

To: Friends of Green River Reservoir Board of Directors, Inc., Dam Committee

From: Anthony N.L. Iarrapino, Esq., outside counsel

Date: 6/9/2021

Re: Developments in MWL FERC Relicensing

---

MWL Appeals to DC Cir. Court of Appeals on Water Quality Certification Waiver Issue

Recall that on November 19, 2020, FERC denied MWL's petition for an order that would have voided ANR's Water Quality Certificate affecting the Green River Dam on the basis that ANR failed to act on MWL's initial application within the one-year timeframe allowed under Section 401 of the federal Clean Water Act. This denial, if upheld means that the ANR's final Water Quality Certification conditions will be incorporated into MWL's license from FERC.

As anticipated in my January 2, 2021 memo to you, MWL has appealed FERC's decision to the U.S. Court of Appeals for the D.C. Circuit. The appeal was initially filed at the end of January 2021.

ANR promptly moved to intervene in the appeal to defend FERC's decision (which the federal Agency will also independently defend). As a basis for its intervention, ANR argued as follows:

*Without the Certification, there is no guarantee FERC will incorporate these conditions into Morrisville's FERC license.... The Green River facility similarly may not be required to pass minimum flows, to refrain from overwhelming the Green River with harmful excessive flows during hydropeaking, or to maintain appropriate water levels to protect habitat in the Green River Reservoir.*

As a refresher, MWL's argument to FERC was based on the theory of "waiver" as has been reflected in past FERC and federal Circuit Court decisions. Waiver has been found—and state-imposed water quality conditions like those in the ANR Water Quality Certificate have been nullified—in situations where the license applicant and the state water quality certifying agency coordinated withdrawal and resubmission of applications for state certification prior to the running of the one-year clock. In this case, MWL did withdraw and resubmit its initial 2013 application to ANR twice before ANR finally issued a decision in 2016 and there is some evidence that it was coordinated with ANR. The issue appears to come down, however, to the question of whether MWL benefitted from the delay.

On April 30, 2021, MWL filed an unopposed motion with the D.C. Circuit asking that the Court put a hold on the case. In support of its motion, MWL argued that the parties and the D.C. Circuit should await decisions in other, earlier-filed pending cases in the D.C. Circuit, Fourth Circuit, and Ninth Circuit that raise similar issues under the waiver provision of Clean Water Act Section 401. MWL argued as follows:

*[B]ecause the pending waiver cases will address issues raised here such as the appropriate trigger date for the one-year period for a state to act on a Section 401 water quality certification request and avoid waiver, and whether the statute permits agreements between an applicant and the state to extend these deadlines. The Village expects that resolution of these pending appeals will add clarity to the arguments raised by the consolidated petitions and depending upon their resolution, may obviate the need for action by this court. Thus, an abeyance will serve judicial economy and benefit the public, hydroelectric licensees....*

Although ANR did not oppose MWL's motion, ANR did file a response expressing concern that the MWL motion was just another in a long series of legal maneuvers to delay the eventual relicensing of the Green River Dam with imposition of the ANR-issued Water Quality Certification Conditions. ANR thus observed to the Court:

*Previously, Morrisville had delayed providing information about the Green River facility to the Commission because of ongoing litigation in state court regarding the Certification. See, e.g., Letter Order Granting Request for Extension of Time, at 1 (Dec. 13, 2018) (Certified Index Doc. 204) (noting that Morrisville had filed requests "to extend the deadline for filing the additional information until after the appeal of the certification is resolved"). However, the Motion notes that ANR "is not prejudiced since an abeyance here will not delay the relicensing proceeding for the Morrisville Project." Mot. at 4. Thus, ANR understands that Morrisville will not use an abeyance in this appeal to request additional extensions in the licensing proceeding, and that an abeyance will not otherwise delay the licensing proceeding and thereby delay implementation of the Certification's water quality protections.*

ANR also pointed out that the decisions of other circuit courts are not controlling on the D.C. Circuit and that those other cases present distinguishable facts. Accordingly, ANR reserved the right to oppose the delay in the case if it drags on too long.

On May 12, 2021, the D.C. Circuit granted MWL's motion, essentially putting the MWL appeal on hold until decisions issue in those other cases. The parties are required to update the D.C. Circuit on the status every 60 days, beginning on July 12, 2021, and to make further filings on scheduling in this case within 30 days of the decisions in those other cases. Based on the scheduling in the other cases, Penny's prediction that MWL's appeal will not be active until Winter/Spring 2022 appears to be accurate.

It is difficult to predict how the D.C. Circuit will rule on MWL's underlying appeal if and when it ends up doing so. There are good arguments to be made on both sides. From a factual and legal perspective, MWL's "unclean hands" in perpetuating the delay in ANR's issuance of the Water Quality Certification by requesting ANR to review additional studies MWL performed and MWL's proposal to phase-in WQC requirements do weigh heavily against MWL. Nonetheless, with all these "waiver" various cases pending across the circuit courts, the

possibility of a circuit split, i.e., different circuits reaching different legal conclusions on similar facts, raises a further possibility that this issue may head to the U.S. Supreme Court.

Given MWL's vigorous pursuit of appeals across many different legal venues, it is hard to accept at face value that MWL will not turn back to FERC at some point to argue that the relicensing process should be delayed again until the waiver issue is resolved. MWL could lose on that issue all the way up to the U.S. Supreme Court, but if it wins there, then it would potentially be free from having to implement some or all of ANR's conditions. Recall, however, that FERC still has discretion to impose some of the ANR conditions on MWL if it so chooses even if the WQC is struck down on waiver grounds.

### Engineering Analysis & Stability Assessment

As discussed in previous memos, MWL has made repeated claims about safety concerns posed by the Water Quality Certificate's requirement of no more than a 1.5 foot winter drawdown at Green River Reservoir. In September 2016, FERC requested that MWL conduct an engineering analysis and stability assessment to determine the effects of the 1.5-foot winter drawdown limit on the stability of the Green River Development's dam, and the ability of the Green River Development to accommodate flood flows.

After receiving multiple extensions from FERC to reply to this request, it now appears that MWL has engaged an engineering consultant to determine whether any of the various WQC conditions applicable to the Green River Dam will cause operational or safety issues and if so what improvements to the dam must be undertaken to address those issues.

Much of the correspondence between FERC and MWL from April and May 2021 on this topic is marked "privileged" in FERC's public database because it contains "Critical Energy/Electrical Infrastructure Information." Thus, the contents are not publicly available in full. I am, however, attaching to this memo a May 24, 2021 letter from MWL to FERC because it contains high-level detail about the work MWL's consultant is doing/the issues of focus and the possible regulatory repercussions that could flow from that work.