June 21, 2021

Via electronic mail

Melanie Davenport
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Virginia Department of Environmental Quality
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Donald Anderson
Deputy Attorney General
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:

The Federal Energy Regulatory Commission ("FERC") recently asked the Department of Environmental Quality ("DEQ") for DEQ's position on whether Mountain Valley Pipeline, LLC's ("Mountain Valley") request for FERC permission to tunnel under nearly one hundred streams and wetlands in Virginia requires state certification pursuant to Section 401 of the Clean Water Act.[1] Many of the undersigned organizations wrote you a letter last month explaining that Section 401 certification is required by law and that DEQ must respond to FERC accordingly.[2] On June 9th, Mountain Valley sent you a letter objecting to that straightforward conclusion based on several justifications that are either irrelevant or wrong.[3] Mountain Valley's letter does not merit a point-by-point rebuttal, but the letter suffers from three critical flaws that undermine the company's rhetoric and proffered rationales.

First, there is nothing remarkable about regulatory oversight under Section 401 for Mountain Valley's requested amendment to its certificate of public convenience and necessity. To be clear: Neither FERC nor the undersigned organizations have asked DEQ to commit at this time to any particular decision about whether a certification ultimately should issue. That question is beside the point for now.

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

[2] Letter from Wild Virginia *et al.* to Melanie Davenport, DEQ, and Donald Anderson, OAG (May 20, 2021), FERC Accession No. 20210520-5090 ("Wild Virginia Letter").

[3] Letter from Todd Normane, Mountain Valley, to Melanie Davenport, DEQ, and Donald Anderson, OAG (June 9, 2021), *available at* FERC Accession No. 20210610-5022 ("Mountain Valley Letter").

Mountain Valley extols the comparative environmental benefits of trenchless crossings versus dry-ditch open cut crossings and repeatedly downplays the threats that the company's tunneling plan poses to water quality. Those arguments are also beside the point for now. Whether Mountain Valley can avoid violating water quality standards while it excavates bore pits and drills tunnels is a question for the Section 401 review process, not a reason to short-circuit that process. Mountain Valley is correct that many of the undersigned organizations have long encouraged the company and regulators to consider trenchless crossings as an alternative to in-stream work because trenchless crossings can be less environmentally damaging. But the potential comparative benefits of trenchless crossings do not mean the company enjoys free rein to tunnel as it sees fit. Section 401 review is key to ensuring that trenchless crossings avoid doing more harm than good. And to reiterate, the potential comparative benefits of trenchless crossings versus dry-ditch open cut crossings are not relevant to the question presently before DEQ: whether the requested amendment would authorize activities that "may result in any discharge into the navigable waters." 33 U.S.C. § 1341(a)(1).

Second, Mountain Valley's letter makes categorical legal statements that are not correct. For example, Mountain Valley acknowledges that water from bore pits will be pumped into dewatering structures and then "released from dewatering structures to well-vegetated upland areas so as to percolate back into the ground and not reach any waterbody," but the company asserts that "[t]hese releases cannot be characterized as a 'point source discharge.'"[4] Not so fast. Just last year, the United States Supreme Court confirmed that the Clean Water Act regulates point source discharges "when a point source directly deposits pollutants into navigable waters" and also "when there is the *functional equivalent of a direct discharge*."[5] This is a context-specific test that accounts for distance, time, chemistry, hydrology, and more[6]—which means Mountain Valley cannot support its sweeping statement or eliminate as a matter of law the potential for point source discharges, especially given the varied hydrological, geological, and

[4] Mountain Valley Letter at 7 n.22.

[5] *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1476 (2020) (emphasis in original). *County of Maui* involved a dispute over an unpermitted effluent discharge rather than a Section 401 certification, but its explanation of the scope of point source discharges controls here even assuming Section 401 is limited to point source discharges, which Virginia has challenged as an unlawful limitation on state authority under Section 401. *See* Compl. at 16 ¶¶ 5.45–5.48, *State of California et al. v. Wheeler*, No. 3:20-cv-04869 (N.D. Cal. July 21, 2020).

[6] *County of Maui*, 140 S. Ct. at 1476–77.

engineering circumstances that Mountain Valley would encounter at its dozens of proposed drilling locations in Virginia.

Mountain Valley also invokes a "materiality" standard for when Section 401 is triggered anew that finds no support in the statute or its implementing regulations.[7] Mountain Valley instead relies on out-of-context quotations from the preamble to the Environmental Protection Agency's ("EPA") Clean Water Act Section 401 Certification Rule.[8] In particular, the company quotes language from two irrelevant discussions: (1) EPA's justification for denying states the authority to unilaterally modify a certification after it has been issued;[9] and (2) EPA's explanation of when a new certification request may be required in a scenario where the proposed project changes *after* a certification request has been submitted but *before* the certifying authority has acted on that certification request.[10] But neither discussion is relevant to the question before DEQ. And Mountain Valley omits that the preamble to the Section 401 Certification Rule expressly contemplates the need for a new Section 401 certification process under the circumstances here: "if a federal license or permit is modified *or the underlying project is changed such that the federal license or permit requires modification*, it may trigger the requirement for a new certification, depending on the federal agency's procedures."[11] In sum, Mountain Valley's "materiality" standard is the company's own invention and the sole authority cited for its rule goes the other way.

Finally, Mountain Valley's requested amendment *is* a material change and falls outside the scope of the 2017 Upland Certification. Mountain Valley repeatedly characterizes its application for a certificate amendment as seeking only "a minor amendment to the existing certificate" that does not justify additional regulatory oversight from DEQ.[12] But Mountain Valley's effort to downplay its trenchless crossing plan as a small change is at odds with the facts. FERC's determination that the company's requested amendment requires new analysis under the National

[7] Mountain Valley Letter at 8–9.

[8] Clean Water Act Section 401 Certification Rule, 85 Fed. Reg. 42,210 (July 13, 2020).

[9] *See* Mountain Valley Letter at 9 & n.29 (quoting 85 Fed. Reg. 42,279). Footnote 30 to Mountain Valley's letter also cites 85 Fed. Reg. 42,279, but the quoted language actually appears at 85 Fed. Reg. 42,247.

[10] *See* Mountain Valley Letter at 9 & n.31 (quoting 85 Fed. Reg. 42,247).

[11] 85 Fed. Reg. at 42,279 (emphasis added).

[12] *See, e.g.*, Mountain Valley Letter at 8.

Environmental Policy Act betrays the reality that the company is seeking to make more than a "minor" change.

Mountain Valley also continues to cherry-pick from the "Definitions" section of the 2017 Upland Certification and ignore the "Scope of Certification" section.[13] This is a telling omission. We agree that the 2017 Upland Certification conferred some flexibility on FERC and we said so in our original letter, but Mountain Valley would stretch that flexibility past its breaking point. 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 project's environmental impact statement. That can end the inquiry for DEQ.

* * *

We respectfully request that DEQ inform FERC a state certification under Section 401 of the Clean Water Act is required for Mountain Valley's requested amendment.

Sincerely,

/s/ David Sligh
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Conservation Director
WILD VIRGINIA

/s/ Spencer Gall
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Co-Chair
PROTECT OUR WATER HERITAGE RIGHTS

[13] *Compare* Mountain Valley Letter at 6 *with* Wild Virginia Letter at 3–4.

/s/ Anne Havemann
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