



*Commonwealth of Virginia*

***VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY***

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June 25, 2021

James Martin, PhD  
Branch Chief, Gas Branch 3  
Office of Energy Projects  
Federal Energy Regulatory Commission  
888 First Street NE  
Washington, D.C. 20426

Re:  
OEP/DG2E/Gas Branch 3  
Mountain Valley Pipeline, LLC  
Docket No. CP21-57-000 § 375.308(x)

Dear Dr. Martin:

In your letter dated May 13, 2021, you asked the Virginia Department of Environmental Quality (“DEQ”) for its opinion on whether certification under Section 401 of the Clean Water Act is required for the February 19, 2021 request by Mountain Valley Pipeline, LLC (MVP) to amend its certificated natural gas pipeline project. As indicated in your letter, the requested amendment would change the waterbody crossing method for the pipeline from open cut to trenchless at 120 locations, which would avoid open cut crossings of 182 waterbodies and wetlands. Specifically, in Virginia, this would include 82 conventional bore crossings and 1 crossing completed via guided conventional bore. In addition, MVP proposes a minor route adjustment in both Virginia and West Virginia to avoid crossing wetlands and waterbodies.

Virginia appreciates that you have solicited the state’s opinion. However, implicit in both Section 401 of the Clean Water Act and U.S. Environmental Protection Agency’s (“EPA”) recent Clean Water Act Section 401 Certification Rule (“401 Rule”)<sup>1</sup>, is that the federal agency issuing a license or permit for an activity that may result in a discharge into a water of the United

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<sup>1</sup> 85 Fed. Reg. 42210 (July 13, 2020) (codified at 40 C.F.R. Part 121).

States has the responsibility for making the determination of whether a 401 certification is required. Has the Federal Energy Regulatory Commission (“FERC”) made that decision?

If FERC has decided that the requested amendment requires state certification, DEQ offers the following analysis. As FERC is aware, DEQ issued a 401 water quality certification (“Certification”) for the project on December 8, 2017. This Certification addresses water quality protections related to upland activities and was issued after an extensive public notice and comment opportunity that included several public hearings. In issuing this Certification, Virginia certified under Section 401 of the Clean Water Act that it had reasonable assurance that certain activities regarding the construction of a natural gas pipeline would not degrade the state’s water. Several environmental groups, individuals, and other entities filed a petition for review with the Fourth Circuit Court of Appeals. Concluding that Virginia’s issuance of the [C]ertification was not arbitrary and capricious, the Certification was upheld by the Court.<sup>2</sup>

During the time Virginia was processing the 2017 Certification, DEQ made it clear that the Certification was narrowly focused on additional protections that DEQ believed are necessary in upland areas, which are beyond the jurisdiction of the U.S. Army Corps of Engineers permitting program, to minimize potential impacts to water quality which are not directly associated with land-disturbing activity. The conditions in the Certification impose requirements that are in addition to other existing DEQ programs being applied to the project as well as many other requirements compelled by other state and federal entities. The resources and impacts of concern are karst hydrogeology, private and public water supplies, maximization of riparian forest buffers, surface water withdrawals that are exempt from permitting requirements and minimization of landslides related to steep slopes.

DEQ repeatedly explained that there are five interconnected actions involved in reviewing and regulating the MVP project. First, DEQ, along with other Virginia natural resource agencies, reviewed FERC’s Draft Environmental Impact Statement (“DEIS”) and submitted comments. Secondly, DEQ is applying the requirements of the Virginia Erosion and Sediment Control (“ESC”) and Stormwater Management (“SWM”) laws and regulations. This includes review and approval of MVPs Annual Standards and Specifications, which incorporate these program requirements. Going beyond regulatory requirements, DEQ required that construction would not be authorized to begin until project specific ESC and SWM Plans have been approved by DEQ.

Thirdly, Virginia evaluated and issued a second water quality certification related to U.S. Army Corps of Engineers (“Corps”) Section 404 permitting<sup>3</sup>. The fourth action was the evaluation and issuance of the upland 401 Certification. Finally, DEQ is conducting in-stream biological and water quality monitoring in critical/sensitive areas before, during and after construction and requiring MVP to fund continuous in-stream turbidity monitoring by the U.S. Geological Survey.

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<sup>2</sup> Sierra Club v. State Water Control Bd., 898 F.3d 383 (4th Cir. 2018).

<sup>3</sup> DEQ is currently processing an application for an individual Virginia Water Protection Permit, which will serve as 401 water quality certification related to the Corps current 404 permit application from MVP.

As stated in Section III, SCOPE OF CERTIFICATION, the 2017 Certification applies to Project 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 and water withdrawal activities that are exempt from coverage under the Virginia Water Protection Permit Program Regulation (9 VAC 25-210-10, *et seq.*). This Certification addresses in several places the situation in which changes may be made to the MVP project.

First, by the terms of the Certification, the Project is defined as “[T]he Virginia portion of a pipeline project approximately 303 miles in length and 42-inches in diameter to transport up to 2.0 MMDth/d of natural gas from an interconnect point in Wetzel County, West Virginia, to an interconnect with an existing pipeline in Pittsylvania County, Virginia including approximately 106 miles of pipeline, 58 miles of Project access roads, and appurtenances which will be located within Virginia and traverse portions of Giles County, Craig County, Montgomery County, Roanoke County, Franklin County and Pittsylvania County. The 401 Water Quality Certification applies to the location of pipeline right of way, access roads, and appurtenances as described in the EIS and any changes thereto subsequently approved by FERC.” This definition means that the Certification applies to any changes that FERC subsequently approves to the project as it is described in FERC’s June 23, 2017 environmental impact statement. If FERC approves the requested amendment then the 2017 Certification covers the approved changes.

Additionally, in Section V. CONDITIONS, Condition 12 requires that “The Owner shall immediately notify the Department of any modification of this Project and shall demonstrate in a written statement that said modifications will not violate any conditions listed in this Certification. If such demonstration cannot be made, the Owner shall apply for a modification of this Certification.” MVP provided such a statement in its February 19, 2021 Joint Permit Application for an individual Virginia Water Protection Permit and subsequent correspondence. .

DEQ has also considered the current 401 Rule. The 2020 rule explicitly bars the certifying agency from modifying its certifications after they have been issued (pgs. 42279-42280). The EPA rule does say that “if certain elements of the proposed project change materially after a certification is issued, it may be reasonable for the project proponent to submit a new certification request”. (pg. 42279). The paragraph directly before that quote says that the circumstances wherein a new certification are required are once again up to the federal agency: “For example, 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.” (pg. 42279). DEQ is not aware of any FERC procedure that requires a new 401 certification.

In addition to the conditions of the Certification, DEQ certainly acknowledges that its review and approval of project specific stormwater management and erosion and sediment control plans is a critical component of assuring protection of water quality. In fact, Condition 13 in Section V. CONDITIONS states that “The Owner shall comply with the requirements of the Stormwater Management Act (Va. Code § 62. 1-44. 15:24, *et seq.*) and Erosion and Sediment Control Law (Va. Code § 62. 1-44. 15:51, *et seq.*) and the Virginia Water Protection Permit Program Regulations (9 VAC25-210-10, *et seq.*)”.

State law mandates that natural gas pipeline utilities (and certain other utilities) meet the requirements for ESC and SWM under a DEQ-approved Annual Standards and Specifications Program (“AS&S”). The program sets out the regulatory and technical requirements that will be applied to the project. DEQ initially approved MVP’s AS&S in 2017 and most recently approved them, as revised through March 31, 2021, by letter dated April 9, 2021. Included in MVP’s approved AS&S are construction and best management practices related to construction utilizing both conventional bore and guided conventional bore crossings.

Although not required by law, at the outset of this project DEQ committed to reviewing and approving all erosion and sediment control and post construction stormwater plans as an additional environmental safeguard. When MVP makes changes to construction plans, the related ESC and SWM plans must be updated to meet regulatory and technical requirements to protect surface water quality during and after construction completion. These plans must be submitted to and approved by DEQ. In any instance where MVP is now proposing to utilize a boring rather than an open cut crossing, plans for controlling erosion and sediment control must be approved by DEQ. This will result in stormwater discharges being controlled as necessary to meet applicable water quality standards and antidegradation requirements.

Thank you very much for the opportunity to provide Virginia’s opinion.

Very truly yours,



Melanie D. Davenport  
Director, Water Permitting Division

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