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NORTH CAROLINA
Environmental Quality

April 29, 2021

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DWR # 20181638 v3
Alamance & Rockingham Counties

Mountain Valley Pipeline, LLC
Attn: Kathy Salvador and Alex Miller
700 Universe Boulevard
Juno Beach FL 33408
Delivered via email to Kathy.Salvador@nexteraenergy.com
Alex.miller@nexteraenergy.com

Subject: Reissuance of DENIAL of 401 Water Quality Certification and Jordan Lake Riparian Buffer Authorization Application with Supplement MVP Southgate Project

Dear Ms. Salvador and Mr. Miller:

The North Carolina Department of Environmental Quality (DEQ), Division of Water Resources (DWR) is sending you this letter to reissue and supplement its August 11, 2020 denial of Mountain Valley Pipeline, LLC's (MVP) application for a 401 Water Quality Certification and Jordan Lake Buffer Authorization (Denial) with additional explanation as required by the United States Court of Appeals for the Fourth Circuit's opinion in *Mountain Valley Pipeline, LLC v. NCDEQ*, No. 20-1971 (4th Cir. Mar. 11, 2021) (Slip Op.).

Background

On August 11, 2020, DWR denied MVP's request for a Section 401 Water Quality Certification and Jordan Lake Buffer Authorization. DWR's Denial explained that, in the face of the significant uncertainty surrounding MVP's Mainline Project, authorizing the water quality impacts from MVP's Southgate Project would be inconsistent with the avoidance and minimization requirements in North Carolina's 401 water quality certification and riparian buffer regulations.



North Carolina Department of Environmental Quality | Division of Water Resources
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On September 10, 2020, MVP filed a Petition for Review in the Fourth Circuit challenging the Denial pursuant to 15 U.S.C. 717r(d)(1). On March 11, 2021, the Fourth Circuit held that the Denial was consistent with North Carolina's regulations and the Federal Clean Water Act. However, the Fourth Circuit held that DEQ failed to adequately address the Hearing Officer's minimization findings and explain why it chose to deny certification rather than adopt the Hearing Officer's alternative recommendation of issuing a conditional certification. Accordingly, the Fourth Circuit remanded the decision back to DEQ to "address the hearing officer's findings and explain why the Department chose denial over conditional certification."

Readoption of DWR's August 11, 2020 Denial

Upon remand from the Fourth Circuit, DWR hereby readopts and incorporates by reference its August 11, 2020 decision, denying MVP's application for a 401 Water Quality Certification and Jordan Lake Buffer Authorization for the MVP Southgate Project. As the Fourth Circuit held, the Denial was "consistent with the State's regulations and the Clean Water Act." In response to the Fourth Circuit's remand to DEQ to "address the hearing officer's findings and explain why the Department chose denial over conditional certification," DWR provides the following supplement.

Supplement Regarding the Hearing Officer's Findings on Minimization

As the Fourth Circuit indicated in its decision, any apparent inconsistency between the Hearing Officer's minimization finding and DWR's Denial may be resolved by considering the Hearing Officer's statements regarding minimization in context.

The Hearing Officer's Report stated that "MVP has minimized impacts to surface waters and wetlands to the greatest extent practical." In context, this statement was clearly focused on the Southgate Project's proposed design, location, construction techniques, and best management practices. While recommending that MVP's minimization practices be included in any potential certification of the Southgate Project, the Hearing Officer also expressed concern regarding the threshold issue of whether the application for the Southgate Project should be approved at all given the uncertainty of the Mainline Project, stating:

In the absence of the MVP Mainline pipeline's completion in Virginia, the MVP Southgate project has no independent utility. In essence, it would be a pipeline from nowhere to nowhere incapable of carrying any natural gas, and certainly not able to fulfill its basic project purpose, while having no practical alternative. As such, prior to incurring any impacts to North Carolina natural resources, and to ensure that the maximum avoidance and minimization of impacts to North Carolina water and buffer resources occurs, a level of certainty regarding the completion of the MVP Mainline pipeline is required.

To “ensure the proper protection of water quality standards and ensure that all necessary avoidance and minimization of impacts has occurred,” the Hearing Officer recommended two options—denial or conditional approval.

In that context, the Hearing Officer’s finding that “MVP has minimized impacts to surface waters and wetlands to the greatest extent practical” is clearly premised on the Director adopting the Hearing Officer’s option of conditionally approving the application, which the Hearing Officer recognized the Director may reasonably choose not to do.

The Hearing Officer’s Report expressed concern about whether approving the Southgate Project would be consistent with the principles of avoidance and minimization given the level of uncertainty associated with the Mainline Project. The Hearing Officer’s Report stated that “prior to incurring impacts to North Carolina natural resources, and to ensure that the maximum avoidance and minimization of impacts to North Carolina water and buffer resources occurs, a level of certainty regarding the completion of the MVP Mainline pipeline is required.” At the time of the Denial, necessary federal permits had been vacated and FERC had issued a stop work order for the Mainline Project. Yet, the proposed Southgate Project would temporarily impact 12.4 acres of wetlands, 13,986 linear feet of streams and 301,994 square feet of regulated riparian buffer in critical water supply areas. Land would be clear cut of vegetation, streams would be dammed, and open trenches would be cut across streams and through wetlands and buffers in order to install the pipeline.

Given the uncertainty of the Mainline Project and the proposed water quality impacts in North Carolina from the Southgate Project, the Director concluded that “[a]pproving construction activities and thereby allowing the most adverse environmental impacts – without certainty of the project’s utility upon completion – is inconsistent with principles of minimization.” To the extent the Hearing Officer’s Report can be interpreted as containing findings that are inconsistent with this conclusion, such findings are rejected for the reasons stated above.

Supplement Regarding DWR’s Denial of MVP’s Application Rather than Issuance of a Conditional Approval

As noted in DEQ’s opening brief in the Fourth Circuit, the DWR Director, in making a final decision on a 401 Water Quality Certification and Jordan Lake Buffer Authorization request, is not bound by the Hearing Officer’s recommendations. However, the Fourth Circuit held that DEQ has an obligation to explain why it did not choose to adopt the Hearing Officer’s alternative recommendation to approve MVP’s application with a condition providing that construction of the Southgate Project “cannot occur until all legal ambiguities presently surrounding the mainline pipeline have been resolved, and all necessary permits and authorizations have been obtained.”

In its briefing to the Fourth Circuit, DEQ explained that, among other things, the Hearing Officer’s suggested condition was too vague to be enforceable. The Court stated that this was a “fair reason” why DWR may have denied the certification rather than issue it

conditionally. The Court also recognized that another fair reason for denying the certification rather than issuing it conditionally was that MVP's acquisition of various permits for the Mainline Project provides no guarantee that it will move forward, given several lawsuits that have revealed deficiencies in the Mainline Project and its permits. However, the Court held that these rationales were not clearly set forth in the Denial.

DWR reaffirms its decision not to certify the Southgate Project with the Hearing Officer's suggested condition. The Hearing Officer's proposed condition raises clear implementation challenges resting on interpretation of broad terms such as "legal ambiguities." Before certifying the Southgate Project, DWR must have the opportunity to evaluate any relevant information regarding the status of the Mainline Project at that time and the likelihood that construction of the Southgate Project will result in avoidable and unnecessary impacts to North Carolina's surface waters and riparian buffers. DWR concludes that imposition of a condition regarding resolution of legal ambiguities at some point in the future does not provide the reasonable assurance of compliance with water quality requirements mandated by Section 401 of the Clean Water Act and North Carolina's 401 water quality certification regulations.

DWR also reaffirms its prior decision not to certify the Southgate Project with a condition like the one adopted by FERC in its issuance of the Certificate of Public Convenience and Necessity. That condition would have authorized construction of the Southgate Project as soon as the Mainline Project receives requisite federal permits and FERC's stop work order is lifted. The history of the Mainline Project demonstrates why such a condition would be inadequate. Indeed, the Mainline Project has received several federal approvals only to have those approvals struck down upon review by the Fourth Circuit. In addition, MVP's well-documented compliance issues related to work performed on the Mainline Project led to a stop work order issued by the State of Virginia. Therefore, under the particular circumstances associated with the Mainline Project, mere issuance of federal permits does not provide sufficient assurance that the Mainline Project will in fact move forward and, consequently, that impacts from the Southgate Project will not be unnecessary and avoidable.

In sum, DWR reaffirms that it is not appropriate to issue a 401 Water Quality Certification and Jordan Lake Buffer Authorization until it is presented with sufficient information to ensure that authorizing construction of the Southgate Project will not result in unnecessary and avoidable impacts to surface waters and riparian buffers.

* * *

Pursuant to Section 19(d) of the Federal Natural Gas Act, any person wishing to challenge this decision may file a petition with the Fourth Circuit Court of Appeals. 15 U.S.C. § 717r(d).

Please contact Sue Homewood at 336-776-9693 or Sue.Homewood@ncdenr.gov if you have any questions or concerns.

Sincerely,

A handwritten signature in blue ink that reads "S. Daniel Smith". The signature is stylized and cursive.

S. Daniel Smith, Director
Division of Water Resources

Attachment: DWR's 401 Water Quality Certification and Jordan Lake Buffer Authorization Denial, dated August 11, 2020.

cc: Heather Patti, TRC Environmental Corporation (via email)
David Bailey, USACE Raleigh Regulatory Field Office (via email)
Todd Bowers, EPA (via email)
DWR WSRO 401 files
DWR 401 & Buffer Permitting Unit