

May 20, 2021

Via electronic mail

Melanie Davenport
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Quality
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Donald Anderson
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Office of the Attorney General
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Re: Section 401 Certification for Mountain Valley Pipeline certificate amendment application (FERC Docket No. CP21-57-000)

Dear Ms. Davenport and Mr. Anderson:

In February, Mountain Valley Pipeline, LLC (“Mountain Valley”) submitted an application to the Federal Energy Regulatory Commission (“FERC”) in FERC Docket No. CP21-57-000 requesting an amendment to the certificate of public convenience and necessity for the Mountain Valley Pipeline (“MVP”) project.¹ The requested amendment would change the waterbody crossing method for MVP from open cut to trenchless at 120 locations spanning 182 waterbodies and wetlands, including 83 trenchless crossings in Virginia. Many of the undersigned organizations notified FERC that it may not grant the requested amendment unless Virginia issues a state certification under Section 401 of the Clean Water Act.² On May 13, 2021, FERC sent a letter to the Department of Environmental Quality (“DEQ”) requesting DEQ’s opinion, as the state certifying agency, on whether the requested amendment requires certification under Section 401.³ We are pleased to see FERC take seriously its compliance with the Clean Water Act, but we emphasize that this is not a matter of opinion. Section 401 certification is required by law and DEQ must respond to FERC accordingly.

¹ Abbreviated Application for Limited Amendment to Certificate of Public Convenience and Necessity and Request for Expedited Action (Feb. 19, 2021), FERC Accession No. 20210219-5179.

² See Joint Scoping Comments of Allegheny–Blue Ridge Alliance et al. 52–59 (Apr. 15, 2021), FERC Accession No. 20210415-5319.

³ Letter from James Martin, FERC Office of Energy Projects, to Melanie Davenport, DEQ (May 13, 2021), FERC Accession No. 20210513-3016.

Section 401 requires state certification for any “Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters.” 33 U.S.C. § 1341(a)(1). This is a low threshold that differs from some other provisions of the Clean Water Act in two key ways. First, Section 401 is triggered by any discharge, regardless of whether that discharge involves a pollutant—the “flowing out or issuing of water” is enough. *AES Sparrows Point LNG v. Wilson*, 589 F.3d 721, 731 (4th Cir. 2009) (citing *S.D. Warren Co. v. Maine Bd. of Env’tl. Prot.*, 547 U.S. 370, 376–87 (2006)). Second, Section 401 is triggered by the potential for a discharge; certainty is not required.⁴ In Virginia, FERC-approved natural gas pipelines that are greater than 36 inches in diameter require both a Virginia Water Protection Permit and an upland certification to satisfy Section 401. *See* Va. Code Ann. § 62.1-44.15:80.

There is no question that Mountain Valley’s requested amendment triggers Section 401 and requires state certification. In fact, both FERC and Mountain Valley have acknowledged that the requested amendment would authorize numerous activities that “may result in [a] discharge into the navigable waters.” 33 U.S.C. § 1341(a)(1). For example, FERC staff recently prepared an environmental assessment to study a now-withdrawn request from Mountain Valley for a certificate amendment that would have allowed a more modest set of trenchless crossings, and concluded that Mountain Valley’s request would have had environmental impacts “not considered in the final environmental impact statement . . . issued in FERC Docket No. CP16-10-000,”⁵ including the possibility of boreholes breaching stream bottoms and a chance that “bentonite or polymer-based lubricant . . . may enter surface waterbodies during drilling or through inadvertent spills.”⁶ The same discharges surely may result here, since Mountain Valley’s current amendment request involves even more crossings in even more challenging terrain using the same conventional bore method.

⁴ *See, e.g.*, Environmental Protection Agency, Clean Water Act Section 401 Certification Rule, 85 Fed. Reg. 42,237 (Jul. 13, 2020) (“[S]ection 401 is triggered by the potential for a discharge to occur, rather than the presence of an actual discharge.”). This standard is a function of the statutory language “may result in any discharge,” 33 U.S.C. § 1341(a)(1), and does not depend on the cited regulation, which elsewhere unlawfully usurps state authority under Section 401 and which we were pleased to see Virginia challenge in court. *See Compl., State of California et al. v. Wheeler*, No. 3:20-cv-4869 (N.D. Cal. Jul 21, 2021).

⁵ Environmental Assessment: Mountain Valley Pipeline Project Amendment, FERC Docket No. CP21-12-000, at 6 (Jan. 2021), FERC Accession No. 20210107-3064.

⁶ *Id.* at 19–20.

Mountain Valley’s own submissions to FERC also demonstrate that its requested amendment triggers Section 401. For example, Mountain Valley’s application for a certificate amendment contemplates dewatering of bore pits on a scale that all but guarantees pumped-out water will enter waterbodies near the bore sites.⁷ And Mountain Valley recently explained in response to a FERC inquiry that bore pit dewatering “will be conducted through a pumped-water filter bag and placed within a dewatering structure,” and that the “structure, rate, and volume will be monitored continuously to ensure that the discharge will not cause erosion, create structure overpumping, compromise structural integrity, or result in *sediment-laden water* entering a waterbody.”⁸ As an initial matter, Mountain Valley’s apparent inability to implement effective erosion and sedimentation control means DEQ cannot credulously accept the company’s optimistic performance predictions.⁹ *See, e.g., Animal Legal Def. Fund v. Perdue*, 872 F.3d 602, 620 (D.C. Cir. 2017) (arbitrary and capricious to accept company’s certification of compliance and ignore its history of violations). But assuming Mountain Valley can live up to its word, certification is still required because even a discharge of *sediment-free* water is enough to trigger Section 401 and could negatively affect water quality in myriad ways. *AES Sparrows Point LNG*, 589 F.3d at 731.

Mountain Valley evidently concedes that its amendment triggers Section 401. When FERC asked Mountain Valley whether it needs to obtain state certification, the company elided the issue of whether Section 401 applies and simply insisted that it already possesses the requisite certification from Virginia.¹⁰ Mountain Valley told FERC that Virginia issued a Section 401 certification in 2017 covering any subsequent changes to MVP that FERC approves, which purportedly would include Mountain Valley’s requested amendment.¹¹

In reality, Mountain Valley’s existing certification is not as sprawling as the company claims—nor could it be. Mountain Valley’s assertion to FERC relies on a

⁷ See Supplemental Environmental Report at 2-11, *available at* FERC Accession No. 20210219-5179.

⁸ Response to Environmental Information Request Issued Apr. 12, 2021 at 6 (Apr. 27, 2021), FERC Accession No. 20210427-5306 (emphasis added).

⁹ *See, e.g.*, Press Release, Office of the Attorney General, Attorney General Herring and DEQ File Lawsuit Over Repeated Environmental Violations During Construction of Mountain Valley Pipeline (Dec. 7, 2018), *available at* <https://bit.ly/3fsZJcI>.

¹⁰ Response to Environmental Information Request Issued Mar. 12, 2021 at 1 (Mar. 29, 2021), FERC Accession No. 20210329-5300.

¹¹ *Id.*

cherry-picked sentence from the “Definitions” section of Virginia’s 2017 certification, which states that “[t]he 401 Water Quality Certification applies to the location of pipeline right of way, access roads, and appurtenances as described in the [FERC environmental impact statement (“EIS”)] and any changes thereto subsequently approved by FERC.”¹² This language most naturally applies only to those subsequent changes that remain within the scope of the EIS—that is, those that do not require supplemental review under the National Environmental Policy Act (“NEPA”)—but to the extent there is any ambiguity, the “Scope of Certification” section resolves it: “This Certification covers all relevant upland Project activities within the route identified in the [EIS].”¹³

Virginia could not have written the blank check that Mountain Valley wants because the EIS assumed in 2017 that “[a]ll waterbody crossings for the MVP would be dry open-cut crossings.”¹⁴ And since Section 401 certification decisions must include a rational connection between the facts found and the choice made, *Appalachian Voices v. State Water Control Board*, 912 F.3d 736, 753 (4th Cir. 2019), a roving license to make post-hoc changes beyond the scope of the EIS would be flatly unlawful. Whatever flexibility Virginia intended to confer upon FERC by the language that Mountain Valley invokes, the requested certificate amendment is beyond the scope of that flexibility. Indeed, by initiating supplemental NEPA analysis for the requested certificate amendment,¹⁵ FERC itself acknowledges that impacts and discharges from the requested certificate amendment would be different in both kind and degree from those disclosed in the EIS and supported by an existing certification from Virginia. In sum, Mountain Valley needs a Section 401 certification for its requested amendment and does not currently have one.

Whether a Section 401 certification for the requested amendment should issue is beside the point for now. DEQ and the State Water Control Board may—or may not—eventually conclude that the requested amendment will not violate applicable water quality standards. In the meantime, the threshold question is whether Section 401 certification is required, and the answer is yes.

¹² See 2017 Certification at 2, available at Accession No. 20210329-5300.

¹³ *Id.* at 3.

¹⁴ Final Environmental Impact Statement: Mountain Valley Pipeline Project and Equitrans Expansion Project, FERC Docket No. CP16-10-000, at 2-43 (June 2017), available at <https://bit.ly/3tSMHTV>.

¹⁵ See Scoping Notice (Mar. 16, 2021), FERC Accession No. 20210316-3075.

Attorney General Herring recently affirmed that “Virginia has the right and responsibility to review proposed projects to ensure they will not harm our environment and dirty our waters.”¹⁶ We wholeheartedly agree. “State certifications under [Section] 401 are essential in the scheme to preserve state authority to address the broad range of pollution” that Congress targeted with the Clean Water Act. *S.D. Warren*, 547 U.S. at 386. We commend the Attorney General for fighting back against a Trump Administration rule gutting state authority under Section 401, and we applaud and support DEQ’s recent effort to ensure Virginia has enough time to conduct its Section 401 review of Mountain Valley’s pending application for a dredge-and-fill permit from the U.S. Army Corps of Engineers. Now it is incumbent upon Virginia to exercise its right and responsibility under Section 401 and review Mountain Valley’s requested amendment—starting with DEQ informing FERC that certification under Section 401 is required.

Sincerely,

/s/ David Sligh
David Sligh
Conservation Director
WILD VIRGINIA

/s/ Spencer Gall
Spencer Gall
Gregory Buppert
SOUTHERN ENVIRONMENTAL LAW CENTER

/s/ Evan Johns
Evan Johns
Staff Attorney
APPALACHIAN MOUNTAIN ADVOCATES

/s/ Kate Addleson
Kate Addleson
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/s/ Peter Anderson
Peter Anderson
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APPALACHIAN VOICES

/s/ Tammy Belinsky
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/s/ Roberta Bondurant
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¹⁶ Press Release, Office of the Attorney General, Attorney General Herring Files Lawsuit Challenging Trump Administration Rule Undermining States’ Clean Water Act Oversight (July 21, 2020), available at <https://bit.ly/3uMxbKK>.

/s/ Russell Chisholm

Russell Chisholm

Co-Chair

PROTECT OUR WATER HERITAGE RIGHTS

/s/ Gillian Giannetti

Gillian Giannetti

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/s/ Ann Rogers

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BLUE RIDGE ENVIRONMENTAL DEFENSE
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/s/ Bill Wolf

Bill Wolf

President

PRESERVE CRAIG, INC.

cc: Virginia State Water Control Board (citizenboards@deq.virginia.gov)