IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-1971

MOUNTAIN VALLEY PIPELINE, LLC,
Petitioner,

v.

NORTH CAROLINA DEPARTMENT OF ENVIRONMENTAL QUALITY, ET AL.,
Respondents.

SIERRA CLUB, APPALACHIAN VOICES, AND CENTER FOR BIOLOGICAL DIVERSITY'S UNOPPOSED MOTION FOR LEAVE TO INTERVENE AS RESPONDENT

Pursuant to Rules 15(d) and 27 of the Federal Rules of Appellate Procedure, Sierra Club, Appalachian Voices, and Center for Biological Diversity hereby move for leave to intervene as Respondents in the above-captioned case. No party opposes this motion.

I. INTRODUCTION

On August 11, 2020, the North Carolina Department of Environmental Quality (NCDEQ) denied Mountain Valley Pipeline, LLC's (Mountain Valley) application for a water quality certification pursuant to Clean Water Act (CWA) section 401, 33 U.S.C. § 1341, for Mountain Valley's MVP Southgate Project. Without such a certification, Mountain Valley cannot construct its Project, an approximately 75-mile long gas transmission pipeline originating in Pittsylvania County, Virginia and running through Rockingham and Alamance Counties, North Carolina.

On September 10, 2020, Mountain Valley filed a petition for review of the NCDEQ's denial of its CWA section 401 certification application in this Court, pursuant to the Natural Gas Act's judicial review provision, 15 U.S.C. § 717r(d). Sierra Club, Appalachian Voices, and Center for Biological Diversity (Movants) now move to intervene because their members have substantial interests in aquatic and other resources that would be adversely impacted if NCDEQ's denial were overturned and pipeline construction allowed to proceed. Neither Mountain Valley nor NCDEQ will adequately protect Movant's unique interests. Movants' counsel conferred with counsel for Mountain Valley and NCDEQ and neither party opposes this motion.

II. FACTUAL BACKGROUND

Mountain Valley seeks to overturn NCDEQ's denial of its application for a CWA section 401 water quality certification for the MVP Southgate Project (Southgate Project), an interstate gas pipeline that requires a certificate of public convenience and necessity from the Federal Energy Regulatory Commission (FERC) pursuant to Section 7 of the Natural Gas Act, 15 U.S.C. § 717f(c), in addition to other federal permits. CWA section 401 applies to any applicant for a federal license or permit for a project that could result in a discharge of pollutants. It requires the applicant to seek a certification from any affected states that the discharges will comply with certain provisions of the CWA, including those governing water quality standards:

> Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which

> may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate . . . that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. . . . No license or permit shall be granted if certification has been denied by the State . . . .

33 U.S.C. § 1341(a)(1).

Mountain Valley submitted its Section 401 certification application to NCDEQ on August 13, 2019, and NCDEQ deemed the application complete upon payment of the application fee on August 15, 2019. Movants submitted comments on the application to NCDEQ on December 18, 2019, and again on May 31, 2020, in response to new information submitted by Mountain Valley to DEQ.[1] Movants comments emphasized the lack of need for the Southgate Project, the uncertainty surrounding the project's future in light of construction delays on the Mountain Valley Pipeline Mainline—a related interstate gas pipeline upon which the Southgate Project is wholly dependent— and the likely adverse aquatic impacts from pipeline construction that would lead to violations of water quality standards, as has regularly occurred during MVP Mainline construction. On August 11, 2020, NCDEQ denied the application, explaining that "the uncertainty of the MVP Mainline project's completion presents a critical risk to the achievability of the fundamental purpose of MVP Southgate," such that "[c]ertification of this project, without further confidence that it can achieve its stated purpose, is inappropriate and

[1] Movant Center for Biological Diversity was not party to the December 18, 2019 comments. All Movants have participated at each stage of the FERC process for the Project.

allows for avoidable environmental impacts to water quality and protected riparian buffers." NCDEQ, Denial of 401 Water Quality Certification and Jordan Lake Riparian Buffer Authorization Application, MVP Southgate Project at 2 (August 11, 2020). Mountain Valley's petition for review of NCDEQ's denial followed on September 10, 2020.

III. ARGUMENT

Federal Rule of Appellate Procedure 15(d) provides for intervention in a direct appellate review of an agency order. Rule 15(d) requires the movant to provide "a concise statement of its interest and the grounds for intervention." Fed. R. App. P. 15(d). Because the rule does not provide a standard for intervention, "appellate courts have turned to the rules governing intervention in the district courts under Fed. R. Civ. P. 24." *Sierra Club, Inc. v. EPA*, 358 F.3d 516, 517–18 (7th Cir. 2004); *see also Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. AFL-CIO, Local 283 v. Scofield*, 382 U.S. 205, 217 n.10 (1965); *Texas v. U.S. Dep't of Energy*, 754 F.2d 550, 552 (5th Cir. 1985). Under Rule 24, a movant has a right to intervene if (1) its motion is timely; (2) the movant has an interest in the litigation; (3) the litigation may impair or impede the movant's ability to protect its interest; and (4) the litigation's parties do not adequately represent the movant's interest. Fed. R. Civ. P. 24(a); *Houston Gen. Ins. Co. v. Moore*, 193 F.3d 838, 839 (4th Cir. 1999). Under this standard, "liberal intervention is desirable to dispose of as much of a controversy 'involving as many apparently concerned persons as is compatible with efficiency and due process.'" *Feller v. Brock*, 802 F.2d 722, 729

(4th Cir. 1986) (quoting *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir.1967). Movants satisfy all four requirements.

First, Movants' intervention is timely because their motion was filed within the 30-day deadline for intervention under Rule 15(d). Given the early stage of the proceeding prior to any briefing, Movants' participation will not prejudice any other parties. *See Blue Water Baltimore v. Mayor & City Council of Baltimore, Md.*, 583 F. App'x 157, 158 (4th Cir. 2014).

Second, Movants have substantial interests in defending the NCDEQ's denial decision. "A public interest group is entitled as a matter of right to intervene in an action challenging the legality of a measure it has supported." *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995) (citing *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 527 (9th Cir. 1983) and *Washington State Bldg. & Constr. Trades Council v. Spellman*, 684 F.2d 627, 630 (9th Cir.1982), cert. denied, *Don't Waste Washington Legal Defense Foundation v. Washington*, 461 U.S. 913 (1983)). *See also WildEarth Guardians v. Nat'l Park Serv.*, 604 F.3d 1192, 1198 (10th Cir. 2010) ("With respect to Rule 24(a)(2), we have declared it 'indisputable' that a prospective intervenor's environmental concern is a legally protectable interest.") (citing *San Juan County v. United States*, 503 F.3d 1163, 1199 (10th Cir. 2007) (en banc)); *Syngenta Seeds, Inc. v. Cnty. of Kauai*, Civ. No. 14-00014BMK, ECF No. 54 (D. Haw. Apr. 23, 2014) ("[W]here proposed intervenors assert an interest in environmental actions

affecting their members, courts have generally found a significantly protectable interest to exist for purposes of intervention as of right.") (citing *American Farm Bureau Federation v. U.S. EPA*, 278 F.R.D. 98, 106 (M.D. PA 2011) and *California Dump Truck Owners Association v. Nichols*, 275 F.R.D. 303, 306–7 (E.D. Cal. 2011)). Movants' members live, work, and recreate in the vicinity of the Southgate Project and use and enjoy aquatic resources that are protected by the NCDEQ's decision. One of Movant's members lives in Alamance County, North Carolina and regularly hikes along the Haw River Trail System in areas that would be impacted by the pipeline and enjoys viewing wildlife whose habitat would be destroyed by the Project's construction. Numerous other members live in Rockingham and Alamance counties and use and enjoy waters in the Dan and Haw River watersheds that would be adversely impacted by construction of the Southgate Project. Movants' members also have economic interests in the tourism that is centered on the existing high quality waters that could be adversely impacted by Project construction. Movants have participated at every stage of the regulatory process for the Project in order to protect those interests. Movants, through their members, thus have the requisite "significantly protectable interest" to support their intervention. *See Teague v. Bakker*, 931 F.2d 259, 262 (4th Cir. 1991) (quoting *Donaldson v. United States*, 400 U.S. 517, 531 (1971)).

Third, this litigation could impair Movants' ability to protect their interests. If a proposed intervenor "would be substantially affected in a practical sense by the

determination made in an action, he should, as a general rule, be entitled to intervene." *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 822 (9th Cir. 2001) (quoting FRCP Rule 24 Advisory Committee Notes). *See also Jackson v. Abercrombie*, 282 F.R.D. 507, 517 (D. Haw. 2012) ("[G]enerally, after determining that the applicant has a protectable interest, courts have 'little difficulty concluding' that the disposition of the case may affect such interest.") (quoting *Lockyer v. United States*, 450 F.3d 436, 442 (9th Cir. 2006)); *WildEarth Guardians*, 604 F.3d at 1199 ("The second element—*impairment*—presents a minimal burden."); *United States v. Exxonmobil Corp.*, 264 F.R.D. 242, 245 (N.D.W. Va. 2010) ("[T]he rule does not require, after all, that [potential intervenors] demonstrate to a certainty that their interests *will* be impaired in the ongoing action. It requires only that they show that the disposition of the action 'may as a practical matter' impair their interests.") (quoting *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.*, 738 F.2d 82, 84 (8th Cir.1984) (emphasis in original)). Currently, the status quo with NCDEQ's denial in place is that the Southgate Project cannot be constructed. *See* 33. U.S.C. § 1341(a)(1) ("No license or permit shall be granted if certification has been denied by the State . . . ."). If Mountain Valley's challenge is successful, the Southgate Project is much more likely to be built.[2] Pipeline construction and operation

[2] The fact that, if Mountain Valley is successful, NCDEQ would have another opportunity to review Mountain Valley's application and could potentially deny that application on other grounds does not nullify the threat to Movants' interests. *See generally Teague,* 931 F.2d at 261 (finding that a significantly protectable interest may include an interest contingent upon the outcome of other pending litigation); *Sierra Club v. State Water Control Bd.*, 898 F.3d 383, 400–02 (4th Cir. 2018) (finding Article III standing for

would cause substantial harm to the waterways and other resources in which Movant's members have interests. As FERC's Environmental Impact Statement for the Project explains,

> construction activities in stream channels and on adjacent banks may affect waterbodies. Clearing and grading of stream banks, in-stream trenching, the installation and removal of temporary crossing structures (e.g., culverts, cofferdams), trench dewatering, and backfilling could each cause temporary, local modifications of aquatic habitat involving sedimentation, increased turbidity, and decreased dissolved oxygen concentrations.

FERC, Southgate Project Final Environmental Impacts Statement, Docket No. CP19-14 (February 2020) at 4-48 to -49. Further,

> The clearing and grading of stream banks could expose soil to erosional forces and would reduce riparian vegetation along the cleared section of the waterbody. The use of heavy equipment for construction could cause compaction of near-surface soils, an effect that could result in increased runoff into surface waters in the immediate vicinity of the proposed construction right-of-way. Increased surface runoff could transport sediment into surface waters, resulting in increased turbidity levels and increased sedimentation rates in the receiving waterbody. Disturbances to stream channels and stream banks could also increase the likelihood of scour after construction.

Id. at 4-49. The prospect of such concrete, adverse impact to Movants' interests is sufficient to satisfy Movants' "minimal burden" to demonstrate impairment. *See WildEarth Guardians*, 604 F.3d at 1199.

Finally, the parties to this proceeding do not adequately represent Movants'

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environmental organizations to challenge issuance of CWA section 401 certification for a gas pipeline despite the fact that "even were Petitioners to prevail on the merits and we were to vacate the December 401 Certificate and remand for further proceedings, Petitioners would need to clear several additional hurdles to eventually obtain the ultimate relief that they seek").

interests. The burden on the applicant of demonstrating a lack of adequate representation "should be treated as minimal," *Teague*, 931 F.2d at 262 (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10 (1972)), and "the movant need not show that the representation by existing parties will definitely be inadequate," *JLS, Inc. v. Pub. Serv. Comm'n of W. Virginia*, 321 F. App'x 286, 289 (4th Cir. 2009). Rather the movant need only show that such representation "may be" inadequate. *Id.* (quoting *Trbovich*, 404 U.S. at 538 n.10). *See also Foster v. Gueory*, 655 F.2d 1319, 1325 (D.C. Cir.1981) (stating that a petitioner "'ordinarily should be allowed to intervene unless it is clear that the party will provide adequate representation for the absentee'") (quoting 7A WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1909); *Kozac v. Wells*, 278 F.2d 104, 110 (8th Cir. 1960) ("We emphasize here that a positive showing that such representation is inadequate is not necessary. The rule requires only that it may be inadequate."); 7C WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1909 § 1909 at 346 ("[S]ince the rule is satisfied if there is a serious possibility that the representation may be inadequate, all reasonable doubts should be resolved in favor of [intervention.]"). Mountain Valley, as the proponent of the Project seeking to clear the way for its construction, plainly does not represent Movants' interests in preventing that construction.

Nor does NCDEQ adequately represent Movants' interests. While NCDEQ primary interest is in protecting its decisional processes, Movants' members have a much more

direct and personal interest in the specific waters that would be affected by the Project and a firm commitment to opposing the Project. *See In re Sierra Club*, 945 F.2d 776, 780 (4th Cir. 1991) (overturning district court's denial of Sierra Club's motion to intervene on behalf of South Carolina in a case involving hazardous waste regulation and explaining that "Sierra Club appears to represent only a subset of citizens concerned with hazardous waste" such that it "does not need to consider the interests of all South Carolina citizens and it does not have an obligation, though [South Carolina] does, to consider its position vis-a-vis the national union."); *JLS, Inc.*, 321 F. App'x at 290 ("[W]e note that even when a governmental agency's interests appear aligned with those of a particular private group at a particular moment in time, 'the government's position is defined by the public interest, [not simply] the interests of a particular group of citizens.'") (quoting *Feller*, 802 F.2d at 730); *Mille Lacs Band of Chippewa Indians v. State of Minn.*, 989 F.2d 994, 1001 (8th Cir. 1993) (finding that proposed intervenors with interests in specific lands, despite wishing to support the government's underlying decision affecting those and other lands, had "narrower and more parochial interests than the sovereign interest the state asserts in protecting fish and game" such that its interests were not adequately represented); *Cooper Techs., Co. v. Dudas*, 247 F.R.D. 510, 515 (E.D. Va. 2007) ("When a party to an existing suit must represent multiple and distinct interests, those multiple interests may dictate a different approach to the litigation, and a party representing one of those interests exclusively should be allowed to intervene.") (citing *United Guar. Residential Ins. Co. of*

Iowa v. Philadelphia Sav. Fund. Soc., 819 F.2d 473, 475–76 (4th Cir.1987)); *Am. Petroleum Inst. v. Cooper*, No. 5:08-CV-396-FL, 2009 WL 10688053, at *4 (E.D.N.C. Feb. 27, 2009) ("[T]here remains a sufficient divergence in interests between the state, representing all members of the public, including consumers as well as retailers and distributors, and the NCPCMA, representing only members of the association, that it cannot be said the state adequately represents NCPCMA's interests."). NCDEQ may choose litigation strategies, such as agreeing to settle or choosing not to appeal an adverse ruling in this Court, that conflict with Movants' interests. *See JLS, Inc.*, 321 F. App'x at 290–91 ("[I]f Movants' intervention is denied, [the state agency] could settle this case in a manner that could harm Movants' interests"); *Feller*, 802 F.2d at 730 (favoring intervention over participation as amicus curiae because "[a]micus participants are not able to make motions or to appeal"). Finally, NCDEQ lacks Movants' significant firsthand experience with Mountain Valley's pipeline construction practices on the MVP Mainline that have led to hundreds of violations of state and federal water quality laws and impacted Movants' members in Virginia and West Virginia, which experience could aid in the defense of NCDEQ's action. *See JLS, Inc.*, 321 F. App'x at 291 (explaining that the movants' particular experience and their greater incentive to defeat a challenge than the government's generalized interest in defending its decisions counsel in favor of finding that their interests may not be adequately represented). Movants thus satisfy all the elements for intervention as of right.

In the alternative, the Court should allow permissive intervention. Permissive intervention is appropriate where the motion (1) is timely; (2) reflects a claim or defense with a question of law or fact in common with the main action; and (3) will not prejudice the rights of the original parties or cause undue delay. Fed. R. Civ. P. 24(b); *In re Sierra Club*, 945 F.2d at 779. Movants satisfy all three requirements. Movants' motion is timely because it is filed within the 30-day filing requirement for intervention under Rule 15(d). Further, the review petition's purpose is to challenge the CWA section 401 certification denial decision, and Movants are determined to defend that denial vigorously. Finally, the existing parties will not be prejudiced because, if granted intervention, Movants will participate on the same briefing and oral argument schedule as NCDEQ.

IV. CONCLUSION

Movants satisfy the requirements for intervention of right and permissive intervention under Rule 24 of the Federal Rules of Civil Procedure, as have been applied by the courts to motions pursuant to Rule 15(d). Movants thus respectfully request that they be granted leave to intervene as a respondent.

Dated: October 13, 2020

Respectfully Submitted,

/s/ Benjamin A. Luckett
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Counsel for Sierra Club, Appalachian Voices, and Center for Biological Diversity

CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the type-face requirements of Fed. R. App. P. 32(a)(5) and the type-volume limitations of Fed. R. App. P. 27(d)(2)(A). This motion contains 3,021 words, excluding the parts of the motion excluded by Fed. R. App. P. 27(d)(2) and 32(f).

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Counsel for Sierra Club, Appalachian Voices, and Center for Biological Diversity

CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2020, I electronically filed the foregoing **Sierra Club, Appalachian Voices, and Center for Biological Diversity's Unopposed Motion for Leave to Intervene as Respondent** with the Clerk of Court using the CM/ECF System which will automatically send e- mail notification of such filing to all counsel of record.

/s/ Benjamin A. Luckett
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Counsel for Sierra Club, Appalachian Voices, and Center for Biological Diversity

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 20-1971 Caption: Mountain Valley Pipeline, LLC v. N. Carolina Dept. of Envtl. Quality

Pursuant to FRAP 26.1 and Local Rule 26.1,

Sierra Club
(name of party/amicus)

who is intervenor, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Benjamin A. Luckett Date: October 13, 2020

Counsel for: Sierra Club

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Pursuant to FRAP 26.1 and Local Rule 26.1,

Appalachian Voices
(name of party/amicus)

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Signature: /s/ Benjamin A. Luckett Date: October 13, 2020

Counsel for: Appalachian Voices

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Center for Biological Diversity
(name of party/amicus)

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Signature: /s/ Benjamin A. Luckett Date: October 13, 2020

Counsel for: Center for Biological Diversity

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