

The Recorder

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Federal court suspends pipeline construction

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BY JOHN BRUCE • STAFF WRITER

MONTEREY — Four years after being publicly proposed, a federal court on Tuesday put the brakes on the Atlantic Coast Pipeline.

The U.S. Court of Appeals for the Fourth Circuit issued an order supporting arguments from pipeline opposition environmental groups, who blamed the federal agency charged with protecting wildlife for making wrongful decisions with respect to threatened and endangered species.

The court order shuts down pipeline construction indefinitely, a senior attorney for Southern Environmental Law Center said.

That's not entirely accurate, according to pipeline managing partner Dominion Energy, which contradicted the SELC.

Dominion to keep building

"We remain confident in the project approvals and the ACP will continue to move forward with construction as scheduled," Dominion communications director Jen Kostyniuk said in a prepared statement this week. "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," Kostyniuk said.

Construction where there are threatened and endangered species is effectively suspended on the \$6.5 billion gas pipeline from northwestern West Virginia to southern North Carolina and Hampton Roads.

The order lists Defenders of Wildlife, Sierra Club and Virginia Wilderness Committee as petitioners versus U.S. Department of the Interior and Fish and Wildlife Service, an agency of the U.S. Department of the Interior; Ryan Zinke, Secretary of the Department of the Interior; Greg Sheehan, Principal Deputy Director; and Cindy Schulz, Field Supervisor, Virginia Ecological Services.

The petitioners sought review of the U.S. Fish and Wildlife Service's Incidental Take Statement, which authorized Atlantic Coast Pipeline to "take" certain threatened or endangered species while the ACP is under construction. For five of the affected species, the petitioners argued the USFWS failed to set clear limits on "take," as required by the Endangered Species Act.

A three-judge panel, consisting of Chief Judge Roger Gregory of Richmond, James A. Wynn Jr. of Raleigh, N.C., and Stephanie Thacker of Charleston, W.Va., upheld the petitioners. Their order states, "Petitioners seek review of the U.S. Fish and Wildlife Service's Incidental Take Statement, which authorized the Atlantic Coast Pipeline project to take certain threatened or endangered species. As to five of the affected species, Petitioners argue that the agency failed to set clear limits on take as required by the Endangered Species Act ... we conclude, for reasons to be more fully explained in a forthcoming opinion, that 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 ... We reserve judgment on the parties' remaining disputes until our forthcoming opinion," the order says.

FERC told to halt ACP

SELC senior attorney Greg Buppert in a letter on Tuesday told the Federal Energy Regulatory Commission it must halt all on-the-ground construction activities in North Carolina, Virginia, and West Virginia for the project indefinitely.

"Today, the U.S. Fourth Circuit Court of Appeals vacated the Incidental Take Statement for the Atlantic Coast Pipeline issued as part of the Biological Opinion prepared by the Fish and Wildlife Service ... An incidental take statement is a required component of formal consultation under the Endangered Species Act. 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.

"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. The (vacating) 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," Buppert wrote.

“Permits issued by the U.S. Army Corps of Engineers likewise must also be supported by a valid biological opinion and incidental take statement. 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,” Buppert said.

“We are very pleased at the decision by the Fourth Circuit to vacate the U.S. Fish and Wildlife Service’s Biological Opinion and Incidental Take Statement regarding the impact of the Atlantic Coast Pipeline on certain endangered species,” said Lewis Freeman, executive director of Allegheny-Blue Ridge Alliance and president of Highlanders for Responsible Development. “While the court’s opinion explaining its decision is still forthcoming, we are encouraged by the expediency with which the court acted and its recognition in the order that the ‘limits set by the agency are so indeterminate that they undermine’ the enforcement and monitoring function of the Endangered Species Act.”

‘Decision not valid’

“This is unquestionably good news,” said David Sligh of Wild Virginia and the Dominion Pipeline Monitoring Coalition.

“What the court in its very brief order says is that the U.S. Fish and Wildlife Service didn’t do its job under ESA, and didn’t explain the basis for their decision, so the decision not valid,” he explained.

“They (the judges) don’t say much in the order, and obviously they’ll tell us a lot more about their thinking ... but the basic problem here is something we’ve been saying in all kinds of contexts — agencies haven’t looked at all things they’re supposed to, or explained their decisions the way their required to,” Sligh said.

“The system is supposed to be designed so you can’t harm the environment unless you’ve thoroughly explained what you’re doing.” While the case could be appealed to the U.S. Supreme Court, Sligh says it’s more likely that when the judges fully explain their decision, they will also explain what needs to be done. “The Fish and Wildlife Service can go back and try to do that, and that’s not something that’s unusual. They say, ‘Here are the gaps we think you need to fill. Go do it.’ Everyone gets another chance to do it again.”

Sligh said it’s a given that ACP will want the USFWS to go back to the drawing board to try to satisfy the court. But, he said, “We don’t know how long it might take to resolve, and we don’t how it might be resolved.”

Further, there’s no indication of when the appeals court might issue its more detailed order on the matter.

Pipeline opponents said after the order was issued, the order may not be the end to the project, but it’s a big stop.

“Like other agencies, the Fish and Wildlife Service rushed this pipeline approval through under intense political pressure to meet developers’ timelines,” said D.J. Gerken, Southern Environmental Law Center managing attorney, Asheville office. “We are grateful this decision upholds the protection of endangered species as the law requires. It’s foolish and shortsighted to risk losing rare species for an unnecessary and costly pipeline boondoggle.”