



ABRA Update #181 – May 18, 2018

Federal Court Decision to Halt ACP Highlights a Roller Coaster Week

The past seven days in the life of the Atlantic Coast Pipeline (ACP) project have been as consequential as any week since the project was first proposed four years ago. Below is a rundown of relevant events. **Please note: at the end of this article is an action alert.**

- Friday, May 11 – The Federal Energy Regulatory Commission (FERC) issued a Notice to Proceed for construction of the ACP in those areas of West Virginia where trees have been felled, excluding the Monongahela National Forest. This was the first authorization of ground-disturbing activity for the project.
- Tuesday, May 15 – The U.S. Court of Appeals Fourth Circuit issued an Order effectively halting construction activity on the ACP on a case brought by Defenders of Wildlife, Sierra Club and the Wilderness Committee. The Southern Environmental Law Center, representing the three organizations, contended that the U.S. Fish and Wildlife Service failed to set clear limits on take as required by the Endangered Species Act (ESA). The ESA defines “take” as meaning “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” The case had been argued before a three-judge panel of the Fourth Circuit the previous Thursday, May 10. In its Order, the Fourth Circuit stated:

the limits set by the agency are so indeterminate that they undermine the Incidental Take Statement’s enforcement and monitoring function under the Endangered Species Act. Accordingly, we VACATE the Fish and Wildlife Service’s Incidental Take Statement.

- Wednesday, May 15 (11:58 pm) – The Southern Environmental Law Center filed with FERC a letter stating that construction activity on the ACP must be halted. The letter stated:

Because the court vacated the Incidental Take Statement, consultation is not complete, and construction cannot commence as specified by Environmental Condition 54 in the Commission’s Certificate Order for the Atlantic Coast Pipeline. 161 FERC ¶ 61,042 (Oct. 13, 2017). Therefore, the Commission must halt all on-the-ground construction activities and revoke or suspend all notices to proceed for the Atlantic Coast Pipeline until consultation has been reinitiated and completed and the defects of the Incidental Take Statement are remedied.

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The vacatur of the Incidental Take Statement also halts implementation of the U.S. Forest Service's Record of Decision and Special Use Permit for the Atlantic Coast Pipeline which are contingent upon compliance with a valid biological opinion and incidental take statement. U.S. Forest Service, Record of Decision, Atlantic Coast Pipeline at 13 (Nov. 2017). Permits issued by the U.S. Army Corps of Engineers likewise must also be supported by a valid biological opinion and incidental take statement. 16 U.S.C. § 1536(a). Therefore, the Forest Service and Corps of Engineers must halt all on-the-ground pipeline activities under these permits until consultation has been reinitiated and completed and the defects of the Incidental Take Statement are remedied.

- Wednesday, May 16 (8:59 am) – Dominion Energy issued the following statement:

We remain confident in the project approvals and the Atlantic Coast Pipeline will continue to move forward with construction as scheduled. This decision only impacts activities directly covered by the Incidental Take Statement in certain defined areas along the route. We will fully comply as required while we continue to construct the project. Although we disagree with the outcome of the court's decision, and are evaluating our options, we are committed to working with the agency to address the concerns raised by the court's order.

- Wednesday, May 16 – FERC posted late in the day on its docket a letter to Dominion Energy Transmission, Inc., managing partner for the ACP project, a letter acknowledging the Fourth Circuit decision, as follows:

The Court indicated it would more fully explain its reasoning in a forthcoming opinion. As a result, Atlantic Coast Pipeline, LLC (Atlantic) has informed Commission staff that it will not proceed with construction in any areas where such activities may affect listed species covered by the FWS' Incidental Take Statement for the project. Atlantic should, within 5 days, file documentation that specifically identifies by milepost/stationing the habitat areas that will be avoided with respect to each of the listed species and confirms the company's commitment to avoid construction in these areas.

Numerous questions arise from the events of the past week, most prominent among them:

- 1) When will the Fourth Circuit issue its opinion and what will it say?
- 2) What action will FERC take after receiving early next week the requested documentation from the ACP, LLC?
- 3) What action will the Fish & Wildlife Service in response to the Fourth Circuit decision?

When answers to these and other questions are available, persons on the *ABRA Update* mailing list will be notified by email. Given that this paragraph is written on Friday, a day when so many consequential developments seem to occur regarding the ACP, you may hear from us sooner rather than later.

ACTION ALERT: We contend that construction activity on the ACP is not authorized as a result of the of the Fourth Circuit's decision in the Fish & Wildlife Service case. Persons who observe any construction activity are urged to report it via ABRA's Compliance Surveillance Initiative program. Email relevant information to csi@abralliance.org (photos are welcome) or call the CSI hotline: 877-GO2ABRA (877-462-2272). Thanks!

May 30 Deadline for Comments on NWP 12 Review Approaches

The special 30-day comment period authorized by the Virginia State Water Control Board to receive public input on input on the adequacy of the U.S. Corps of Engineers Nationwide Permit 12 in protecting streams and wetlands crossed by the Atlantic Coast Pipeline and the Mountain Valley Pipeline ends on May 30. The Department of Environmental Quality (DEQ) has issued the following guidelines for the scope of requested comments:

The sole purpose of the written public comment period is for interested persons to submit **technical comments and/or information** for the MVP and ACP projects relevant to:

- 1) the sufficiency of the Corps NWP 12 permit's *general and regional conditions*, as they relate to **specific, wetland or stream crossing(s)**;
- 2) the sufficiency of the Corps NWP 12 *permit authorization* for each project, as related to **specific, wetland or stream crossing(s)**; and/or
- 3) the sufficiency of the Commonwealth's § 401 *water quality certification of NWP 12*, as related to **specific, wetland or stream crossing(s)**

Information and Instructions:

1. All written comments submitted must include the name(s), mailing address(es) and telephone number(s) of the person(s) commenting.
2. All written comments submitted must be **to a specific wetland or stream crossing**. Comments should reference exact wetlands and streams crossings by the identifiers found at the following address: <http://www.deq.virginia.gov/PipelineUpdates.aspx> or by providing other detailed identifying information such as latitude/longitude or road mile marker.
3. Written comments may be submitted via hand-delivery to DEQ, 1111 East Main Street, Richmond, VA 23219; via postal mail to DEQ, P.O. Box 1105, Richmond, VA 23218; or via e-mail at the following email address(es) ONLY – **emails and attachments sent to other email addresses or internet sites will not be considered:**
 - NWP12InfoOnMVP@deq.virginia.gov
 - NWP12InfoOnACP@deq.virginia.gov

All ABRA members are urged to file their own comments and encourage their members and constituencies to do so as well. Wild Virginia has prepared an excellent guide to provide assistance: “Suggestions for Comments to DEQ Public Notice Impacts from Waterbody Crossings and Water Quality Standards,” available by clicking [here](#).

In the News:

Local/Atlantic Coast Pipeline

Official: Most pipeline work can go on despite tossed permit

- The Washington Post – 5/16/18

https://www.washingtonpost.com/national/energy-environment/pipeline-work-in-question-after-court-vacates-key-permit/2018/05/16/cee441c8-5927-11e8-9889-07bcc1327f4b_story.html?utm_term=.c18f7d36277c

Despite Dominion's claims and FERC's failure to stop all work, questions remain over impact of the U.S. 4th Circuit Court of Appeals ruling on threatened and endangered species on the Atlantic Coast Pipeline project.

- Related:
- https://www.washingtonpost.com/local/virginia-politics/federal-appeals-court-orders-halt-to-work-on-atlantic-coast-pipeline/2018/05/15/5bb5a422-589f-11e8-858f-12becb4d6067_story.html?utm_term=.76ee7678b9e0
 - <http://www.naturalgasintel.com/articles/114395-questions-loom-for-acp-timeline-after-federal-court-throws-out-key-permit>

Federal court suspends pipeline construction

- The Recorder – 5/17/18

https://www.abralliance.org/wp-content/uploads/2018/05/Federal-court-suspends-pipeline-construction-Recorder_20180517.pdf

FERC lets Atlantic Coast Pipeline construction begin in West Virginia

- Charlotte Business Journal – 5/14/18

<https://www.bizjournals.com/charlotte/news/2018/05/14/ferc-lets-atlantic-coast-pipeline-construction.html>

Volunteer brigade deploys drones and maps

- E&E News: EnergyWire – 5/15/18

<https://www.abralliance.org/wp-content/uploads/2018/05/Volunteer-brigade-deploys-drones-and-maps-EE-News-EnergyWire-5-15-18.pdf>

Pipeline opponents using high-tech means to monitor construction and aid states in enforcing the law.

Atlantic Coast Pipeline opponents say state ignored minorities' civil rights

- The News & Observer – 5/15/18

<http://www.newsobserver.com/news/business/article211163269.html>

Public-interest groups allege the state failed to consider the disproportionate impact the pipeline will have on communities where a large number of people of color live.

Regional/Mountain Valley Pipeline, other

Mountain Valley Pipeline cited for environmental violations in West Virginia

- The Roanoke Times – 5/16/18

http://www.roanoke.com/news/local/mountain-valley-pipeline-cited-for-environmental-violations-in-west-virginia/article_cb51a4a9-b6d4-5e97-8850-2a7e3cf787c5.html

In West Virginia, an inspection in early April found flaws in erosion and sediment control measures at two construction sites in Wetzel County, where the pipeline will originate.

Court flags concerns about judicial review of FERC permits

- E&E News – 5/14/18

<https://www.eenews.net/stories/1060081593>

Federal judges appeared sympathetic last week to the plight of landowners in the path of the Mountain Valley pipeline.

Rutherford Institute suing over doctor's failed attempt to examine Mountain Valley Pipeline protester

- The Daily Progress – 5/16/18

http://www.dailyprogress.com/news/local/rutherford-institute-suing-over-doctor-s-failed-attempt-to-examine/article_2f75dd84-595b-11e8-8847-131b35265631.html

Appalachian boom: Potholes, landslides and shattered peace

- E&E News: EnergyWire – 5/15/18

<https://www.abralliance.org/wp-content/uploads/2018/05/Appalachian-boom-Potholes-landslides-and-shattered-peace-EE-News-EnergyWire-5-15-18.pdf>

States, localities, citizens overwhelmed by the damage wrought by pipeline companies.

Pipeline Protesters Take to The Trees

- Rolling Stone – 5/15/18

<https://www.rollingstone.com/politics/news/pipeline-protestors-trees-w520215>

A growing network of resistance is risking life and limb to stop fracking and other natural gas projects along the East Coast.

Related:

- http://www.register-herald.com/news/blocking-the-pipeline-path-tree-sitter-continues-vigil-on-peters/article_11a18e79-92c2-52e0-8a2f-5e3fd3e85eed.html

The man in the middle: DEQ director David Paylor, a lightning rod for critics, begins serving under fourth governor

- Richmond Times-Dispatch – 5/13/18

http://www.richmond.com/news/the-man-in-the-middle-deq-director-david-paylor-a/article_ec82c4a8-70b9-5f8e-8926-5b1512cefa9d.html

Big Picture:

Perry Hints Trump May Thwart States from Blocking Oil, Gas Pipelines

- Natural Gas Intelligence – 5/15/18

<http://www.naturalgasintel.com/articles/114382-perry-hints-trump-may-thwart-states-from-blocking-oil-gas-pipelines>

Although Perry did not say whether the Trump administration would ultimately issue an executive order (EO) to rein in states such as New Jersey and New York that are opposed to pipelines, Trump signed an EO calling for expedited permitting of such projects last August.

Climate change, the GOP and Trump

- Boulder Weekly – 5/17/18

<http://www.boulderweekly.com/opinion/climate-change-gop-trump/>

The exploitation and wielding of fossil fuels now sits at the very heart of the Trumpian definition of national security, as the recently released NSS [National Security Strategy] makes all too clear.”

Delaware Riverkeeper Network wants court to force decision on PennEast rehearing

- The Morning Call – 5/17/18

<http://www.mcall.com/news/local/easton/mc-nws-penn-east-rehearing-20180514-story.html>

FERC issued a “tolling order” on DRN’s request for rehearing for PennEast’s application, which essentially allows them to put off a decision while the project is built, thus rendering the request for rehearing moot. DRN aims to force the issue.

Climate change on track to cause major insect wipeout, scientists warn

- The Guardian – 5/17/18

<https://www.theguardian.com/environment/2018/may/17/climate-change-on-track-to-cause-major-insect-wipeout-scientists-warn>

Insects are vital to ecosystems but will lose almost half their habitat under current climate projections

The EU and China will leverage renewable energy to create a new global order

- The Hill – 5/16/18

<http://thehill.com/opinion/energy-environment/388030-the-eu-and-china-will-leverage-renewable-energy-to-create-a-new>

Too bad...America will spend decades playing catch-up.

African cities pledge to cut climate emissions to zero by 2050

- Reuters – 5/17/18

<https://www.reuters.com/article/us-africa-climatechange-cities/african-cities-pledge-to-cut-climate-emissions-to-zero-by-2050-idUSKCN1I19S>

If Africa can do it, why not Virginia...Dominion?