

UNITED STATES OF AMERICA

BEFORE THE

FEDERAL ENERGY REGULATORY COMMISSION

**In the Matter of the Applications of:**

**ATLANTIC COAST PIPELINE, LLC  
DOMINION TRANSMISSION, INC.**

**Docket Nos. CP15-554-000  
CP15-554-001  
CP15-554-002  
CP15-555-000  
CP15-555-001**

**Filed: December 21, 2017**

**ANSWER IN OPPOSITION TO REQUEST BY ATLANTIC FOR LIMITED  
NOTICE TO PROCEED**

**OF**

**SHENANDOAH VALLEY NETWORK,  
HIGHLANDERS FOR RESPONSIBLE DEVELOPMENT,  
VIRGINIA WILDERNESS COMMITTEE,  
SHENANDOAH VALLEY BATTLEFIELDS FOUNDATION,  
NATURAL RESOURCES DEFENSE COUNCIL,  
COWPASTURE RIVER PRESERVATION ASSOCIATION,  
FRIENDS OF BUCKINGHAM,  
CHESAPEAKE BAY FOUNDATION,  
DOMINION PIPELINE MONITORING COALITION,  
POTOMAC RIVERKEEPER NETWORK,  
SHENANDOAH RIVERKEEPER,  
SOUND RIVERS,  
WINYAH RIVERS FOUNDATION**

As authorized by 18 C.F.R. 385.213 (Rule 213), Shenandoah Valley Network, Highlanders for Responsible Development, Virginia Wilderness Committee, Shenandoah Valley Battlefields Foundation, Natural Resources Defense Council, Cowpasture River Preservation Association, Friends of Buckingham, Chesapeake Bay Foundation, Dominion Pipeline Monitoring Coalition, Potomac Riverkeeper Network, Shenandoah Riverkeeper, Sound Rivers, and Winyah Rivers Foundation

(“Conservation Groups”) submit this answer opposing Atlantic Coast Pipeline, LLC’s (“Atlantic”) December 15, 2017, motion requesting limited notice to proceed with felling of upland trees.<sup>1</sup>

Conservation Groups respectfully request that the Commission deny Atlantic’s request to begin felling trees for the proposed Atlantic Coast Pipeline for the following reasons:

1. Multiple permits and approvals are outstanding or incomplete, including Clean Water Act Section 401 Certifications in Virginia and North Carolina, the National Historic Preservation Act Section 106 Programmatic Agreement, the Clean Water Act Section 404 permit, formal consultation under the Endangered Species Act, and state erosion and sediment control and stormwater management plans. The Commission also has not resolved numerous requests for rehearing and motions for stay.
2. In North Carolina, state law prohibits tree felling because the state has not fully approved Atlantic’s proposed Erosion and Sedimentation Control Plan. North Carolina has also not issued a Section 401 Certification for the project. And in West Virginia, the Department of Environmental Protection has not approved a required stormwater permit.
3. In Virginia, the State Water Control Board has not issued an effective Section 401 Certification for the project, and therefore, Atlantic does not have the required state approval for tree felling. The Board is not expected to make a final decision on whether to certify the project until March or April 2018 at the earliest.

Atlantic’s request for a limited notice to proceed is an unwarranted attempt to start construction of its project despite lacking approvals and permits which are

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<sup>1</sup> Atlantic Coast Pipeline, LLC et al., Request for Limited Notice to Proceed (Dec. 15, 2017) (eLibrary No. 20171218-5008). While Atlantic has styled its request to begin felling trees as a letter, it is in substance a Rule 212 motion before the Commission requesting a ruling. Dominion’s motion makes factual and legal assertions that are in dispute. Because such a motion is a pleading under Rule 202, Conservation Groups file this answer to the motion as permitted by Rule 213(a)(3).

required under the Commission's Certificate order. At this point, it is unknown whether Atlantic will obtain all of the necessary approval and permits to move forward with its project. The Commission must reject Atlantic's attempt to cut corners and preempt state authority by denying the company's premature request.

**I. The Commission Must Deny Atlantic's Request to Commence Tree Felling Prior to Issuance of All Required Permits and Resolution of Requests for Rehearing and Motions for Stay.**

Atlantic's request to begin tree felling along the route of the proposed Atlantic Coast Pipeline is premature, and the Commission must deny it. Atlantic lacks critical approvals it needs to proceed with construction of the pipeline, including:

- A Section 401 Water Quality Certification from North Carolina;
- An effective Section 401 Water Quality Certification from Virginia;
- An executed Programmatic Agreement (PA) in compliance with Section 106 of the National Historic Preservation Act; and
- Completion of the Endangered Species Act Section 7 consultation process.

The Certificate is conditioned on receipt of these approvals, which are still outstanding and not guaranteed.<sup>2</sup>

First, Atlantic proposes to begin tree felling before it has received Clean Water Act Section 401 certifications from Virginia and North Carolina. The Commission must withhold such authorization under the Natural Gas Act until the required

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<sup>2</sup> Atlantic Coast Pipeline, LLC, 161 FERC ¶ 61,042 at P 224 (Section 401 Certifications), Env'tl. Condition 54 (Endangered Species Act Section 7), Env'tl. Condition 56 (National Historic Preservation Act Section 106) (Oct. 13, 2017).

state water quality certifications “ha[ve] been obtained or ha[ve] been waived.”<sup>3</sup> Any condition established by state Section 401 certifications “becomes a condition on any Federal license or permit,” including the Certificate.<sup>4</sup> Before the Commission may grant any notice to proceed, including one limited to non-mechanized tree felling, Atlantic must obtain effective water quality certifications from North Carolina and Virginia, both of which are currently outstanding. As discussed in detail below, tree felling is an activity that may cause or contribute to violations of state water quality. As such, it must not be permitted by the Commission prior to certification from Virginia and North Carolina.

Atlantic also proposes to begin tree felling before the Endangered Species Act Section 7 process is complete. In its Request for Limited Notice to Proceed, Atlantic asserts that the U.S. Fish and Wildlife Service (“FWS”) completed the Section 7 process on October 16, 2017, when it issued the Biological Opinion. However, this characterization is inaccurate because consultation is still ongoing for the candy darter, which FWS proposed to list as threatened under the Endangered Species Act on October 4, 2017.<sup>5</sup> The candy darter’s habitat has historically declined due to land conversion activities that have removed the

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<sup>3</sup> 33 U.S.C. § 1313(a)(1). See *Del. Riverkeeper Network v. Fed. Energy Regulatory Comm’n*, 857 F.3d 388, 399 (D.C. Cir. 2017) (upholding the Commission’s conditional certificate order because it “expressly conditioned FERC’s approval of potential discharge activity on [the applicant] first obtaining the requisite § 401 certification, and was not itself authorization of any potential discharge activity.”).

<sup>4</sup> 33 U.S.C. § 1313(d).

<sup>5</sup> Proposed Threatened Species Status for the Candy Darter, 82 Fed. Reg. 46,197 (Oct. 4, 2017).

forested and riparian habitat that sustain necessary stream conditions.<sup>6</sup> The species is endemic to the New River drainage in Virginia and West Virginia, and currently has the potential to occur in Pocahontas County, West Virginia, within the ACP project area.<sup>7</sup> On November 9, 2017 the Commission requested a formal conference opinion from FWS to confirm the Commission’s provisional finding of not likely to jeopardize the candy darter. The formal conference process is part of the agency’s Section 7 consultation obligations.<sup>8</sup> That process is ongoing and must be completed” before the requested action “can commence.”<sup>9</sup>

Finally, the Commission must not grant authorization to proceed until requests for rehearing and motions to stay the Certificate of Public Convenience and Necessity are resolved. Were the Commission to grant Atlantic’s request to proceed with tree felling, it would erroneously prejudge the outcome of Conservation Groups’ challenge to the Certificate by allowing the project to proceed before the issues raised in the Request for Rehearing are resolved on the merits. Conservation Groups are entitled to a meaningful rehearing before the Commission, not merely a paper exercise in which the Commission lets the project move forward long before the issues raised on rehearing are resolved.

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<sup>6</sup> U.S. Fish & Wildlife Serv., *Candy Darter* (last updated Oct. 16, 2017), <https://www.fws.gov/northeast/candydarter/>.

<sup>7</sup> Final EIS at 4-216.

<sup>8</sup> See 50 C.F.R. § 402.01 (defining the “scope” of consultation requirements).

<sup>9</sup> See Request for Limited Notice to Proceed, *supra* note 1.

## **II. The Commission Must Deny Atlantic’s Request to Commence Tree Felling in North Carolina and West Virginia Pending Review and Approval of Proposed Erosion and Sedimentation Control Plan by NC DEQ and Stormwater Permit by WV DEP.**

### **A. North Carolina**

Atlantic’s request for limited notice to proceed fails to notify the Commission that the company cannot proceed with tree felling until the North Carolina Department of Environmental Quality (“NC DEQ”) approves Atlantic’s proposed Erosion and Sedimentation Control (“ESC”) Plan. In an October 18, 2017 email, the Chief of Program Operations for NC DEQ’s Division of Energy, Mineral, and Land Resources advised Atlantic that tree felling constitutes a land-disturbing activity under the North Carolina Sedimentation Pollution Control Act.<sup>10</sup> Because tree felling is a land-disturbing activity that will “result[] in a change in the natural cover . . . and that may cause or contribute to sedimentation,” NC DEQ instructed Atlantic that it cannot begin tree felling prior to approval of the ESC Plan. To date, NC DEQ has not approved Atlantic’s Erosion and Sediment Control Plan for four of the seven North Carolina counties the pipeline would cross: Northampton, Halifax, Wilson, and Johnston counties.

Not only has NC DEQ not approved those plans, Atlantic has not yet responded to a November 6, 2017, request from the agency for additional

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<sup>10</sup> NCGS 113A-57(4); E-mail from Toby Vinson, Chief of Program Operations, N.C. Dep’t of Env’tl. Quality, to Spencer Trichell, Environmental Consultant, Dominion Energy Servs. (Oct. 18, 2017, 02:23 PM), **included as Attachment A**.

information.<sup>11</sup> In that letter, NC DEQ advised Atlantic that its ESC Plan had been reviewed and disapproved, and the agency requested additional information to address the Plan's deficiencies. Because NC DEQ has not fully approved the ESC Plan in North Carolina, state law prohibits tree felling.

Further, while NC DEQ maintains that it does not regulate tree felling under Section 401 of the Clean Water Act, Conservation Groups strongly disagree with the agency's position. As discussed at greater length below with respect to Virginia's Section 401 authority, any activity that can cause or contribute to a violation of state water quality standards falls under the state's Section 401 Clean Water Act authority. Because North Carolina has not issued a Section 401 certification for the project, such activities are prohibited prior to certification. Specifically, to the extent tree felling would take place in forested wetlands, it may violate the wetland standards in 15A NCAC 02B.0231. For instance, "floating or submerged debris" or "other material may not be present in amounts which may cause adverse impacts on existing wetland uses."<sup>12</sup>

Therefore, Conservation Groups respectfully request that the Commission deny Atlantic's request to begin tree felling in all upland areas in North Carolina until the ESC Plans are approved for the entirety of the route through the state and NC

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<sup>11</sup> Letter from Timothy L. LaBounty, Regional Engineer, DEMLR-Fayetteville Regional Office, to Leslie Hartz, VP Pipeline Construction, Dominion Energy Transmission Inc. (Nov. 29, 2017), <https://files.nc.gov/ncdeq/Energy%20Mineral%20and%20Land%20Resources/DEMLR/Atlantic-Coast-Pipeline/DEMLR-ACP-FRO%20Ltr%20of%20App%20120517.pdf>

<sup>12</sup> 15A N.C. Admin. Code 02B.0231(b)(2).

DEQ issues a Section 401 certification. Only if Atlantic's ESC Plans are fully approved can Atlantic request a notice to proceed for tree felling activities in upland areas in North Carolina. Atlantic's December 15, 2017, request is premature and must be denied.

### **B. West Virginia**

The Commission must also deny Atlantic's request to fell trees in West Virginia because Atlantic has not received a required stormwater permit. The public comment period for the stormwater permit does not close until December 31.<sup>13</sup> If the West Virginia Department of Environmental Protection ("WV DEP") approves the permit, that approval will trigger a 30-day appeal window.

As is the case for North Carolina, felling trees along the proposed route in West Virginia threatens to increase sedimentation and stormwater runoff in waterways, including high quality (Tier 3) waters. Because Atlantic has not been granted a stormwater permit in West Virginia, the Commission should deny the applicant's request to begin felling trees.

## **III. The Commission Must Deny Atlantic's Request to Commence Tree Felling in Virginia Pending Issuance of an Effective 401 Water Quality Certification.**

### **A. Atlantic Does Not Have an Effective 401 Water Quality Certification from Virginia.**

Virginia has not issued an effective 401 water quality certification. The Virginia State Water Control Board ("the Board") made clear in its December 12,

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<sup>13</sup> See Atlantic Coast Pipeline Stormwater Permit Application, [https://apps.dep.wv.gov/webapp/\\_dep/securearea/Application/Templates/GenericMenu.cfm](https://apps.dep.wv.gov/webapp/_dep/securearea/Application/Templates/GenericMenu.cfm).

2017, decision that the required 401 certification is not, and will not be, effective until the Department of Environmental Quality (“VA DEQ” or “the Department”) completes its review of proposed erosion and sediment control plans, stormwater management plans, and karst mitigation plans. To date, no Certification has been issued or made available on VA DEQ’s website.<sup>14</sup> At the December 12 meeting, Board members expressed serious concern that they had been asked to prematurely certify a project without critically important information, and the Board required VA DEQ to present its analysis of those plans to the Board once that analysis is complete. The Board reserved its authority to take additional action, including denying the water quality certification, and also required DEQ to release its review of the final plans to the public for review and comment.

The Department stated that its review of erosion and sediment control and stormwater management plans will not be complete for months, until March or April 2018 at the earliest. At the Virginia State Water Control Board meeting on December 12, DEQ told the Board that it does not know when its review of the karst mitigation plans will be complete.<sup>15</sup> Atlantic will not have an effective 401 certification from Virginia until after the Department completes its review, the public has been given an opportunity to comment on the Department’s review, and

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<sup>14</sup> Va. Dep’t of Env’tl. Quality, *Water Protection for Pipelines* (last visited Dec. 21, 2017), <http://www.deq.virginia.gov/Programs/Water/ProtectionRequirementsforPipelines.aspx>.

<sup>15</sup> Transcripts of the December 11 and December 12, 2017 State Water Control Board meeting are not yet available.

both the Department's review and public comments are presented to the Board for final action.

**B. Tree Felling Must Be Regulated Under Virginia's Section 401 Regulatory Program.**

Virginia's proposed 401 certification applies to upland activities, including tree felling, that may cause or contribute to violations of state water quality standards. In its request for limited notice to proceed, Atlantic asserts that Virginia DEQ "confirmed in writing that [tree-felling] activities are not regulated under Section 401 of the CWA. See Attachment A." But the email the company included from VA DEQ does not confirm or even justify that conclusion. VA DEQ wrote to Atlantic that the Department does not regulate tree felling under either of two state laws, the Stormwater Management Act, Va. Code Ann. § 62.1-44.15:24 and the Erosion and Sediment Control Law, Va. Code Ann. § 62.1-44.15:51, but never addressed the state's authority to regulate that activity under Section 401.

In the first instance, Conservation Groups disagree with the Department's determination that tree felling does not constitute land-disturbing activity, but those laws do not constrain the state's authority under the Clean Water Act. Virginia's authority to grant or deny water quality certifications for federally licensed or permitted projects flows not from state law, but from Section 401 of the federal Clean Water Act. The email from DEQ does address this aspect of the state's authority. Therefore, contrary to Atlantic's contention, Virginia has not determined that tree felling is not regulated under Section 401 which employs a

standard different from the state-law question of whether tree felling is a land-disturbing activity.

Before Virginia can authorize a project under Section 401, the State Water Control Board must assess all activities that may violate water quality standards to determine that there is “reasonable assurance” that the proposed project will not violate those standards. For purposes of Section 401, the relevant question is not whether tree felling is a land-disturbing activity as defined by state law, but whether tree felling may cause or contribute to violations of state water quality. As discussed below, non-mechanized tree felling in upland areas may result in adverse effects on water quality.

Indeed, Virginia’s regulatory framework for considering impacts to water quality from the construction of large interstate natural gas pipelines like the Atlantic Coast Pipeline underscores the need for the state to consider the impacts of tree felling on water quality. DEQ recognized that the state statute that typically implements Section 401, found in 9VAC25-210 (the Virginia Water Protection Permit, or VWPP, program), was insufficient to adequately assess impacts to water quality from construction and operation of large natural gas pipelines like the Atlantic Coast Pipeline, specifically in upland areas.<sup>16</sup>

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<sup>16</sup> See Commonwealth of Va. Dep’t of Env’tl. Quality, 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) (2017), <http://www.deq.virginia.gov/Portals/0/DEQ/Water/Pipelines/GuidanceMemoGM17-2003Section401WaterQualityCertification.pdf>.

Accordingly, the Department developed a new regulatory mechanism—an “additional upland 401 Water Quality Certification”—to ensure the impacts from construction of the pipeline across steep slopes and through fragile karst terrain would be accounted for.<sup>17</sup> This certification covers “[p]roject activities in upland areas outside of the Corps jurisdictional areas under 33 U.S.C. § 1344 which may result in an indirect discharge to waters of the United States . . . that are exempt from coverage under the Virginia Water Protection Permit Program Regulation (9VAC 25-210-10, *et seq.*)” In other words, the sole purpose of Virginia’s upland 401 certification is to ensure that impacts from upland activities will not violate state water quality standards. Because tree felling may violate water quality standards, the Commission would strip Virginia of its authority under the Clean Water Act if it were to allow Atlantic to commence tree felling activities prior to issuance of an effective certification.

### **1. Tree Felling May Cause or Contribute to Violations of Water Quality Standards for Sedimentation and Turbidity.**

Non-mechanized tree felling may cause or contribute to violations of Virginia water quality standards that regulate sediment input to waterways. Under Virginia law, it is well established that erosion and sedimentation affect water quality and are regulated.<sup>18</sup> Therefore, an assessment of erosion and sedimentation impacts

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<sup>17</sup> Va. Dep’t of Env’tl. Quality, Proposed 401 Water Quality Certification Atlantic Coast Pipeline, LLC Certification No. 17-002 at 67 (2017), [http://townhall.virginia.gov/1/GetFile.cfm?File=C:\TownHall\docroot\meeting\103\26648\Agenda\\_DEQ\\_26648\\_v1.pdf](http://townhall.virginia.gov/1/GetFile.cfm?File=C:\TownHall\docroot\meeting\103\26648\Agenda_DEQ_26648_v1.pdf).

<sup>18</sup> 9 Va. Admin. Code § 25-260-20.

from pipeline construction in upland areas is essential to an adequate analysis under Section 401.

As Virginia noted in comments on the final Environmental Impact Statement (“final EIS”) for the project, forests “contribute the lowest nutrient and sediment loadings to Virginia’s waterways of any type of land cover,” and they are “the best land cover for intercepting precipitation required for the recharge of groundwater aquifers.”<sup>19</sup> The risk that non-mechanized tree felling will affect water quality is heightened along the long, steep slopes that characterize the pipeline’s route through western Virginia.

Tree felling can lead to increased erosion and sedimentation for several reasons. First, the activity reduces interception, defined as the amount of rainfall that never makes it to the ground because it gets caught in the tree canopy and eventually evaporates instead of falling all the way to the ground.<sup>20</sup> Virginia DEQ’s 1999 Stormwater Management Handbook recognizes interception as a significant issue: “Surface runoff occurs only when the rainfall rate is greater than the infiltration rate and the total volume of rainfall exceeds the *interception*, infiltration, and surface detention capacity of the watershed.”<sup>21</sup> Its 2013 Handbook

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<sup>19</sup> Va. Dep’t of Env’tl. Quality, Impacts of the proposed Atlantic Coast Pipeline on Virginia’s Forests and Mitigation Recommendations filed as comments to the draft EIS (Feb. 16, 2017).

<sup>20</sup> A.M.J. Gerrits and H.H.G. Savenije, *Interception*, in *Treatise on Water Science* (Peter Wilderer, ed., 2011).

<sup>21</sup> Va. Dep’t of Conservation and Recreation, Virginia Stormwater Management Handbook 4-13 (1st ed. 1999), <http://www.deq.virginia.gov/Portals/0/DEQ/Water/Publications/Hndbk Volume2.pdf>.

notes that “[c]learing removes the vegetation that intercepts, slows and returns rainfall to the air through evaporation and transpiration.”<sup>22</sup> Studies have shown that often at least 20 percent and up to 70 percent of rainfall is intercepted and never reaches the ground.<sup>23</sup> Because tree felling will reduce interception and increase the amount of rainwater reaching the ground, it has significant implications for runoff and increased sedimentation in receiving waterways.

Second, tree felling will affect runoff and sedimentation by increasing the velocity with which rain hits the soil. As Virginia DEQ has acknowledged, “[r]aindrops hit the exposed soil like tiny bombs.”<sup>24</sup> “The magnitude of this energy is dependent on the amount and intensity of rainfall, raindrop diameter, and *raindrop velocity*.”<sup>25</sup> When trees are felled and the canopy reduced, raindrop velocity increases, thus magnifying the force of the “tiny bombs” that contribute to soil detachment and runoff. The final EIS also confirms that the velocity of rainfall striking the ground surface is a factor that can exacerbate erosion, increase the

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<sup>22</sup> Va. Dep’t of Conservation and Recreation, Virginia Stormwater Management Handbook 4-15 (2d ed. 2011), [http://www.deq.virginia.gov/fileshare/wps/2013\\_SWM\\_Handbook/Chapter%2004/](http://www.deq.virginia.gov/fileshare/wps/2013_SWM_Handbook/Chapter%2004/).

<sup>23</sup> See Leslie M. Reid & Jack Lewis, USDA Forest Service Gen. Tech. Rep. PSW-GTR-194, *Rates and Implications of Rainfall Interception in a Coastal Redwood Forest* (2007), [https://www.fs.fed.us/psw/publications/documents/psw\\_gtr194/psw\\_gtr194\\_17.pdf](https://www.fs.fed.us/psw/publications/documents/psw_gtr194/psw_gtr194_17.pdf); Katarina Zabret et al., *Evaluation of Drop Size Distribution Impact on Rainfall Interception by Trees*, MDPI Proc. 1 (2017).

<sup>24</sup> Va. Dep’t of Env’tl. Quality, *Fundamentals of Erosion and Runoff* 5, [http://www.deq.virginia.gov/Portals/0/DEQ/ConnectwithDEQ/Training/Streamlined\\_ESC\\_Inspector/Streamlined\\_ESC\\_Insp\\_Mod2\\_Presentation.pdf](http://www.deq.virginia.gov/Portals/0/DEQ/ConnectwithDEQ/Training/Streamlined_ESC_Inspector/Streamlined_ESC_Insp_Mod2_Presentation.pdf).

<sup>25</sup> *Id.* (emphasis added).

volume and intensity of runoff, and harm the water quality of receiving streams downslope.<sup>26</sup>

Third, tree felling disturbs the ground surface as large trees crash to the ground and canopy branches pierce and gouge the soil. Trees may also fall down steep slopes directly into waterways, topple adjacent but uncut trees and dislodge their roots, or be located adjacent to or even in intermittent or ephemeral waterways that have not been identified prior to felling. These factors increase the likelihood that tree felling will impact water quality.

Finally, in light of these potential impacts, Conservation Groups disagree with Virginia DEQ's contention that tree felling activity does not constitute land disturbance. Large trees felled to the ground can change soil and topographical characteristics of upland areas, which can in turn cause increased erosion, runoff, and sedimentation issues. "Land-disturbing activity" is defined in Virginia law as "a man-made change to the land surface that may result in soil erosion or has the potential to change its runoff characteristics, including"—but not limited to—"clearing, grading, excavating, or filling of land."<sup>27</sup> Regardless of whether tree felling is a land-disturbing activity under state law, the fact remains that felling

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<sup>26</sup> See final EIS at 4-51 ("Erosion is a natural process generally resulting from water and wind forces that can be accelerated by human disturbance. Factors that influence the magnitude of erosion include soil texture, soil structure, length[] and percent of slope, existing vegetative cover, rainfall intensity, and wind intensity.")

<sup>27</sup> Va. Code Ann. § 62.1-44.15:24.

large trees can impact water quality and is therefore subject to Virginia's Section 401 authority.

## **2. Tree Felling Implicates Other Virginia Water Quality Standards.**

Not only may tree felling lead to violations of water quality standards related to erosion and sedimentation, it also implicates other Virginia water quality standards, including:

- 9VAC25-260-40, which provides that “[m]an-made alterations in stream flow shall not contravene designated uses including protection of the propagation and growth of aquatic life”;
- 9VAC25-260-50, which provides numerical criteria for dissolved oxygen, pH, and maximum temperature for various classes of water that may be affected by pipeline construction, including tidal waters in the Chesapeake Bay and its tidal tributaries and natural and stockable trout waters;
- 9VAC25-260-60, which prohibits a rise above natural temperature of more than 3° C, or 1° C for natural trout waters;
- 9VAC25-260-70, which prohibits an hourly temperature change greater than 2° C, or .5° C for natural trout waters;
- 9VAC25-260-185, which lists dissolved oxygen, submerged aquatic vegetation and water clarity, and chlorophyll criteria designed to protect designated uses from the impacts of nutrients and sediment in the Chesapeake Bay and its tidal tributaries; and
- 9VAC25-260-310 through 540, which establish special standards and requirements for particular basins and sub-basins throughout the state.

As the final EIS for the Atlantic Coast Pipeline recognizes, “[c]learing of riparian trees in forested areas would reduce shade near streams,” which may

result in increases in water temperature.<sup>28</sup> As noted above, Virginia water quality standards in Sections 9VAC25-260-60 and 9VAC25-260-70 prohibit increases or variations in temperature above certain thresholds for natural trout streams. The Atlantic Coast Pipeline would cross 31 trout streams in Virginia.<sup>29</sup> Because tree felling may violate these water quality standards, it must fall within Virginia's authority under Section 401 of the Clean Water Act to ensure protection of state water quality standards.

Because tree felling implicates water quality standards related to erosion, sedimentation, and temperature, Virginia must assess impacts from tree felling under the state's Section 401 regulatory authority. Before Atlantic may fell trees, Virginia must determine that there is "reasonable assurance" that doing so will not violate water quality standards and issue an effective water quality certification. As discussed above, Virginia has not issued an effective 401 certification and is not expected to do so, if at all, until March or April 2018 at the earliest. The Commission must therefore deny Atlantic's request to begin tree felling.

### **CONCLUSION**

For these reasons, the Commission must deny Atlantic's request to proceed with non-mechanized tree felling for the Atlantic Coast Pipeline.

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<sup>28</sup> Final EIS at 4-114; *see id.* at 4-110.

<sup>29</sup> *Id.* at 4-213.

**CERTIFICATE OF SERVICE**

I hereby certify that I have on December 21, 2017, caused the foregoing document to be served upon each person designated on the official service list compiled by the Secretary in this proceeding.



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