

# The Recorder

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## Foundation clarifies position on easements

BY JOHN BRUCE • STAFF WRITER

MONTEREY — The Virginia Outdoors Foundation told federal regulators Monday the proposed Atlantic Coast Pipeline crossing of conservation easements would need to meet state statutory requirements under the Open-Space Land Act.

In October, the Federal Energy Regulatory Commission directed pipeline company Dominion to document that it is “not precluded from establishing an easement for the ACP on each VOF easement crossed.”

VOF, a state agency, holds nearly a dozen conservation easements on private property in this region where Dominion proposes to build the pipeline.

The 1,200-acre Hayfields Farm property, located in Highland County between McDowell and Williamsville, was sold to the Conservation Fund, a partner of Dominion, and Dominion asked the VOF to consider an easement “swap.” To mitigate crossing properties with VOF conservation easements, Dominion proposed to put an easement on Hayfields Farm — a “conversion” move VOF allows in rare circumstances under a specific process heretofore involving much smaller pieces of land for public use.

In late August, Dominion spokesman Aaron Ruby explained the Conservation Fund made the purchase on behalf of the pipeline company, and applied to VOF for conversions. “We continue to believe that our proposal is appropriate and reasonable, consistent with the mission of the VOF, and advances the goal of land conservation in the commonwealth,” Ruby said at the time.

Dominion then requested the VOF board postpone considering the conversion applications from September to February because the company felt it was appropriate for that to take place further along in the project’s federal review process.

Most of the acreage under easement is in Bath County, which passed an ordinance last April proclaiming the proposed pipeline is at odds with the county’s comprehensive plan.

There would be about 100 acres of construction impact on the properties with easements, including temporary and permanent right of way and access roads, according to VOF. About two-thirds of the acreage would be permanently impacted. The easements range in size from 53 to 794 acres. They cover a total of 4,211 acres — 3,474 acres in Bath and 737 acres in Highland.

FERC told Dominion to identify any construction, restoration, or operation mitigation measures identified by the foundation that would promote compatibility with the purpose and values of the easements.

Dominion responded in early November. “After a series of consultations with VOF, Atlantic filed 10 applications with VOF in May 2016 for minor conversions under (the Open-Space Land Act) for each of the open-space easements proposed to be crossed by the ACP,” Dominion explained. “Atlantic and VOF jointly determined to defer VOF board consideration of Atlantic’s conversion applications until after FERC issued its Draft Environmental Impact Statement.”

The VOF board is scheduled to consider those applications at its Feb. 9, 2017 meeting.

Dominion told FERC it will submit updated or revised applications to VOF for each crossing in early January. Dominion said it believes it will have met all state criteria for VOF to approve the crossings “if they are deemed to be conversions, and will be prepared to present this to the VOF board ... In order to modify the open space easements on the properties crossed by the ACP, Atlantic has worked and will continue to work with the VOF and individual landowners to develop potential conditions to negotiated easements over these properties to ensure the interests of all involved parties are appropriately addressed.”

The VOF replied Monday, taking issue with Dominion’s response. Deputy director Martha Little said, “It is VOF’s position that the proposed conversions under this code section are not minor and, in fact, would represent the largest conversion of open-space land in VOF’s 50-year history.”

She noted Dominion was correct in stating VOF will retain control over the easement lands such that it can preclude additional development or utility infrastructure in the future, but clarified the language involved in those easements.

Dominion had said, “Recognizing the need to balance its preservation obligations with necessary utility infrastructure, many executed open space easements in the Commonwealth of Virginia contain language providing for existing and future utilities subject to review and approval of VOF. Eight of the 10 open-space easements currently proposed to be crossed by ACP provide explicitly that private and public utilities constructed in whole or in part to serve other properties may be constructed with the approval of VOF, so long as the construction and maintenance of the utilities to do not impair the conservation values of the affected property.”

VOF’s Little explained to FERC, “It is accurate to say that this language is present in the easements and that VOF does recognize the need to balance its preservation obligations with necessary utility infrastructure. However, what is not clearly stated here is that construction of the Atlantic Coast Pipeline would not fall within the scope of activities permitted by this language in the easements.”

The foundation, she said, “has stated since the very first consultation with Atlantic that this project could not be completed on VOF open space land without impairing conservation values of the affected properties. VOF has consistently taken the position that construction, maintenance and operation of the interstate gas transmission line is inconsistent with the open-space protections afforded by the subject easements.

“Therefore, the construction, operation and maintenance of the ACP (would) constitute a conversion/diversion of the easement property as outlined in ... the Open-Space Land Act,” she said.

“It is not a question at this time of whether the crossing will be deemed to be a conversion, but rather whether Atlantic will have met the statutory requirements of (the Open-Space Land Act).”

Dominion said it was working with VOF to minimize and mitigate permanent and temporary impacts. Plans will be designed “to support VOF’s goals to be a leader in land conservation in Virginia, minimize any unavoidable impacts on the environment and cultural resources, and balance the interests of all stakeholders with the public need for a project such as the ACP,” the company said.

“Some of the measures that have been discussed, over and above typical restoration requirements, include minimizing and, where possible, eliminating above ground facilities, minimizing the extent of the permanent easement and construction footprint where feasible, developing pollinator corridors and habitat, and offering significant compensatory mitigation beyond on-site restoration and mitigation efforts.”

Also, Dominion stated, “As an additional means of allowing projects such as the ACP to co-exist with Open Space Easements, state law provides a procedure by which VOF may approve the conversion/diversion of open-space lands to other uses so long as such proposed use is ‘essential to the orderly development and growth of the locality’ and ‘in accordance with the official comprehensive plan’ for the locality.”

The Act states, “No open-space land, the title to or interest or right in which has been acquired under this chapter and which has been designated as open-space land under the authority of this chapter, shall be converted or diverted from open-space land use unless ... conversion or diversion is determined by the public body to be: Essential to the orderly development and growth of the locality and in accordance with the official comprehensive plan for the locality in effect at the time of conversion or diversion; and there is substituted other real property which is of at least equal fair market value, of greater value as permanent open-space land than the land converted or diverted and of as nearly as feasible equivalent usefulness and location for use as permanent open-space land as is the land converted or diverted ... The public body (VOF) shall assure that the property substituted will be subject to the provisions of this chapter.”

Dominion argues that for projects like the ACP that cross multiple localities in Virginia and two other states, “a proper evaluation of whether the project is essential to the orderly development and growth of the locality cannot be limited to any one locality in isolation, but instead must be evaluated more broadly to accurately reflect the economic benefits to the Commonwealth of Virginia overall.”

Dominion claims the proposed pipeline is “critical to achieving the carbon reduction targets outlined in the Environmental Protection Agency’s final rules aimed at reducing carbon dioxide emissions from power generating facilities. The ACP’s new pipeline capacity is required in order to decrease utilization of aging coal-fired power generation and increase generation of electricity using natural gas, a cleaner fuel source. By providing access to low-cost, diversely sourced natural gas supplies, the ACP will increase the reliability and security of natural gas supplies in Virginia and North Carolina, while allowing the electric utilities to continue to serve their customers in compliance with the EPA’s carbon emission limits. As such, the ACP is essential for the orderly development and growth of a comprehensive energy system.”

Further, Dominion told FERC, “It is a stated policy objective of the Virginia Energy Plan to ‘ensure the availability of affordable natural gas throughout the commonwealth by expanding Virginia’s natural gas distribution and transmission pipeline infrastructure.’ The Virginia Energy Plan further provides that ‘all agencies and political subdivisions of the commonwealth, in taking discretionary action with regard to energy issues, shall recognize the elements of the Commonwealth Energy Policy and where appropriate, shall act in a manner consistent therewith.’”

Dominion noted the ACP is not specifically included in many local comprehensive plans because under the Natural Gas Act, localities don’t have jurisdiction over siting such pipelines. “The FERC certificate will determine the location of ACP, and if FERC approves the construction of the ACP, it is expected that the ACP will be reflected in local comprehensive plans,” Dominion said. “Local governments do have the opportunity to intervene in the FERC process, including commenting on routing, making environmental recommendations and preparing and submitting studies on impacts that may be relevant to FERC’s public interest findings. In addition to ongoing discussions with VOF regarding onsite mitigation and restoration activities, Atlantic has offered significant compensatory mitigation for the proposed crossings of existing open space easements. The proposed replacement land offers extraordinary conservation value at a ratio (replacement acreage versus conversion acreage) that is unprecedented in the Commonwealth of Virginia.

“VOF indicated to Atlantic that it is their preference to have compensatory mitigation for all open space easements affected by the proposed route satisfied with a few large parcels, as opposed to several smaller disbursed parcels across the region. In keeping with this VOF preference, Atlantic has proposed to provide two large, extremely high quality open-space parcels as compensatory mitigation to VOF, in fee title, for the impacts associated with this project.

One of those is Hayfields Farm, which Dominion says satisfies multiple VOF conservation values. “Hayfields Farm’s fair market value far exceeds the fair market value of all of the affected easement areas combined and is in close proximity to the group of open space easements that would be directly affected by the ACP,” Dominion said.

The company also pointed out that Hayfields is adjacent to the Virginia Department of Game and Inland Fisheries’ Highland Wildlife Management Area.

“The mountainous topography on the western portion of the property primarily consists of shale; the eastern side of the property has a high probability of karst features, which would also be protected by the proposed open space easement. The Bullpasture River bisects the parcel from north to south for two miles. This stretch of the river has a cobble and shale base, and brook trout, brown trout and rainbow trout have all been observed within the river on the parcel. The Bullpasture River, in the context of the hilly terrain that surrounds it, provides the primary scenic element of this parcel. The deciduous forest on the ridges to the east and west of the river adds to the scenic character, and may be particularly attractive in the foreground during spring (new blossoms) and fall (multi-colored foliage). Areas along the river are used for agricultural operations, including cattle grazing and hay making,” Dominion said.

“Wetland areas in the floodplain, as well as the stream banks of the Bullpasture, are fenced off, keeping cattle away from these areas, allowing natural vegetation to grow within the wetland areas. The valley surrounding the Bullpasture River consists of open fields, which are in good condition and can be used for wildlife habitat. Additionally, there are at least five cold water springs on the property that have been developed into ponds and/or cisterns to provide water sources to wildlife and cattle. Given the diversity in terrain, protection of water quality of receiving waters, protection of potential karst features, habitat potential and contribution to both state and local goals emphasizing visibility of conserved land, the Hayfields Farm parcel provides significant value as an open space easement,” Dominion told FERC.

One of the properties with a conservation easement the pipeline is proposed to cross is the 794-acre Normandy Capital tract. According to a statement by Chuck Burke, managing partner of Normandy Capital Group LLC, Normandy secured the easement in 2013 because of the land’s extensive karst topography. Burke has said the Open-Space Land Act prohibits VOF from permitting Dominion to cross conservation easements. In a statement to VOF, Burke said any or all of the easement on that property was unavailable for conversion and ineligible for taking through eminent domain.

Normandy, he said, would “take full advantage of all legal recourse” against Atlantic Coast Pipeline LLC to protect “the significance of the gift” covered under the Code of Virginia, adding that numerous federally endangered species are present there, such as the Indiana bat, Northern long-eared bat, the Virginia Big-eared bat, and at least six special invertebrate species in the cove.