

The Recorder

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Foundation works with Dominion on conversion

BY JOHN BRUCE • STAFF WRITER

RICHMOND — The Virginia Outdoors Foundation has been cooperating with Dominion in preparing its applications to convert open-land conservation easements in the path of the proposed Atlantic Coast Pipeline with a 1,200 tract to the north.

There are nearly dozen landowners who have given conservation easements to the foundation whose land would be crossed by the pipeline, as the route is proposed. Those landowners who wish to work with Dominion to allow the pipeline to cross their land under easement cannot do so without the foundation's consent because the VOF holds the easement.

In an email The Recorder obtained under a Freedom of Information Act request, the VOF apologized to Dominion and its member-landowners for delays in finalizing what was described as a "technical step" in the process — helping draft an agreement Dominion can use with landowners.

News of the sample agreements arrived 52 days ahead of a Feb. 9, 2017 board meeting in which the VOF is scheduled to consider Dominion's proposed conversion of easements in southern Highland and northern Bath counties for Hayfields Farm, south of McDowell.

The Recorder filed Dec. 12 under FOIA to review VOF correspondence pertaining to the proposed pipeline and the Virginia Open-Space Land Act, and received documents Monday.

In one email, VOF deputy director Martha Little told Dominion her agency notified the landowners who donated open-space conservation easements in the path of the proposed Atlantic Coast Pipeline that "easement option agreements" were delayed by VOF, not Dominion.

"Sorry for the delay in these option agreements," Little wrote in a Dec. 7 email to Dominion senior environmental manager Robert Hare, and senior right-of-way agent Hardy Barrett. "I had hoped to get a new revised draft to Robert by now, but our attorney has been tied up. Hopefully, it will make it to you by tomorrow. We heard from some concerned landowners and apologized to them, making it clear that this was VOF's delay, not Dominion's."

The draft agreement is laid out in a 30- page document prepared by Dominion and revised by VOF, whose spokesman Jason McGarvey explained the agreement is associated with existing easements.

“They are just a technical step in the process ... There are two separate interests in the properties that lie in the proposed pipeline route: VOF’s (on behalf of the public) and the landowners’. The option agreements are only binding on the landowners’ interests. These interests must be negotiated separately from ours. However, the landowners can’t do that unless we consent to it. We don’t want to withhold consent because it puts the landowners at a severe disadvantage when negotiating their own interests, so these option agreements allow them to begin their separate negotiations without VOF sacrificing any of its rights through the easements. The option agreements in no way preempt the (easement conversion) process or push it one direction or another,” McGarvey said. “There is no agreement yet for Hayfields because our board has not considered the applications. They will do that on Feb 9.”

While the agreements will not be useful unless the VOF agrees to the proposed easement conversion, a decision it will make in February, Dominion can use them to negotiate with landowners who are willing for the pipeline to cross their land upon which VOF holds an easement. Currently, The Recorder is aware of only two landowners who have thus far refused to allow Dominion’s proposed pipeline to cross their land.

A portion of the draft agreement Dominion will use says: “By execution of this instrument, VOF consents to grantor (landowner) entering into this agreement, such consent being subject to grantor and grantee (identified as Atlantic Coast Pipeline LLC, which is partly owned by Dominion) complying with all applicable law including but not limited to (the Virginia Open-Space Land Act) as such laws may relate to the Open Space Easement,” the sample agreement states, in an attachment to an email dated last Thursday, Dec. 15.

Further, it states, “Grantee (ACP) agrees that it is solely responsible for obtaining any relevant federal authorization to construct the pipeline and related facilities, and for securing VOF approval of the easements. Grantor (landowner) agrees to not interfere, and reasonably cooperate, with grantee and VOF as deemed reasonably necessary by grantee to secure the approval to construct its facilities. Grantee agrees to reimburse grantor for any reasonable expenses directly incurred as a result of this cooperation.”

A supporting exhibit states, “Grantee (ACP) shall have the right to use the permanent easement to construct, install, maintain, repair, replace, change the size of, operate and remove anodes and other devices for the cathodic protection of the pipeline, and to construct, install, maintain, repair, replace, change the size of, operate and remove any valves, gates, drips and other appurtenances necessary for the operation of the pipeline.

“Grantee shall have the right of ingress and egress to and along the temporary work easement and the permanent easement, and to use the temporary work easement and permanent easement to transport pipe, vehicles, machinery, persons, equipment and other materials to and from other lands. Further, grantee shall have the right to use any existing road(s) on the property to access the temporary work easement and the permanent easement or to exercise any of the rights granted herein. Grantee shall repair any damage caused by its use of those roads.

“Grantor (landowner) hereby grants to grantee (ACP) all other rights necessary or convenient for the full use and enjoyment of the rights herein granted, including but not limited to the right to clear the permanent easement of any and all obstructions, and to clear, cut, trim, and remove all vegetation, trees, brush, and overhead branches from the temporary work easement and permanent easement, provided that removal of trees and vegetation shall be by mechanical means only.

“Grantee agrees to pay for actual damages to crops, trees and fences arising from the exercise of rights granted herein during construction and operation of pipeline, consistent with its obligations under applicable laws. Grantor (landowner) shall be entitled to the use and enjoyment of the lands covered by the permanent easement, subject to the rights herein granted to grantee.

“Grantor shall not construct nor cause to be constructed any permanent or temporary structures or obstructions of any kind within the permanent easement, including but not limited to buildings, garages, sheds, pools, mobile homes, trees, poles or towers. No construction equipment or vehicles of any kind shall be stored, nor heavy machinery or equipment operated, within the permanent easement, provided that nothing herein shall prohibit the use of typical farming equipment and farming activities. No earth shall be removed from or filled upon the permanent easement without the express written consent of grantee.

“Grantor (landowner) shall be responsible for complying with any state or local ‘one call’ requirements in the event of construction on or near the permanent easement. Grantee (ACP) agrees to protect, defend, indemnify and hold harmless the grantor from any and all damages, claims for damages, demands, suits, recoveries, judgments or executions which may arise or be made by reason of injuries or damages to persons or property resulting from grantee’s exercise of the rights granted herein, consistent with grantee’s obligations under applicable laws or regulations. This indemnification shall not extend to any claims which arise from the sole negligence or willful or wanton misconduct by grantor or third parties.

“All equipment, fixtures, and facilities placed on the permanent easement by grantee shall be and remain the property of grantee. Grantee (ACP) shall have the right to terminate this agreement or any portion thereof by filing a release in the same public records in which it is recorded. In the event that grantee terminates this agreement, in whole or part, grantee shall have a reasonable time afterward to remove all of its equipment, fixtures, and facilities unless express permission has been received from the then-owner to abandon such items in-place. Following removal of its equipment and fixtures, grantee shall restore the lands, as nearly as practicable, to the condition existing prior to termination.

In earlier response to landowner concerns about VOF respecting conservation easements, Little wrote, “We are dedicated to making sure that we follow the conversion of open space process through in a way that is transparent and accountable, that we protect the public interest, and that we get the best possible outcome using whatever authority we have. I would like to emphasize that there is no ‘trade deal’ here. It’s a legal process that VOF, as a public agency, is required to follow any time someone wants to convert or divert protected open space to an incompatible use. The process requires ‘substitute other real property which is: (a) of a least fair market value, (b) of greater value as permanent open space land than the land converted or diverted, and (c) of as nearly feasible equivalent usefulness and location for use as permanent open-space land as is the

land converted or diverted.’ We are confident in the integrity of our board and staff to adhere to the process and the law and make certain that the commonwealth’s interests are not compromised.”

Bath County Circuit Court has ruled Dominion has the right to enter properties of landowners who refuse surveys. The VOF materials included a lawsuit against Normandy Capital LLC, owner of one of the open-space conservation easements in the pipeline’s path.

The VOF received a large volume of emails from landowners and others concerned about the integrity of the open-land easement conservation process and expressing negative sentiments about the VOF after news of the proposed conversion emerged last summer.

As a result, the agency pushed back consideration of Dominion’s applications from June to September, and from September to February 2017.

“What we property owners had in common was a desire to protect our land. If we’d believed rights the VOF holds are a pool of conservation rights and could be traded up for prettier or pricier properties, we wouldn’t have assigned our rights to VOF,” Donald McCaig of Williamsville wrote. “Dominion Resources has suggested they buy Hayfields Farm and swap its conservation easement for easements VOF presently holds along Dominion’s proposed pipeline route. Then presumably, they’d sell Hayfields or perhaps use it as an executive retreat for their multi-million dollar executives. It’s a pretty place and upstream from the destruction their pipeline will wreak.”

Buck Burwell of Hot Springs also wrote to VOF. “I was astounded to learn that VOF would seriously consider any deal like the ‘Hayfields swap,’” he said. “Our expectation was that VOF would be ‘shoulder to shoulder’ with us in opposition to this horrific ACP project. We incurred considerable upfront expenses, time dedicated, and property value reduction to make our easement a permanent reality. We would never have considered the easement if we had known that a deal like this was a possibility and/ or that VOF would even consider such a proposal. We trusted that VOF would always stand with us to protect and defend the land from exactly this kind of carnage. Linda and I urge the VOF board to reject any type of ‘deals’ with the ACP or Dominion on principle, and join us in the fight to stop this destructive project that is so at odds with our mutual goals. Our grandchildren and their grandchildren will thank you.”

VOF easement landowner Roberta Koontz wrote, “It is very good news that the Valley Conservation Council (another entity that holds easements) knows of VOF’s negotiations with Dominion for a ‘land swap’ and does not support this unethical betrayal of people with conservation easements from VOF.”

The VOF board meeting will be 11 a.m. Feb. 9 at the Virginia Department of Game and Inland Fisheries, 7870 Villa Park Drive, Suite 400, Henrico.

The VOF is accepting comments by email until then to: bcabibbo@vofonline.org.