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February 11, 2020

Via U.S. Mail and email to:

William T. Walker
Chief, Norfolk District Regulatory Branch
U.S. Army Corps of Engineers
803 Front Street
Norfolk, VA 23510
William.T.Walker@usace.army.mil

Re: Nationwide Permit 12 Verification No. NAO-2014-1749 for Atlantic Coast Pipeline

Dear Chief Walker:

This letter is a notice that the United States Army Corps of Engineers, Norfolk District, cannot lawfully reinstate its suspended verification that the proposed Atlantic Coast Pipeline is authorized to be constructed using Nationwide Permit 12. The pipeline developer, Atlantic Coast Pipeline, LLC (Atlantic), expressly plans to violate at least one of the permit's general conditions and has taken steps to do so, despite making contrary representations to the Corps and other regulators. As we explain in detail below, the Norfolk District cannot reinstate its suspended verification because:

- General Condition 10 of Nationwide Permit 12 requires Atlantic to “comply with applicable FEMA-approved state or local floodplain management requirements.”
- Nelson County, Virginia’s floodplain ordinance adopts a FEMA recommendation that critical facilities not be located within floodplains by mandating that any such facility proposed to be located in a special flood hazard area receive a variance.
- Atlantic sued the County in federal court, claiming that the variance requirement is preempted as applied to the Atlantic Coast Pipeline.
- Atlantic will not satisfy General Condition 10 unless Atlantic complies with the variance requirement, regardless of the outcome of Atlantic’s separate lawsuit.
- The Corps cannot lawfully excuse Atlantic’s plan to violate General Condition 10.

Under the circumstances, reinstating the suspended verification would be arbitrary, capricious, and not in accordance with law. We therefore request that you revoke verification of the proposed Atlantic Coast Pipeline in accordance with 33 C.F.R. § 330.5(d) and instruct Atlantic to seek an individual permit.

1. Atlantic must comply with FEMA-approved local floodplain management requirements to be eligible for Nationwide Permit 12.

The proposed Atlantic Coast Pipeline (ACP or pipeline) and its access roads would cross over 1,500 waterbodies and more than 41 miles of Federal Emergency Management Agency (FEMA)-designated 100-year floodplains.¹ Atlantic cannot build the pipeline without a permit from the Corps under Section 404 of the Clean Water Act.²

As the Corps knows, Atlantic proposed to fit its pipeline project within the scope of Nationwide Permit (NWP) 12 rather than apply for an individual permit. On February 9, 2018, the Norfolk District issued a verification letter (the Norfolk Verification) stating that the ACP as proposed satisfied the criteria of NWP 12 and authorizing Atlantic to proceed under that permit.³ The Norfolk Verification was subsequently suspended on November 20, 2018, after the United States Court of Appeals for the Fourth Circuit stayed the Huntington District’s verification (which the court later vacated altogether).⁴ The Norfolk Verification remains suspended as of the date of this letter.

The Corps cannot lawfully reinstate the Norfolk Verification unless the Corps is satisfied that Atlantic will comply with all the terms and conditions of NWP 12. General Condition 10, which applies to all NWPs, mandates that any activity authorized by NWP involving fill in a 100-year floodplain “must comply with applicable FEMA-approved state or local floodplain management requirements.”⁵ General Condition 10 is not optional. Army Corps regulations provide that “[a]n activity is authorized under an NWP only if that activity and the permittee satisfy *all* of the NWP’s terms and conditions.”⁶ For years, Atlantic has represented to the Corps

¹ See **Ex. A**, Atlantic Coast Pipeline and Supply Header Project, Final Environmental Impact Statement, at 4-31, 4-103 & Table 4.3.2-2 (2017).

² See 33 U.S.C. §§ 1311(a) and 1344(a); *Appalachian Voices v. State Water Control Bd.*, 912 F.3d 746, 750 (4th Cir. 2019).

³ See **Ex. B**, Letter from William T. Walker, Chief, Norfolk District Regulatory Branch, to Leslie Hartz, Atlantic Coast Pipeline, LLC (Feb. 9, 2018).

⁴ **Ex. C**, Letter from William T. Walker, Chief, Norfolk District Regulatory Branch, to Leslie Hartz, Atlantic Coast Pipeline, LLC (Nov. 20, 2018); see also Stay Order, *Sierra Club v. U.S. Army Corps of Eng’rs*, No. 18-2273 (4th Cir. Nov. 7, 2018); Vacatur Order, *Sierra Club*, No. 18-2273 (4th Cir. Jan. 25, 2019).

⁵ **Ex. D**, U.S. Army Corps of Eng’rs, Norfolk District, Nationwide Permit 12, Utility Line Activities, and Regional Conditions, at 9 (Mar. 19, 2017).

⁶ 33 C.F.R. § 330.1(c) (emphasis added); see also *Sierra Club v. U.S. Army Corps of Eng’rs*, 909 F.3d 635, 640 (4th Cir. 2018) (“Potential permittees ‘must satisfy *all* terms and conditions of an NWP for a valid authorization to occur.’” (quoting 33 C.F.R. § 330.4(a)).

and other regulators that it would obtain the necessary floodplain permits from local governments along the pipeline route.⁷

2. Atlantic does not intend to comply with an applicable FEMA-approved floodplain management requirement in Nelson County.

It is now indisputable that Atlantic plans to violate General Condition 10 in Nelson County, Virginia. Nelson County participates in the FEMA-administered National Flood Insurance Program (NFIP), which requires the County to adopt and enforce floodplain regulations that meet or exceed federal minimum standards.⁸ FEMA regulations provide that any NFIP-participating community may adopt floodplain regulations that are more restrictive than the federal minimum standards, and that those higher standards “are encouraged and shall take precedence.”⁹ FEMA also formally recommends that a “critical facility should not be located in a floodplain” because “[f]or some activities and facilities, even a slight chance of flooding poses too great a threat.”¹⁰ Consistent with FEMA’s recommendation, Nelson County’s floodplain ordinance restricts the development of critical facilities in FEMA-designated special flood hazard areas (SFHAs). Section 10.15(f) of the County’s floodplain ordinance provides that “critical facilities are prohibited from being constructed or operated within a SFHA unless a [v]ariance is granted.”¹¹ The ordinance also lists examples of critical facilities, including “[s]tructures or facilities that produce, use, store, or transport highly volatile, flammable, explosive, toxic, and/or water-reactive materials.”¹² This description tracks FEMA’s guidance almost verbatim.¹³

Atlantic plans to flout Nelson County’s floodplain ordinance and, by extension, General Condition 10. The proposed ACP qualifies as a critical facility and the pipeline route would cross roughly 3.5 miles of FEMA-designated SFHA in Nelson County, so Atlantic sought

⁷ See, e.g., **Ex. A**, at 4-118 (“Atlantic and DETI have committed to obtaining floodplain permits, where applicable, for the projects (typically through county-level agencies.)”); **Ex. E**, Atlantic Coast Pipeline Joint Permit Application: U.S. Army Corps of Eng’rs–Norfolk District, Va. Dep’t of Env’tl. Quality, and Va. Marine Res. Comm’n, Supplemental Information, at 9 (2017) (“The ACP will cross several [FEMA]-designated 100-year floodplains throughout Virginia. . . . Atlantic has been working with the counties in Virginia and will apply for applicable floodplain permits.”).

⁸ 44 C.F.R. § 60.1; see also FEMA, Community Status Book Report: Virginia Communities Participating in the National Flood Program, at 4 (last visited Feb. 7, 2020), available at <https://www.fema.gov/cis/VA.html> (listing Nelson County as a participating NFIP community).

⁹ 44 C.F.R. § 60.1(d).

¹⁰ **Ex. F**, FEMA, *Managing Floodplain Development Through the National Flood Insurance Program*, at 6-18 (Mar. 5, 2007).

¹¹ **Ex. G**, Nelson County, Va., Code of Ordinances, app. A, § 10.15(f) (2019).

¹² *Id.*

¹³ See **Ex. H** (table comparing excerpts of **Ex. E** and **Ex. F**).

variances from the Nelson County Board of Zoning Appeals.¹⁴ After a review process and public hearings, the Board denied four of Atlantic’s variance requests.¹⁵ Rather than try to further buttress its applications or seek review of the Board’s decision under Va. Code Ann. § 15.2-2314, Atlantic decided that it could deny its obligation under General Condition 10 and sidestep the County’s floodplain ordinance completely. On December 6, 2018—just three days after the Board denied Atlantic’s variance requests and about two weeks after the Norfolk Verification was suspended—Atlantic sued Nelson County and the Nelson County Board of Supervisors in federal court. Atlantic claims that the Natural Gas Act excuses Atlantic from “comply[ing] with [Nelson County’s floodplain ordinance], including obtaining any zoning permits for any of the floodplain crossings, as part of the construction and siting of the [pipeline].”¹⁶ When Atlantic was reminded of its obligation under General Condition 10, Atlantic still refused to comply.¹⁷ That litigation is ongoing.

Atlantic’s attempted end run around Nelson County’s floodplain ordinance is especially troubling because the County has good reason to be cautious about siting critical facilities in its floodplains. In 1969, Hurricane Camille dumped over two feet of rain on the County in just eight hours.¹⁸ In Nelson County alone, the storm and resulting flood killed over 120 people and inflicted \$116 million in damage (not accounting for inflation).¹⁹ Nelson County’s experience underscores FEMA’s judgment that a critical facility should not be located in a floodplain in part because “a higher flood or an error on the builder’s or operator’s part could result in a greater risk than the community is willing to accept.”²⁰

3. The Corps cannot reinstate the Norfolk Verification unless Atlantic complies with Nelson County’s floodplain ordinance, regardless of Atlantic’s lawsuit.

The Corps must enforce General Condition 10 regardless of the outcome of Atlantic’s lawsuit against Nelson County. The gravamen of Atlantic’s claim against the County is that the Natural Gas Act preempts the County’s floodplain ordinance as applied to the ACP.²¹ But General Condition 10 independently requires compliance with the County’s floodplain ordinance

¹⁴ See **Ex. I**, Compl. ¶¶ 17–20, 27, *Atlantic Coast Pipeline, LLC v. Nelson County Bd. of Supervisors*, No. 3:18-cv-115 (W.D. Va. Dec. 6, 2018).

¹⁵ See *id.* ¶¶ 29–37.

¹⁶ *Id.* ¶ 47.

¹⁷ See generally **Ex. J**, Pl.’s Opp’n to Defs.’ Mot. for Summ. J., *Atlantic Coast Pipeline, LLC v. Nelson County Bd. of Supervisors*, No. 3:18-cv-115 (W.D. Va. Jan. 10, 2020).

¹⁸ See **Ex. K**, U.S. Dep’t of Commerce, Env’tl. Sci. Servs. Admin., *The Virginia Floods: August 19–22, 1969*, at 2 (1969).

¹⁹ **Ex. L**, Garnett P. Williams & Harold P. Guy, U.S. Dep’t of Interior, *Erosional and Depositional Aspects of Hurricane Camille in Virginia, 1969*, at 1 (1973).

²⁰ **Ex. F** at 6-18.

²¹ See **Ex. I** ¶ 47.

as a matter of federal law, and preemption does not apply to federal laws.²² Moreover, General Condition 10 does not contemplate that local floodplain management regulations can be treated as severable based on preemption or for any other reason. First, the text of General Condition 10 makes no mention of severability or preemption.²³ Second, the administrative record for NWP 12 cannot support any such exceptions. When the Corps reissued NWP 12 in 2017, it relied on the permit’s general conditions—and General Condition 10 specifically—to ensure that activities authorized by NWP 12 would stay within the thresholds that Section 404 of the Clean Water Act sets for adverse environmental impacts and to ensure that the Corps could lawfully forego preparing a full environmental impact statement under the National Environmental Policy Act.²⁴ Severability and preemption are not relevant to those analyses because they are legal determinations that have no effect on the environmental impacts of activities authorized by NWP 12. Consequently, the Decision Document for NWP 12, the Norfolk District’s Supplemental Decision Document for NWP 12, and the Federal Register notice for the 2017 issuance and reissuance of all NWPs are silent about preemption.²⁵

Reinstatement of the Norfolk Verification would be thus arbitrary, capricious, and not in accordance with law.²⁶ The Corps cannot ignore Atlantic’s manifest intention to violate General Condition 10.²⁷ And the Corps cannot excuse Atlantic from its obligation under General

²² See, e.g., *POM Wonderful LLC v. Coca-Cola Co.*, 573 U.S. 102, 111 (2014).

²³ See **Ex. D**, at 9.

²⁴ See, e.g., **Ex. M**, U.S. Army Corps of Eng’rs, Decision Document: Nationwide Permit 12, at 22 (Dec. 21, 2016) (“The finding of no significant impact is reached because of the terms and conditions of the NWP and the mitigation measures (e.g., the general conditions and other mitigation measures) for NWP 12 that are discussed throughout the decision document.”); *id.* at 60 (“Compliance with general condition 10 will ensure that authorized activities in 100-year floodplains will not cause more than no more than [*sic*] minimal adverse effects on flood storage and conveyance.”); *id.* at 75 (“Activities authorized by this NWP may adversely affect the movement of water in the aquatic environment. . . . General condition 10 requires activities to comply with applicable FEMA-approved state or local floodplain management requirements, which will reduce adverse effects to surface water flows.”); *id.* at 75 (“To ensure that the NWP does not authorize activities that adversely affect normal flooding patterns, general condition 10 requires NWP activities to comply with applicable FEMA-approved state or local floodplain management requirements.”); *Issuance and Reissuance of Nationwide Permits*, 82 Fed. Reg. 1860, 1890 (Jan. 6, 2017) (“The mitigation measures discussed in the national decision documents include the NWP general conditions, which help ensure that NWP activities result in no more than minimal adverse environmental effects.”).

²⁵ See generally **Ex. M**; **Ex. N**, U.S. Army Corps of Eng’rs, Norfolk District, Supplement to the Decision Document for Nationwide Permit 12 (2017); *Issuance and Reissuance of Nationwide Permits*, 82 Fed. Reg. 1860 (Jan. 6, 2017).

²⁶ See 5 U.S.C. § 706(2).

²⁷ See *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (an agency action is arbitrary and capricious when the agency “entirely failed to consider

Condition 10 because the Corps does not have authority to relax the conditions of an NWP on a case-by-case basis.²⁸ The Corps should therefore supplement its notice suspending the Norfolk Verification because two additional factors identified in the NWP regulations—“[c]hanges in circumstances relating to the authorized activity” and “the extent of the permittee’s compliance with the terms and conditions of the NWPs”—now reinforce the need for suspension.²⁹

4. The Norfolk Verification must be revoked unless Atlantic obtains variances or reroutes the pipeline.

Since the Norfolk Verification cannot be reinstated on this record, the only thing left to do is revoke it. After an authorization is suspended, Corps regulations mandate that the district engineer “will take action to reinstate, modify, or revoke the authorization.”³⁰ The district engineer must choose one of these enumerated options because the word “will” is a term of “unmistakably mandatory character.”³¹ Revocation is the only option available here because the Corps cannot lawfully reinstate the Norfolk Verification or modify General Condition 10 for the reasons explained above. Furthermore, Corps regulations state that the district engineer “will revoke authorization” following suspension if the district engineer “determines that sufficient concerns for the environment . . . or other relevant factors of the public interest so require.”³² This mandate does not allow the district engineer to ignore a violation of a permit condition. Unless Atlantic obtains variances or reroutes its proposed pipeline to avoid SFHAs in Nelson County, the Corps must revoke the Norfolk Verification and instruct Atlantic to seek an individual permit.³³

The law dictates this outcome, but fundamental fairness requires it too. NWPs provide a streamlined path to permitting for qualified projects by regulating “with little, if any, delay or paperwork certain activities having minimal impacts.”³⁴ But that streamlined process exists only because the terms and conditions of NWPs ensure that permitted activities will have “minimal impacts.” Atlantic voluntarily chose NWP 12 and its attendant conditions rather than pursue an individual permit. Atlantic cannot reap the benefit of a streamlined permit and then repudiate the burden at its leisure, and the Corps cannot abet Atlantic’s effort to shirk an obligation that Atlantic freely chose.

an important aspect of the problem” or “offered an explanation for its decision that runs counter to the evidence before the agency”).

²⁸ See *Sierra Club*, 909 F.3d at 649–51.

²⁹ See 33 C.F.R. § 330.5(d)(1).

³⁰ 33 C.F.R. § 330.5(d)(2)(ii) (emphasis added).

³¹ *Ewell v. Murray*, 11 F.3d 482, 488 (4th Cir. 1993) (quoting *Hewitt v. Helms*, 459 U.S. 460, 469 (1983)).

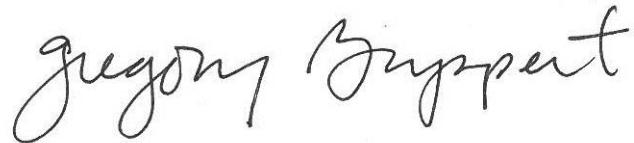
³² 33 C.F.R. § 330.5(d)(2)(iii) (emphasis added).

³³ See *id.* § 330.6(a)(2).

³⁴ *Id.* § 330.1(b).

We respectfully request that you revoke the Norfolk Verification.

Sincerely,

A handwritten signature in black ink that reads "Gregory Buppert". The signature is written in a cursive, flowing style.

Gregory Buppert
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