

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF ENVIRONMENTAL QUALITY
DIVISION OF WATER PERMITTING

Subject: Guidance Memo No. **GM17- 2003**, Interstate Natural Gas Infrastructure Projects - Procedures for Evaluating and Developing Additional Conditions for Section 401 Water Quality Certification Pursuant to 33 USC § 1341 (“401” Certification)

To: James Golden, Jeff Steers, Dave Davis, Division and Regional Directors

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Summary: This guidance document provides staff and project owners of certain large natural gas construction projects regulated by the Federal Energy Regulatory Commission (FERC) with information needed to evaluate whether additional Section 401 conditions may be appropriate to supplement those associated with either a US Army Corps of Engineers (Corps) Permit and/or a Virginia Water Protection (VWP) Permit. This review is intended to supplement, but not replace, the Corps and/or VWP permit processes for such projects. This guidance document also provides the procedures that are applicable to such additional Section 401 conditions if they are found to be necessary.

Electronic Copy: An electronic copy of this guidance in PDF format is available for staff internally on DEQNet, and for the general public on DEQ’s website at:
<http://www.deq.virginia.gov>.

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Disclaimer: This document is provided as guidance and, as such, sets forth standard operating procedures for the agency. However, it does not mandate any particular method nor does it prohibit any particular action not otherwise required or prohibited by law or regulation. If alternative proposals are made, such proposals should be reviewed and accepted or denied based on their technical adequacy and compliance with appropriate laws and regulations.

Definitions.

For purposes of this guidance, the term

“Board” means the State Water Control Board established pursuant to Title 62.1, Chapter 3.1 (§ 62.1-44.2 et seq.) of the Code of Virginia.

“Certification” means certification by the Board pursuant to 33 USC § 1341.

“Department” means the Department of Environmental Quality established pursuant to Title 10.1, Chapter 11.1 (§10.1-1182 et seq.) of the Code of Virginia.

“Director” means the director of the Department.

“Procedural Rule No. 1” means Chapter 9 VAC 25-230 of the Virginia Administrative Code.

General requirement and purpose.

In order to comply with § 401 of the Clean Water Act of 1977 (33 USC § 1341) (the Act), any applicant for a federal license or permit pursuant to Section 7c of the Natural Gas Act (15 USC § 717f(c)) to conduct any activity, including, but not limited to, the construction or operation of facilities which may result in a discharge to state waters, must provide the federal licensing or permitting authority with a certification from the State Water Control Board (Board) in accordance with the State Water Control Law that the activity will comply with the applicable provisions of §§ 301, 302, 303, 306 and 307 of the Act. A certification sets forth any conditions necessary to assure compliance with applicable water quality requirements under state law, and these become a condition of the federal license or permit.

Applicability.

Pursuant to Section 62.1-44.15:20 of the Code of Virginia and the Virginia Water Protection (VWP) Permit Regulation (9 VAC 25-210) VWP permit coverage, including general VWP coverage and coverage associated with a Corps’ Nationwide Permit certified by Virginia, constitutes the certification required under § 401 of the Clean Water Act. The VWP program has proven to be sufficient to evaluate and, when necessary, mitigate potential water quality impacts for most federally permitted projects.

However, VWP Permit coverage addresses the impacts caused to wetlands and streams by excavating in a wetland, draining or significantly altering wetland acreage or function, filling or dumping in a stream or wetland, or permanently flooding or impounding a wetland area or stream. The conditions and requirements of VWP Permits do not cover activities in upland areas,

outside of wetlands and streams which may result in a discharge to state waters or otherwise cause or contribute to an exceedance of Virginia's Water Quality Standards (9VAC25-260). For large FERC-regulated natural gas pipeline projects subject to Section 7c of the Natural Gas Act, there may be activities in upland areas that may have the potential to affect water quality but do not fall within the scope of the VWP regulation. Likewise, information related to such impacts would not be contained in the Joint Permit Application (JPA) utilized to determine permit conditions for a VWP general or individual permit. In such appropriate cases, DEQ may request additional information from the project owner and conduct a separate supplemental review of the project with respect to upland impacts that may indirectly affect state waters. If warranted, the Department may make a recommendation to the Board for additional conditions on upland activities.

The following procedures will be utilized for projects regulated by the FERC where the Department has reviewed available information and determines that additional information and determines that additional conditions may be necessary to protect water quality water beyond the conditions required by, or that can be imposed through, the Virginia Water Protection Permit Program, Corps' permits, including any applicable Nationwide Permits, or conditions otherwise imposed by the FERC.

In determining whether to impose additional conditions, the Department will consider a number of factors including but not limited to:

Length of project/amount of construction related land disturbance

Diameter of pipeline

Geographic, hydrologic and topographic considerations: steep slopes, karst geology, proximity to sensitive streams/wetlands, seasonally high water tables, sink holes/underground springs, water impoundment structures/reservoirs, areas with highly erodible soils, low pH and acid sulfate soils.

Initiation of information request.

At any time during the FERC action, but before the issuance of a Certificate of Public Convenience and Necessity, the Department may deliver an information request to the project owners related to activities in upland areas. It is the Department's intent that this information request will be consistent with the project owner's planned schedule. As the Department will be

an active participant in the development of FERC's Environmental Impact Statement (EIS), review of stormwater and erosion and sedimentation control plans and the Corps' wetland and stream permitting, the timing of the information request will be dependent upon when project information is substantially complete and available. The information request will provide a reasonable amount of time for the project owner to respond.

Preparation of draft certification conditions.

The Department will review the project information, including any additional information obtained through the information request, and may develop a draft certification that contains any additional conditions for activities in upland areas necessary to protect water quality.

Public notice of draft certification conditions.

A. Public notice of the draft certification conditions will be published once in one or more newspapers of general circulation in the areas in which the proposed pipeline activity is to take place.

The public notice will include:

1. The name, address and telephone number of the Department office at which persons may obtain information pertinent to the application;
2. A brief description of the pipeline activity which may result in a discharge to state waters or how to obtain detailed information on the activity or operation;
3. The location of such activity and the state waters that may be affected. The location should include a listing of all counties and cities in which the pipeline construction will occur and include either maps of the project area or directions on how to access such maps. Where possible, location information should reference route numbers, road intersections, map coordinates or similar information or how to obtain detailed information on the activity;
4. A summary of the draft certification conditions;
5. A brief description of the procedures for formulation of a final determination of any additional conditions, including the appropriate comment period required by subsection B of this section and the means by which interested persons may comment on the application; and
6. Instructions for requesting a public hearing if not already scheduled.

B. If no public hearing has already been scheduled, a period of not less than 15 days nor more than 30 days following the date of the publication of public notice will be provided during which interested persons may submit written comments and requests for a hearing. If a public hearing has been scheduled, public notice will be provided at least 30 days before the public hearing date (§ 50 D 1 of Procedural Rule No. 1).

Requests for public hearing

Requests made by the public for a public hearing shall contain the information required by § 40 of Procedural Rule No. 1.

Hearings and final decisions.

A. All written comments submitted during the comment period will be retained and considered during the final decision on the additional conditions to be imposed, if any.

B. The Director shall consider all requests for public hearing received during the comment period and in cases where a hearing has not already occurred, make a determination on the necessity of a hearing in accordance with § 50 of Procedural Rule No. 1.

C. All proceedings, hearings and decisions from it will be in accordance with Procedural Rule No. 1.

Requests for modification or revocation; public notice.

A. The project owner or the Department may request that such conditions be modified or revoked. Requests for modification or revocation of any additional certification conditions should contain the following information:

1. If the request is made by the project owner, the name, mailing address and telephone number of the requester and the name, mailing address, and telephone number of anyone representing the requestor;
2. Where applicable, a statement specifically setting forth the requested modification, and the reason for it; and
3. Where applicable, a statement specifically setting forth the reason for the requested revocation.

B. The Director will review all requests for modification or revocation and make a tentative determination within 30 days whether to grant or deny the requested modification or revocation.

C. Requests for modification or revocation will be public noticed and final decisions made in the same manner as the original certification conditions.