilling are not assessed at all in this process, relying on the erroneous assumption that there will be no impacts from the use of HDD drilling. This is an absurd and baseless assumption that ignores the reality of recent HDD drilling accidents over the past several years that have fouled streams, destroyed wetlands and contaminated drinking water supplies.⁵ Just yesterday, the Federal Energy Regulatory Commission ordered Rover Pipeline LLC to stop drilling under the Tuscarawas River in Ohio, after regulators discovered repeated spills and loss of HDD fluid at the drilling site.⁶ Spills of drilling fluid or blowouts during the drilling process that would result in damage to Little Tonoloway Creek or the Potomac River are reasonably likely to occur, given the recent history of HDD accidents. And considering the ecologic and public health value of the Potomac River, it defies logic that MDE would not require the Project Applicant to assess the potential impact to the Potomac River of such an accident. The Potomac is arguably Maryland's most valuable water resource, providing clean drinking water to over 6 million people in the D.C. metropolitan area downstream of the proposed drilling route under the river. By allowing the Applicant to shirk this requirement, MDE has utterly failed to meet its regulatory responsibility and is attempting to set a dangerous and reckless precedent that puts all of Maryland's waters at risk.

³ See Code of Maryland Regulations 26.23.02.

⁴ March 15, 2017 Joint Permit Application (JPA), Attachment 4 at 1.

⁵ See Attachment A at 3.

⁶ Cite to news article from 1/24/Anne

MDE's preposterous decision to allow the Applicant to ignore potential impacts to the Potomac River and Little Tonoloway Creek also renders the Application incomplete and invalid, because it fails to meet the basic criteria of Section 5-907 of the Maryland Code. Pursuant to this section, MDE may not issue a Nontidal wetland permit unless the applicant demonstrates that the regulated activity "Will not cause or contribute to a degradation of groundwaters or surface waters."⁷ Without assessing whether the construction of this pipeline will degrade the Potomac River and Little Tonoloway Creek, MDE cannot validly determine that the Applicant has met this requirement.⁸ As a result, the Project Application and Permit must be denied.

MDE's failure to require a permit for drilling under the Potomac River also provides strong support for Commenters' assertion that an individual 401 Certification must be required for this project. Without it, the Applicant is apparently free to deploy HDD drilling equipment near the banks of the Potomac and begin drilling under the riverbed with no state oversight whatsoever. Section 401 of the Clean Water Act was specifically written to provide states the authority to review federally licensed projects to ensure that state water resources would be protected. The need for a Section 401 Certification is triggered when a federal license is required for any activity "which may result in any discharge into navigable waters [.]"⁹ This language clearly contemplates projects where there may not be 100% certainty of a discharge, but the reasonable likelihood and risk of one occurring is sufficient to trigger this review. In order to be fully protective of the state's water resources, MDE must conduct an individual 401 review, and must deny this deficient Nontidal Wetlands permit application.

As a non-water dependent project, the Applicant has failed to meet the Nontidal Wetlands Permit Criteria of Section 5-907(a)(1)(ii) of the Maryland Code and COMAR 26.23.02.04(A),(D).

Maryland law requires that the Applicant demonstrate that "practicable alternatives have been analyzed and that the regulated activity has no practicable alternative."¹⁰ The Project Application includes an Alternatives Analysis that includes a No Action Alternative, reviews alternative energy sources, system alternatives and route alternatives.¹¹ In its Route Alternatives analysis, the Applicant noted that the goal was to find the most direct route to connect the existing Columbia gas pipeline system to the proposed Mountaineer system north of Berkeley Springs, West Virginia.¹² All Route Alternatives considered were intended to meet this requirement, and all routes required crossing the Potomac River.

In its review of the Application, MDE is required to consider a range of factors, including the "economic value of the proposed regulated activity in meeting a demonstrated public need *in the area* and the ecological and economic value associated with the nontidal wetland."¹³(emphasis added). In this case, the Project fails to provide any economic value

⁷ Section 5-907(a)(3) of the Annotated Code of Maryland.

⁸ The assessment of water quality impacts to other aquatic resources in the Application is also deficient. *See* Attachment C at 3.

⁹ 33 USC §1341(a)(1).

¹⁰ Section 5-907(b) of the Annotated Code of Maryland.

¹¹ JPA Attachment 9.

¹² *Id.* at Section 1.4.

¹³ Section 5-907(b)(4) of the Annotated Code of Maryland.

to Maryland and its residents in Washington County, the area that would be affected by the pipeline's construction. The pipeline does not meet any "demonstrated public need" in Maryland. In fact, any benefits from this Project solely accrue to producers of fracked gas in Pennsylvania and possibly the users of gas in West Virginia. Maryland receives no benefit but bears all the risk of streams polluted by construction sediment and the Potomac River at risk of pollution from a HDD drilling blowout. Had MDE followed its own rules and required inclusion of the Potomac River as an aquatic resource in this Application, it logically would have found that the ecological and economic value associated with the water resources at risk here far outweigh the virtual absence of any benefit to Maryland from the pipeline. The inestimable value of the Potomac River as a source of clean drinking water for over six million people downstream clearly merits the state's protection, and consideration in this permit review. Notwithstanding the fact that the only practicable route for this Project may include a crossing of the Potomac River, the lack of any benefit to Maryland combined with the real risk of harm to valuable Maryland water resources provides MDE with a more than adequate basis for denying the Permit for failure to meet this requirement. In other words, it does not matter that this is the only feasible route for the Applicant. MDE's job is to weigh that against the value of the Potomac River and other water resources at risk; under that calculus, the pipeline must be denied.

Given the risk posed by this Project to the Potomac River, MDE must require a bond sufficient to secure compliance with conditions in the Permit to protect water quality and cover the costs of any reasonably foreseeable accident that would interfere with the use of the Potomac as a drinking water source for millions of people.

As noted above, the risk to the Potomac River and other Maryland surface waters and groundwater resources posed by this Project is significant, and must be fully assessed as part of this permit review. Maryland regulations grant MDE the authority to require a bond or other financial instrument to secure compliance with the permit.¹⁴ Commenters urge MDE to deny the current permit due to the proven deficiencies of the Application, and if the Applicant chooses to refile its Application, require the Applicant to secure a bond large enough to cover the costs of construction impacts, accidents or spills that contaminate groundwater or surface water, degrade wetlands, violate water quality standards or otherwise interfere with the designated uses of these waterways. Any such bond would have to be sufficient to offset the disruption and enormous cost of interfering with the use of the Potomac River as a drinking water source for downstream communities.

Conclusion

Commenters appreciate this opportunity to submit comments on this Project. For the reasons discussed above, we urge MDE to deny this deficient permit Application and formally withdraw its previous determination that a permit is not required in Maryland for the underground crossing of an aquatic resource using HDD technology. The Potomac River and all of Maryland's precious water resources deserve, and the law requires, the highest level of protection by MDE. Given the recent history of HDD accidents that have ruined waterways in other states, failure to correct this mistake would threaten the legitimacy of MDE as a credible environmental regulator.

¹⁴ Section 5-906(g) of the Annotated Code of Maryland.

Respectfully,



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